



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.67 OF 2012**

**KELVIN OUMA OKINYI..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Rongo,  
Hon. Z. J. Nyakundi in Criminal Case No. 133 of 2012 dated 20<sup>th</sup> March, 2012)**

**JUDGMENT**

1. The appellant, **Kelvin Ouma Okinyi** (hereinafter referred to only as “**the appellant**”) was charged at the Principal Magistrate’s court at Rongo with the offence of defilement of a girl contrary to **section 8 (1) and (4) of the Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that the appellant on diverse dates between 29<sup>th</sup> day of December 2011 and 18<sup>th</sup> March 2012 at [particulars withheld] in Migori County in the Republic of Kenya, unlawfully and intentionally caused an act of penetration with FAW a girl aged 17 years. The charge having been read and explained to the appellant in English interpreted in Dholuo, the appellant pleaded guilty. The trial court then caused the facts on which the said charge was grounded to be read to him. On being asked whether the said facts were true, the appellant answered in the affirmative. The trial court thereafter proceeded to convict the appellant on his own plea of guilty and sentenced him to serve 15 years imprisonment.
2. Being aggrieved and dissatisfied with the said conviction and sentence the appellant has brought this appeal which is based on the following grounds;
  - a. *That he pleaded guilty because of the way the offence was read to him thinking that he would be given a chance “to elaborate the way the whole story was”.*
  - b. *That he had been living with the complainant since December 2011 and all along the complainant was communicating with her parents. He is wondering why the complainant’s parents decided to complain three months down the line.*
  - c. *That the complainant told him that she wanted a place to go to because she was not in good terms with her parents.*
  - d. *That he was convinced by the complainant that she was a grown up and that she could make decisions by herself.*

He urged the court to intervene in the matter so that he may be given a fair trial.

3. When the appeal came up for hearing on 17<sup>th</sup> October, 2013, the appellant appeared in person while **Mr. Shabola** appeared for the state. In his submission the appellant told the court that he wanted a re-trial because he was wrongly convicted on his own plea of guilty. He argued that he

- was not given an opportunity to explain himself before a plea of guilty was entered and that his plea of guilty was not unequivocal. He urged the court to set aside his conviction and sentence and to order a re-trial.
4. **Mr. Shabola** for the State submitted that the appellant was charged and convicted on his own plea of guilty to a charge of defilement contrary to **section 8 (1) and (4) of the Sexual Offences Act**. He submitted that looking at the proceedings, the appellant when asked to plead, responded that **“it is true”** and it is on this basis that he was convicted. He submitted that this kind of plea was not unequivocal. He submitted that in view of the severity of the offence, the appellant should be subjected to a retrial so that the court can ascertain the merit of the charge against the accused. He urged the court to order that the appellant do remain in custody until the process of his re-trial commences when he would be at liberty to make any application deemed appropriate.
  5. This being a first appeal this court has a duty to evaluate all the evidence given at the trial and come to its own independent conclusion on the same. The court must however be alive to the fact that it never saw nor heard the witnesses as they testified and therefore it must make an allowance for that. See, **Okeno vs. Republic (1972) E. A 336**. In the instant case in which the appellant was convicted on his own plea of guilty, this court is under a duty to ascertain whether the steps required to be taken by the trial court in entering a plea of guilty were complied with.
  6. In the case of, **Adan vs. Republic (1973) E.A. 445** the Court of Appeal set out the following steps for purposes of confirming that a plea of guilty is unequivocal:-

**“a. 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.**

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

**c. 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.**

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

**e. 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.**

7. After carefully analyzing the record of the lower court, the issue that arises for determination is whether these steps were complied with. In his submissions the appellant told the court that the plea of guilty was not unequivocal, this was confirmed by **Mr. Shabola** for the State. I do find that the steps as set out in **Adan vs. Republic (supra)** were not followed by the trial court thus the plea herein was not unequivocal. I must add here however that I have reached the conclusion that the plea of guilty herein was not unequivocal simply because the appellant had stated **“it is true”** in response to the charge. The statement **“it is true”** in appropriate cases can amount to unequivocal plea of guilty. In the circumstances of this case however it did not.
8. I do agree with the state counsels submissions on the seriousness of the offence herein. I am also persuaded by the appellant’s desire for a re-trial to which the learned counsel for the state did not object. I see no reason that would make a re-trial impossible or undesirable in the circumstances of this case. Neither the appellant nor the state alluded to any. It is therefore ordered that the case herein be taken back to the trial court at Rongo for a re-trial. The appellant shall remain in custody until he is produced at the resident magistrate’s court at Rongo to take a plea afresh. This shall be done within five(5) days from the date hereof failure to which the appellant shall be released from custody forthwith unless otherwise lawfully held. The appellant is at liberty to make an appropriate application for bail or bond during the re-trial.

**Delivered, dated and signed at KISII this 6<sup>th</sup> day of December 2013.**

**S. OKONG’O**

**JUDGE**

**In the presence of:**

Appellant present in person

Mr. Shabola for the Respondent

Mobisa Court clerk

**S. OKONG'O**

**JUDGE**