



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 92 OF 2013

JOSEPH NJUGUNA WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Joseph Njuguna Wambui was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on 27/10/2011 *particulars withheld* unlawfully and intentionally inserted his genital organ into that of L N, a child aged 5 years. In the alternative, he faced a charge of committing an indecent act contrary to **Section 11(1)** of the **Sexual Offences Act**. When the appellant was arraigned before the trial court on 31/10/2011, he pleaded guilty to the charge and was convicted on his own plea and sentenced to life imprisonment.

The appellant is aggrieved by the conviction and sentence based on three grounds, contained in the memorandum of appeal which are to the effect that:-

1. **That the court erred by not interpreting the charge in a language that the appellant understands;**
2. **That the appellant rights under Article 49(f)(1) were violated;**
3. **That the court convicted the appellant without the court informing the appellant of the gravity of the offence;**

He therefore prays that the conviction be quashed and sentence set aside and that the matter be remitted back to the lower court for trial.

In his written submissions, the appellant urged that the plea offended **Section 198(1)** of the **Criminal Procedure Code** in that the court did not indicate the language of the court, was it English or Kiswahili. He also submitted that **Section 207** of the **Criminal Procedure Code** was also breached which provides the manner in which a plea is to be taken.

On ground 2, the appellant contended that he was arrested on 28th October 2011 and he was not arraigned in court till 31/10/2011 which was in breach of the **Article 49(1)(f)(i)** of the **Constitution** which requires that an accused person be arraigned before the court within 24 hours of arrest.

Lastly, the appellant complained that despite the offences being so serious, the court did not disclose to the appellant the consequences of pleading guilty.

The Learned State Counsel, Mr. Chirchir, partially conceded the appeal for reasons that the plea was not

unequivocal; that the court did not disclose what language was used in court and he agreed with the appellant that there be a retrial.

Under **Section 348** of the **Criminal Procedure Code**, no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence. Though the law only allows an appeal on sentence where one pleaded guilty, in the case of **Ndede v Rep (1991) KLR 567**, the court held that where the court finds that the plea was not unequivocal or there was other sufficient cause to the contrary, then the court will not hesitate to intervene. That court held:-

- “1. There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute;**
- 2. The Court is not bound to accept the accused’s admission of the truth of the charge and convict him as there may in the words of the statute; ‘appear sufficient cause to the contrary.’;**
- 3. Where, as happened in this case, at the time of the taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to cut from the date of arrest etc, then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the court.”**

Article 50 of the **Constitution** guarantees an accused persons right to a fair hearing and this includes the right to be informed of the charge, with sufficient detail {**Article 50(2)(b)**}. The appellant was charged with the offence of defilement under **Section 8(1)** as read with **8(2)** of the **Sexual Offences Act** which carries a life sentence upon conviction. Nowhere in the record of the trial court was the appellant informed of the consequences of admitting the offence or pleading guilty to the charge. That court fell into serious error by that omission.

In Kenya, the language of the High Court and Magistrates court is English and Kiswahili (See **Section 198** of the **Criminal Procedure Code**). Under **Article 50(2)(m)** of the **Constitution** an accused person is entitled to assistance of an interpreter without payment; if the accused cannot understand the language used at the trial, **Section 198** of the **Criminal Procedure Code** also requires an interpreter to be availed for the accused. In this case, at no time did the court state the language of the court. The accused was never asked to state what language he understood or whether he needed interpretation. This court has therefore no idea whether the appellant understood the proceedings before the trial court. The only conclusion this court can arrive at is that the plea was equivocal and the conviction was irregular and must therefore be quashed.

The appellant also alleged breach of his constitutional rights under **Article 49(1)(f)** of the **Constitution** which requires that an accused person be taken to court as soon as reasonably possible but not later than twenty four hours after arrest. Indeed the charge reads that the date of arrest was 28/10/2011 and arraignment in court was 31/10/2011. I have looked at the calendar, 28/10/2011 fell on a Friday. The appellant was arraigned in court on Monday 31/10/2011 which was the next day after 28/10/2011 that courts were sitting. Courts do not sit on weekends. **Article 49(1)(f)(i)** provides for arraignment in court of an accused on the next working day if the day following the arrest falls on a weekend. That is what happened in this case and the appellant’s rights were not breached at all. That ground must fail.

Having found the plea to be equivocal, I hereby quash the conviction and set aside the sentence.

Can the court order a re-trial? For the court to order a retrial, the preconditions that must exist have been considered in several cases. In **Patel Ali Manji v Rep (1960) EA** and **Pascal Braganza v Rep (1951) EA 52**. In **Patel’s** case the court said:-

- “1. In general a re-trial will be considered when the original trial was illegal or defective;**

2. Each case must depend on its own facts and circumstances;
3. That an order of re-trial should only be ordered where the interest of justice require it;
4. A re-trial will not be ordered if by so doing an injustice will be caused or occasioned;
5. In *Ratilal Shah v Rep* (1958)EA 3, the court said:-

‘A re-trial should be ordered when the court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result.’

6. In *Alloys Awori v Uganda* (1972)EA 469, the court went a notch higher and said:-

‘A re-trial will not be granted for purposes of enabling the prosecution to fill up the gaps in the evidence at the first trial.’”

The appellant was convicted in 2011, about 2½ years ago. The offence which he faced was a very serious one, that carried life sentence. Neither the appellant nor the State Counsel were opposed to a re-trial. The appellant having been sentenced only 2½ years ago, it is very likely that the witnesses can be found and a fresh trial to be conducted.

Whether a re-trial will prejudice the appellant: I find not. The appellant called for it himself. 2½ years is not a long period considering that the sentence is life imprisonment. In that regard, I hereby order that this case be remitted back to the Chief Magistrate’s Court Nakuru for a re-trial before a different magistrate other than Kituyi, Resident Magistrate. Since the appellant has already served 2½ years, the case should be given priority and be heard expeditiously. It is so ordered.

DATED and DELIVERED this 22nd day of September, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person

Mr. Chirchir for the State

Kennedy – Court Assistant