



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 163 OF 2011

(From original conviction and sentence in Criminal Case No. 1309 of 2011 of the Principal Magistrate's Court at Nyahururu, A. B. Mongare, SRM)

SAMUEL GASHEGWA WAITHERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of willful assault to a child contrary to Section 127(1) of the Children Act 2001 (*No. 8 of 2001*), and was on his own plea of guilty convicted and sentenced to five years imprisonment. He appealed to this court on the grounds of sentence.

The Appellant's written submissions are entitled "**PETITION OF MERCY**", and contains seven paragraphs all pleading that he did not intend to assault the child, but he accidentally knocked the boiling kettle of water and scalded the child. He would be very careful in the future. He prayed that he either be acquitted of the offence or he be granted a non-custodial sentence.

Fortunately for the Appellant, the State did not oppose but conceded to this appeal on the principal ground that the plea was not unequivocal and offended the principles for recording pleas of guilty set out in the case of **ADAN VS. REPUBLIC [1973] E.A. 445** that -

- (a) the charge and all 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 entered.***
- (c) the prosecution should then immediately State the facts and the accused 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 raises any question of his guilt his reply must be recorded and a 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.***

In this case, the prosecution's case was that the appellant -

“willfully and unlawfully assaulted a child, namely Joyce Wambui Muthoni aged 11 years by burning her on left leg using very hot tea.”

Contrary to the principles set out in the case of **ADAN VS. REPUBLIC** (*supra*) when the facts were read, the prosecution alleged that the appellant burnt the victim ***“on both legs with hot tea which the mother of the child had prepared.”***

Though the appellant confirmed these facts as true (Facts true), the facts did not tally with the charge sheet, that the appellant had scalded the victim on the ***“left leg”***, not all legs as the facts alleged.

State Counsel submitted that the facts did not support the charge or offence with which the appellant was charged. Besides the appellant stated - ***“I did not do it willfully”*** and that is a material contradiction in the particularity of the offence. The burn was on her left leg, but the facts referred to both legs.

I with respect agree with submissions by State Counsel. It is unsafe to maintain the conviction of the Appellant. There was no evidence of willful scalding of the child.

I therefore set aside the Appellant's conviction and sentence and direct that the appellant be released forthwith, unless otherwise lawfully held.

It is so ordered.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE