



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 228 of 2011

*(From Original Conviction and Sentence in Criminal Case No. 430 of 2011 of the Resident Magistrate's Court at Wundanyi – K. I. Orange (RM))*

JOCKTAN MWAKUDUWA MNYIKA ..... APPELLANT

- Versus -

REPUBLIC ..... RESPONDENT

**J U D G M E N T**

The Appellant was sentenced to 15 years imprisonment for the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.

The particulars being that-

**“On diverse dates between the month of April and October 2011 at Taita-Taveta County had unlawful carnal knowledge of MWM a girl aged 17 years.”**

The Appellant in this case pleaded guilty to the charges read to him and he was convicted and sentenced. He has appealed on the grounds that the plea was not unequivocal and Section 207(2) of the Criminal Procedure Code was not complied with.

Secondly that the language used was not clearly set out and further that the Appellant was held in custody for more than the prescribed period and that this violated and infringed on his constitutional rights under Article 49 of the Constitution.

A perusal of the original record shows that when the matter was first mentioned for plea before Mrs. Chesang (DM II) the language used was not indicated.

On the main Count it is indicated that the Appellant answered, **“it is true.”** The Magistrate proceeded to enter a plea of guilty before the facts were read to the Appellant. She thereafter referred the file to Court one for mitigation and sentence.

In Court one before Orange K.I. the facts were read to the Appellant. It is also not indicated in which language these facts were read to the Accused.

Article 50(2)(b) of the Constitution provides-

**“Every Accused person has the right to a fair trial which includes the right to be informed of the charge, with sufficient detail to answer it.”**

A perusal of the record before the Court does not indicate that the Appellant was informed of the charge with sufficient details as envisaged in the Constitution.

In the celebrated case of **Adan –Vs- Republic C.A. 445 the Court of Appeal** held-

- (i) The charge and all the essential ingredients of the offence should be explained to the Accused in his language or a language he understands;**
- (ii) The Accused 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 the facts or raises any question of his guilt his reply must be recorded and charge of plea entered;**
- (v) If there is no charge of plea, a conviction should be recorded and a statement of the facts relevant to sentence to together with the Accused reply should be recorded.**

It does appear that conditions set out as above were not followed.

It is also argued that the Appellant was held in custody for a period exceeding that prescribed by the Constitution.

Article 49(1) provides that-

**“An arrested person has the right to be brought before a Court as soon as reasonably possible but not later than twenty four hours after being arrested.”**

It is incumbent upon an Applicant in relation to violation of his rights to bring it to the attention of the Court as soon as he appears before it, so as to give the state the necessary opportunity to answer to the alleged infringements.

The relief's available to an Applicant do not include an acquittal but are as spelt out in Article 23(3) of the Constitution which include-

- (a) A declaration of rights.**
- (b) An injunction**
- (c) A conservatory order**
- (d) A declaration of invalidity of any law that denies, violates, infringes or threatens a right of fundamental freedom in the bill of rights and is not justified under Article 24.**
- (e) An order for compensation.**
- (f) An order of Judicial Review**

Flowing from the above, it is patently clear that the relief's available to the Applicant lie in the realm of Civil remedies. The Appellant was charged under the Sexual Offences Act No. 3 of 2006. Punishments in the said Act are governed by the age of the complainant in particular and it is incumbent upon the prosecution to prove the age of the complainant. In the present case there was no attempt to produce documentary evidence to that effect.

I am therefore of the considered view as no prejudice will be occasioned to the Appellant then this is a good case for retrial.

I accordingly order that the sentence of fifteen years imprisonment is hereby revised with the attendant order that this case is remitted to the lower Court for the Accused to be tried by a Court of competent jurisdiction.

**Dated and delivered at Mombasa this 12<sup>th</sup> day of March, 2013.**

**M. MUYA  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**Mr. Tanui for State**

**Counsel for the Accused**

**Court clerk – Mr. Musundi**

**M. MUYA  
JUDGE**