



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 21 OF 2011

PATRICK CHERUIYOT TERER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Simon Ruto Rotich Principal Magistrate in Sotik Criminal Case No.437 of 2011)

JUDGMENT

PATRICK CHERUIYOT TERER, the appellant herein, was convicted on his own plea of guilty for the offence of attempted defilement of a girl contrary to **Section 9(1)(2) of the Sexual Offences Act no.3 of 2006**. He was thereafter sentenced to serve 10 years imprisonment. Being aggrieved, the appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds in his Petition:

1. **THAT** the learned trial Magistrate erred in law and in fact by pronouncing Judgment against the Appellant and in favour of the Respondent and proceeding to convict the Appellant on a defective and incompetent charge sheet.
2. **THAT** the learned trial Magistrate erred in law and in fact by pronouncing Judgment against the Appellant and in favour of the Respondent in total disregard of the flagrant violations of the rights of the Appellant as guaranteed in Sections 49 and 50 of The Constitution of Kenya, 2010.
3. **THAT** the learned trial Magistrate erred in law and in fact by not conducting the proceedings in a language the Appellant understood contrary to the provisions of Section 50(2)(m) of the Constitution of Kenya, 2010 and Section 198 of the Criminal Procedure Code.
4. **THAT** the trial Magistrate erred in law and in fact by convicting and sentencing the Appellant on the basis of an equivocal plea.
5. **THAT** the learned trial Magistrate erred in law and in fact by pronouncing judgment against the appellant and in favour of the Respondent on charges not read to the accused in the language the accused understood or at all.
6. **THAT** the conviction and sentence is irregular and bad in law and harsh in the circumstances.

When the appeal came up for hearing, Mr. Mutai, learned Senior Prosecution Counsel, conceded the appeal on the ground that the appellant was convicted on a charge which was fatally defective. He pointed out that the Section which the charge was premised does not exist. Mr. Mutai further argued that the facts outlined did not support the charge hence the conviction was not safe. The aforesaid grounds were essentially the same grounds as those Mr. Motanya, learned advocate for the appellant relied upon in support of the appeal.

Before delving deeper into the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. The particulars of the charge are that on the 16th day of May 2011 at [particulars withheld] Village in Bureti District within Rift Valley Province, the appellant is alleged to have unlawfully attempted to commit an act which could have caused penetration of his penis into the vagina with G C a girl aged 13 years. Upon conviction, the court prosecutor outlined the facts in support of the charge as follows: *“That on 16th May 2011 at 7.00pm, the complainant went to the house of her grandmother. She was driving cattle when she met the accused on the way. It is said the accused wanted to have sex with the complainant but she screamed thus attracting the attention of passers by. The complainant was taken to hospital where the P3 form issued to her was filled”*. Having set out in brief, the case which was before the trial court, let me now turn my attention to the substance of the appeal. The first ground argued is to the effect that the charge was fatally defective, in that the charge was premised on a non-existent provision of the law. I have examined the charge and it is apparent on the face of it that the charge is based on **Section 9(1)(2) of the Sexual Offences Act**. A critical look at the **Sexual Offences Act** will reveal that **Section 9(1)(2)** does not exist. The charge, was therefore fatally defective and could not be cured under **Section 382 of the Criminal Procedure Code**. The learned trial Principal Magistrate erred when he failed to exercise his discretion to amend the charge under **Section 214 of the Criminal Procedure Code**, a discretion which the appellate does not enjoy. With respect, I agree with the submission of Mr. Motanya that the learned Principal Magistrate should have corrected the error in the earliest opportunity possible. In the second ground, it is argued that the facts outlined did not establish the offence the appellant was convicted for. I have already reproduced the facts outlined by the court Prosecutor in support of the charge under the Proviso to **Section 207(2) of the Criminal Procedure Code**. With respect, those facts did not establish the ingredients of the offence the appellant was convicted for. The plea cannot therefore be said to be unequivocal since the facts admitted did not establish any offence. On the basis of the above grounds, the appeal is allowed. Consequently, the conviction is quashed and the sentence set aside. The appellant should be set free forthwith unless lawfully held.

Dated, signed and delivered in open court this 4th. day of April, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Kivali for Director of Public Prosecutions

Mr. Motanya for Appellant