REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.95 OF 2012

DAVID OMWENDI …….....…… APPELLANT/APPLICANT

VERSUS

REPUBLIC …….……,,,,,,…… PROSECUTOR

(From original conviction and sentence by the Principal Magistrate Hon. B.O. Ochieng, PM,

in Kilgoris PM's Court Criminal case No.268 of 2012)

JUDGMENT

1. The appellant herein, David Omwendi pleaded guilty to the charge of committing an unnatural offence contrary to **section 162 (a)** of the **Penal Code**. The particulars of the offence being that on the 30th day of March 2012 at [Particulars Withheld] in Transmara District within Narok County, he had carnal knowledge of P. K against the order of nature.
2. The facts giving rise to the offence were that on 30th March 2012 at [Particulars Withheld] in Transmara District of Narok County at about 12.00 p.m., the complainant who was aged 2 years was left at her home by her aunt as the aunt took milk to the trading centre for sale. The complainant was left in the care of the appellant. On her return, the complainant's aunt found the appellant sodomising the child. On seeing the complaint's aunt, the appellant quickly put on his trousers and ran away.
3. Before he ran away, the complainant's aunt asked the appellant what he was doing, but instead of answering, the appellant remained quiet and ran away. The appellant, who had stayed in the home for 3 days was thereafter arrested and escorted to Kilgoris police station. The complainant was taken to Enosaene Health Centre and upon examination by medical personnel, she was found to have been sodomised. The incident was reported to Kilgoris police station and thereafter the complainant was taken to Kilgoris District Hospital for further management. A P3 form dated 1st April 2012 was produced in evidence as **P. Exhibit 1**. The appellant was then charged.

4. On conviction, the appellant was sentenced to 18 years' imprisonment.
5. The appellant, being aggrieved by both conviction and sentence, filed this appeal on 13th April 2012 on the following 4 grounds:-

1. *THAT the learned trial magistrate erred in law and fact in sentencing the appellant when the plea of guilty was not entered against the appellant herein.*
2. *THAT [the] learned trial magistrate erred in law and fact in convicting and sentencing the appellant on the plea which was not unequivocal.*

3. *THAT [the] learned trial magistrate erred in law and fact in sentencing the appellant unlawfully and improperly as not provided for in law as the appellant was a minor and school going.*
4. *THAT the sentence imposed upon the appellant is unlawful, improper and a nullity and excessive in the circumstances and same should be set aside and/or varied.*

6. The appellant therefore prays that the conviction and sentence be quashed.
7. When the appeal came up for hearing before me on 29th July 2013, the appellant was represented by Mr. Anyona Mbunde of Anyona Mbunde & Co. Advocates while the State was represented by Mr. Shabola Ahindukha of the office of the Director of Public Prosecutions.

8. The arguments put forward by Mr. Anyona revolved around the 4 grounds of appeal. Counsel contended that the plea of guilty was not unequivocal; that no plea of guilty was infact entered against the appellant by the trial magistrate thereby making the sentence imposed upon the appellant to be unlawful and excessive in the circumstances. Counsel relied on the following 2 authorities:- **Kisii High Court Criminal Appeal No.191 of 2010 – Moses Lemo Abwao –vs- Republic** (unreported) and **Kisii High Court Criminal Appeal No.184 of 2010 – Peter Ondiek –vs- Republic** (also unreported).
9. In the said two authorities, Makhandia J (as he then was) allowed the appeals after it was established that the steps for taking pleas as set out in the case of **Aden –vs- Republic [1973] EA 445** were not followed to the letter by the trial court. In the **Peter Ondiek case**, the learned judge declined to order for a retrial because the exhibits produced in the court below had long been released and were unlikely to be produced in the same State in which they were at the time of the trial. In the **Moses Lemo Abwao case**, the learned judge allowed the case to go for retrial after both the appellant and the State asked for a retrial.
10. This appeal was opposed on both conviction and sentence. Mr. Shabola submitted that the record clearly shows that the appellant was aged over 18 years, so that the question of the appellant being a minor does not arise. Secondly, counsel submitted that there was ample evidence that the complainant was sodomised. As to whether or not the plea in this case was unequivocal, counsel asked the court to make a finding on the same.

