



KAHINDI KARISA BEJA APPELLANT

-versus-

REPUBLIC RESPONDENT

J U D G M E N T

1. The appellant KAHINDI KARISA BEJA was charged with Defilement contrary to section 8(4) of the Sexual Offences Act, it being alleged that on diverse days between 11th October, 2009 and 29th October, 2009 at Jimba Sublocation, Malindi he defiled F. C. a girl aged 17 years. The appellant pleaded guilty and was sentenced to serve 15 years imprisonment. His petition of appeal was filed by J. K. MWARANDU ADVOCATE but the written submissions were done in person and filed on 21st June, 2011. At the hearing of the appeal the appellant relied on the grounds and submissions.

2. The State through Mr. Naulikha opposed the appeal on conviction but left the matter of sentence to the court.

The appellant's chief complaint is that his plea was not unequivocal because he did "not understand the language of the court and the consequences of the plea" and he has cited authorities in support of his arguments. Paradoxically, in the same submissions the appellant states:

"I don't complain of the language used by the court. I say that the learned trial magistrate did not give me time to reflect on the plea I was about to make.... I was coached and misled by police to plead guilty as the offence...was petty which the same was a trick to have me jailed."

3. In the celebrated case of Adan vs R (1972)EA 445 the court outlined the procedure of taking plea was follows:

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 reordered 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."

4. Having perused the record of the Lower Court, I note that these guidelines were followed. There is yet no requirement except for capital offences for the court to warn the accused pleading guilty to any offence of the consequences thereof (see Boit vs Republic (2002) KLR Vol. 1 page815.)

It may however be undertaken as a measure of prudent caution in less serious charges, the aim being for the plea court to reassure itself that the plea is indeed unequivocal. In Adan's Case the court stated:

“The courts have always been concerned that an accused person should not be convicted on his own plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court.”

5. In the present case, the trial court cannot be faulted on the procedure but there was a fatal error of substance with regard to the facts read out by the prosecution:

They did not disclose the offence preferred. Even though a P3 form purporting that there had been penetration was tendered, the facts read out did not assert all ingredients of the offence. The total substance of the prosecution’s fact was that the complainant (minor) and the appellant were in a “relationship”; that she left her home to live as “man and wife” with the appellant. These facts do not amount to defilement as contemplated in section 8(1) of the Sexual Offences Act. This appeal must succeed on that score alone and I do quash the conviction and set aside the sentence.

6. The only issue remaining for determination is whether or not to order a retrial. The principles to be considered when determining whether or not to order a retrial are well settled. The key considerations are two-fold: first, whether the interests of justice require such an order and if such order may occasion prejudice upon the appellant, and secondly whether the admissible or potentially admissible evidence may result in a conviction (see **MANJI V R (1966) EA 343, MWANGI V R (1983)KLR 522.** A retrial should not be ordered merely to allow the prosecution to fill any gaps.

7. Having considered the proceedings in the Lower Court as well as the medical records, I am of the view that a retrial ought to be ordered in this matter. The appellant should be presented before the Chief Magistrate Court in Malindi for fresh plea on 27th June, 2012.

Dated and delivered at Malindi this 20th day of June, 2012 in the presence of: Mr. Kemo for the State, Appellant present CC Evans.

**C. W. MEOLI
JUDGE**