



No. 392/14

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 75 OF 2011

J M S.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original orders in the Chief Magistrate Court P&D No. 18 of 2011

by Hon. J. M. Munguti, SRM on 11/3/2011)

JUDGMENT

1. **J M S** the appellant herein was charged with the offence of neglecting a child contrary to **Section 127(1)** of the **Children Act No. 8 of 2001**. Particulars of the offence thereof being that on diverse dates between **20th March, 2010** and **10th February, 2011** at Lower **Kiandani Sub-location** in **Machakos District** within **Eastern Province**, being a father to **M N K** a child aged **12 years** and in standard seven failed to provide the said child with shelter, food and clothing.

2. He was arraigned in court on the **11th February, 2011** where a plea was purportedly taken and he admitted the charge. Subsequently orders were made whereby he was expected to pay some money towards the upkeep of the child.

3. Being aggrieved by the order of the court, he appealed on grounds that:-

- i. The learned magistrate erred in law and fact by convicting him on a defective charge.
- ii. The language in which the proceedings were taken was not recorded.
- iii. The order for payment of Shs. 2000/= per months was based on an ambiguous social inquiry report.
- iv. The conviction was based on a plea that was equivocal.
- v. The learned trial magistrate failed to take into account the fact that the appellant was not the biological father of the child he purportedly neglected.

4. Parties agreed to have the appeal canvassed by way of written submissions. When the matter came up on **8th September, 2014** the State had filed submissions. Counsel for the appellant, **Mr. Mutia** on noting that the State conceded to the appeal decided not to file any submissions.

5. As the 1st appellate court, I endeavor to re-consider the proceedings of the Lower Court in order to come up with my own conclusions. ***See Okeno versus Republic [1972] E.A. 32).***

6. Ms Kefa, learned State Counsel conceded to the appeal on grounds that the proceedings do not indicate the language that was used to read the charge to the appellant therefore it could not be established if the appellant followed proceedings.

7. There was an indication that facts were stated as per the charge sheet. In that regard she stated that it was not clear if the appellant had the charge sheet to know the facts therein or if the appellant was able to read. In her view the plea was not unequivocal.

8. She however, prayed for a retrial considering that it would be in the best interest of the child.

9. The criteria for interfering with a plea of guilty was set out in the case of **Laurent Mpinga versus Republic [1983] TLR 166** where it was stated thus;-

“i). That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the Lower Court erred in treating it as a plea of guilty.

ii). That the appellant pleaded guilty as a result of mistake or misapprehension.

iii). That the charge laid at the appellant’s door disclosed no offence known to law; and

iv). That upon the admitted facts the appellant could not in law have been convicted of the offence charged”.

10. As correctly pointed out the language used is not indicated. There is no way the appellant would have followed proceedings which were conducted in an unknown language. The proceedings were as follows:-

“The substance of the charge and every element of it read and explained to accused and understood.

Accused in his own words replies;-

Facts: As per charge sheet.

J.M. Munguti

Senior Resident Magistrate

Prosecutor – First offender

Mitigation –I had married Rosemary Nzilani for 6 years. A time reached when she tried to commit suicide. I took her to hospital.

Court – Case referred for Probation report...”

11. The legal principle to be applied in plea taking in all criminal cases were well enunciated in the locus classic case of **Adan versus Republic [1973] E.A 445** where the court held;-

“i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

ii). The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.

iii). *The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.*

iv). *If the accused does not agree with the facts or raises any question of his guilt, his reply must be recorded and change of plea entered.*

iv) *If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded. (Also See Section 207 of the Criminal Procedure Code)".*

12. The trial magistrate failed to adhere to the procedures of taking plea. No plea of guilty was recorded. The appellant was not given an opportunity of knowing the facts of the case and/or dispute/explain the fact. There is also no conviction. The plea was indeed not unequivocal hence a nullity.

The question to be answered, therefore, is whether I should order a retrial?

13. In the case of *Mwangi versus Republic [1983] KLR 522 Hancox J.A, Chesoni and Nyarangi, Ag. JJA* held:-

"We are all aware that a retrial should not be ordered unless the appellate court is of the opinion that on proper consideration of the admissible and potentially admissible evidence a conviction might result".

14. I have perused the charge as framed. The appellant was stated to have contravened **Section 127(1)** of the **Children Act No. 8 of 2001** which provides thus:-

"1). Any person who having parental responsibility, custody, charge or care of any child and who—

(a) Wilfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to health (including injury or loss of sight, hearing, limb or organ of the body, and any mental derangement); or

(b) By any act or omission, knowingly or wilfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding five years, or to both.

Provided that the court at any time in the course of proceedings for an offence under this subsection, may direct that the person charged shall be charged with and tried for an offence under the Penal Code, if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature".

15. The paragraph he may have contravened was not stated. The particulars of the offence as outlined do not disclose the envisaged offence. In the circumstances, the charge as laid at the appellant's door disclosed no offence known in law. There is no way he could have been convicted of the offence, unless the charge was amended. A retrial is not supposed to assist the prosecution to fill the gaps that were omitted. This is therefore not a case where a retrial should be ordered.

16. From the foregoing, I quash subsequent orders that were made by the learned trial magistrate.

17. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 17TH day of SEPTEMBER, 2014.

L.N. MUTENDE

JUDGE