11. After hearing both counsel on their submissions, the issue that arises for determination is whether the plea in this case was unequivocal and if not, what are the consequences of the same. The steps to be followed by any trial court taking a plea of guilty were set out in the **Aden case** (supra) and these are:-

i. *the charge and all the 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 on 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 change of plea entered;*
v. *if there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.*

12. In the **Aden case**, the Court of Appeal for East Africa noted that an accused person ought not to be convicted on his own plea unless it was plainly clear that he understood the nature of the offence facing him and the defence to such an offence, so that where a plea appears to be one of guilty, **"it must be recorded in the words of the accused."**
13. In the instant case, the record shows that after the charge was read and explained to the appellant in Kiswahili, the appellant said **"it is true"** and immediately thereafter the prosecution was called upon to state the facts without the trial court first of all entering a plea of guilty. This was obviously an omission on the part of the trial court. A plea of guilty should have been entered before the prosecution was called upon to state the facts. Though Mr. Shabola did not say so expressly, he was aware that no plea of guilty was entered against the accused before the

prosecution gave the facts.

14. Secondly, the use of the words **"it is true"** when answering to the charge and the facts has been found to be inadequate as such words do not bring out to the court whether the charge and the facts as read are indeed true. In the **Aden case**, the court observed that in cases where an accused is unrepresented as was the case herein, and because of the possibility of certain English words having no real equivalent in the vernacular language of an accused, it is important for the trial court to satisfy itself that an accused person has truly understood the content and context of his answers by having the accused's own words recorded by the trial court.
15. In the instant case, the use of the words **"it is true"** in answer to the charge and the failure by the trial court to enter a plea of guilty prior to the facts being given by the prosecutor broke the chain in the taking of a plea of guilty. I am therefore in agreement with counsel for the appellant that no plea of guilty was entered against the appellant that could have led to the conviction after the facts were given by the prosecution.

16. In the circumstances therefore, I find the conviction and the consequent sentence to be null and void. For this reason, I do hereby allow the appeal, quash the conviction and set aside the sentence of 10 years.
17. The next issue for determination is whether the appellant should be set free or whether I should order a retrial. In **Nyakundi & another –vs- Republic [2003] KLR 704**, the appellants were tried, convicted and sentenced to death on charges of robbery with violence. Part of the prosecution had been conducted by a police officer below the rank of Inspector contrary to **section 85 (2)** of the **Criminal Procedure Code**.
18. On appeal, the conviction was quashed, sentence set aside and retrial ordered. In considering whether or not to order a retrial, the Court of Appeal took into account the age of the case against the appellants, whether it would be easy for the prosecution to trace the prosecution witnesses for a retrial, and whether such a retrial would meet the ends of justice.
19. In the instant case, I note that the offence herein took place on or about 30th March 2012, and the appellant's case was completed on 2nd April 2012 when he was sentenced to serve 10 years in prison. That being the case, I do not think that the appellant will suffer any prejudice it a retrial is ordered. Secondly, I do not think that it would be difficult to trace the witnesses in this case if the case is remitted for trial. Further, considering the circumstances of this case in which a 2 year old child was the victim of the appellant's ugly crime, I am persuaded that it would serve the interests of justice for this case to be remitted to the lower court for retrial.

20. Accordingly, I order that there shall be a retrial of the appellant. The appellant shall therefore appear for mention of his case before the Principal Magistrate's court at Kilgoris on Friday 16th August 2013 for the trial court to set fresh dates for the hearing of the appellant's case. The trial shall take place before a magistrate other than Hon. B.O. Ochieng, P.M. who handled the case previously.
21. It is so ordered.

Dated and delivered at Kisii this 14th day of August, 2013.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Anyona Mbunde for the Appellant

Mr. Shabola for the State/Respondent

Mr. Bibu - Court Clerk