



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 20 OF 2012**

**DAVID NDAMBIRI NJIRU ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case Number 902 of 2011 in the Senior Principal Magistrate's court at Kerugoya HON. H.N. NDUNGU (SPM))***

**JUDGMENT**

**David Ndambiri Njiru** the appellant herein was charged and convicted for offence of Defilement of a minor contrary to **Section 8(1) and (2) of the Sexual Offences Act NO. 3 of 2006.**

The particulars of the charge as presented in the trial shows that the child defiled was aged 8 years at the material time. The record shows that the appellant pleaded guilty both to the charge and the particulars even after being cautioned on the seriousness of the offence. He was handed life imprisonment by the trial court. He felt aggrieved and appealed against both the conviction and sentence to this court asking for a retrial.

The appellant has listed seven grounds of appeal in his petition but the main ones are that the plea was taken in a language he did not understand. He says he is only familiar with Kikuyu language, his mother tongue but the proceedings were conducted in English translated to Kiswahili a language he did not understand. He also states that the age of the minor /complainant was not ascertained. This court shall consider only these two grounds as the same is sufficient to dispose off this appeal.

The Respondent through Omayo opposed this appeal as he was of the view that the appellant understood Kiswahili language which was used at the trial court and properly pleaded guilty to the charge and the court was right to convict and hand out the sentence that was meted out against the appellant.

The record from the trial court reveals that the language used was English translated to Kiswahili at the taking of the plea. There is no mention on the language the appellant understood. The record just states that the charge is read over to the appellant in a language he understands but the language is not mentioned. The court of appeal for East Africa in the case of **ADAN –VS- REPUBLIC (1973) E.A. 445** considered the issue of plea taking and laid down proper steps for trials in plea taking especially when recording a plea of guilty. The following guidelines were laid out.

- i. The charge and all the essential ingredients of the offence should be explained in the language of the accused person or in a language which he understands.
- ii. The accused's own words should be recorded and, if it is an admission, a plea of guilty should be recorded.

- iii. The prosecution should then immediately state the facts and the accused is 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.
- v. 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.

In this appeal the court appeared to have even caution the appellant but the language used to caution him is not indicated. The issue under contention now is that the language used was strange to the appellant. This is an issue that have faced appellate courts in numerous cases and the position of these courts have always been the same. The language used at the plea and trial should be clearly indicated. The language of the accused or the language he understands should be recorded even before the plea is taken to ensure that he understands well what faces him/her. When a court omits this very important step, then inadvertently they create a fertile grounds for convicts to change their minds later and get an opportunity to have a second bite on the case which may result to injustice being done to the victim or the complainant. I find the trial court to have been cognizant of the nature of the offence and the need for the court to tread cautiously but unfortunately fell into error by failing to record the accused's words in the plea of guilty to the charge and the facts. It is also noteworthy to note that even at mitigation, the appellant said nothing. Of course an accused person is entitled to remain silent but with such a serious charge and harsh sentence facing one, it is expected that the accused could have at least said something in mitigation.

**Section 198** of the **Criminal Procedure Code** reinforces the need to have proceedings conducted in the language understood by an accused person. In the case of **KARIUKI –VS- REPUBLIC (1984) KLR 801** the court of appeal affirmed the position that it is the responsibility of trial courts to ensure compliance with this provision of law and are obliged to show in their records that the provisions of the law have been complied with. There is no reason why a trial court should leave the appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place.

Further in the case of **REPUBLIC –VS- VASHANJEE LILANDAR DOSSANI (1946) 13 EACA 150** the court found that the plea in the trial court was not done satisfactorily and the fairest and proper order to correct the anomaly was an order for a retrial.

This court noted during the hearing of this appeal that the appellant understood some Swahili language though I was not able to establish the extent but the decision of the court of appeal **ADAN –VS- REPUBLIC (SUPRA)** is binding to this court as it was categorical that where an accused person pleads guilty to a charge .

“the accused's own words should be recorded”.

I also find that where interpretation is required, the name of the interpreter should be given and it should also be noted for avoidance of doubt whether understands well the language of the accused/interpreted language.

I also find that the age of the minor or the victim in the trial court was not ascertained. This was a fatal omission on the part of the trial court because the age of a victim is material is so far as the sentence is concerned under Sexual Offences Act.

This court therefore finds that the plea taken was not unequivocal. The subsequent conviction of the appellant was therefore unsafe as it is not certain that the appellant understood clearly the charge read to him. The danger of a conviction on unequivocal plea is bigger especially where the accused is unrepresented and does not speak the language of the court. The manner in which the plea was taken at trial court did not meet all the requirements of law. I find merit in this appeal and I quash the conviction and set aside the sentence meted out against the appellant and order the case to be tried afresh before another magistrate with competent jurisdiction at Kerugoya Senior Principal Magistrate's Court. The

appellant shall remain in custody in the meantime pending trial. This case shall be mentioned on 1<sup>st</sup> day of December 2014 before Senior Principal Magistrate's Court for plea and further action.

**R.K. LIMO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 25<sup>TH</sup> DAY OF NOVEMBER 2014**  
in the presence of:-

The Appellant

Mr Sitati for state

Mbogo Court Clerk