



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 48 OF 2009
BETWEEN

W.K.K.:.....APPELLANT

AND

REPUBLIC:.....RESPONDENT

(Being an appeal from the decision of the Senior Resident Magistrate Hon. Nathan Shiundu dated 13th March 2009 at Eldoret CMCRC No. 1565 of 2009)

JUDGEMENT

W.K.K, the appellant, was charged with the offence of defilement of a girl contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant, on the 5th day of march, 2009, in Keiyo District of the Rift Valley Province unlawfully defiled **J.K** (hereinafter “the complainant”) a girl aged 14 years of age.

There was an alternative charge of indecent Act with a girl contrary to section 11(1) of the same Act. The allegation was that the appellant at the same time, same place, unlawfully and indecently touched the private parts of the complainant.

The appellant appeared before N. Shiundu, Senior Resident Magistrate on 13th march, 2009, and purportedly pleaded guilty to the charge. The prosecutor then stated the facts and when the appellant was invited to react to those facts he stated that the facts were true. The Learned Senior Resident Magistrate then convicted the appellant on his own plea of guilty to the principal count of defilement of a girl aged 14 years and after considering the appellant’s mitigation sentenced him to fifty (50) years imprisonment.

The appellant was dissatisfied with his conviction and sentence and has appealed to this court on three (3) main grounds namely:

- 1) *That the Learned Magistrate erred in law and fact in failing to avail an interpreter to the appellant despite the same being his constitutional right under Section 77(2)(f) of the Constitution.*
- 2) *That the learned magistrate erred in law and in fact in failing to consider breach of the appellant’s constitutional right to liberty and refer the issue to the High Court for determination.*
- 3) *That the Learned magistrate erred in Law and in fact in imposing an excessive and severe*

sentence.

At the hearing of the appeal, the appellant was represented by Mr. Rotich, Learned Counsel and the Republic was represented by Mr. Kabaka, Learned State Counsel. Mr. Rotich introduced a new

ground in his submissions namely that the charge as laid was defective given the age of the complainant and the particulars alleged in the charge. Counsel further submitted that the language used at the time of the plea was not understood by the appellant and finally that the appellant's fair trial rights guaranteed by the repealed constitution article 72(3) (b) were breached.

With regard to sentence, counsel for the appellant submitted that the same was excessive in the circumstances.

Mr. Kabaka on his part, supported the appellant's conviction and sentence contending that the plea of the appellant was unequivocal and that the appellant's complaints are an afterthought. Counsel referred to the replying affidavit filed by the investigating officer in which the delay in arraigning the appellant was explained. In the premises, he submitted that there was no breach of the appellant's constitutional right guaranteed under Article 72(3) (b) of the constitution (now repealed).

Having considered the record and the submissions of counsel, I take the following view of this matter. The new complaint raised in counsel's submissions regarding the charge cannot be entertained as no leave was sought to amend the grounds of appeal before arguing the said ground. Notwithstanding the failure to obtain leave to amend the grounds of appeal in my view nothing much would have turned on the new ground as I detect no defect in the charge as laid.

With regard to the allegation that the appellants rights under article 72(3) (b) of the repealed Constitution were breached, I have come to the conclusion that that is not the case. I have come to that conclusion given the explanation contained in the affidavit filed by **PC Leah Tanui**, the investigating officer, averments whereof were not challenged. In any event the appellant did not demonstrate that the alleged delay was trial related. (See **Julius Kamau Mbugua -VS- R Criminal Appeal No. 50 of 2008 (UR)**)

The appellant's complaint regarding the language used when his plea was taken has caused me some anxiety. The record shows that the proceedings were conducted in English and interpreted in Kiswahili. The appellant now says he does not understand both English and Kiswahili. The procedure of recording a plea of guilty is settled. The authorities are united that when such a plea is offered it should be recorded as nearly as possible in the words used by the accused. (See **Joseph Mbebi -VS- R (1957)EA 426**). In fact that is what is provided in section 207(2) of the Criminal Procedure Code which reads as follows:-

"207(2). If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him, unless there appears to it sufficient cause to the contrary."

The predecessor of our Court of Appeal considered the manner in which pleas of guilty should be recorded and the steps which should be followed and held as follows in **Aden -V- Republic (1973)E.A 445:-**

- (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 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 with the facts or raises any question of 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 facts relevant to sentence together with accused's reply should be recorded."*

The court made the following observations at page 446 of the report:-

"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. For this reason, it has long been a rule of practice, that where a plea appears to be one of guilty it must be recorded in the words of the accused."

I have extensively quoted from the Aden case (subra) because the record of the lower court does not show that the Learned Senior Resident Magistrate complied with the procedure of recording the appellant's plea as set out in the said case. The appellant was not represented by counsel before the learned Senior Resident Magistrate. He is also of limited education and did not speak the language of the court. He now says he is not conversant with both English and Kiswahili.

The record however suggests that the proceedings were conducted in English and interpreted in Kiswahili. When the charge was read and purportedly explained to the appellant, it is recorded that he said "it is true" and when the facts were narrated, it is recorded that he said "the facts are true." The statements "it is true" and "the facts are true," cannot have been the appellant's own words. If the appellant was fluent in Kiswahili as the Learned State Counsel appears to suggest then his actual words in the Kiswahili language should have been recorded.

In the premises, I am not satisfied that the applicant's plea was unequivocal. The conviction of the appellant cannot therefore safely be allowed to stand. The appellant was sentenced to fifty (50) years imprisonment and has served only two of them. I am, in the premises, inclined to order a new trial as the same will not lead to a grave injustice upon the appellant should he ultimately be acquitted.

In the end the appeal is allowed. The conviction of the appellant is quashed and the sentence set aside. The appellant shall be retried before a different magistrate with competent jurisdiction. Pending his retrial, he may be released on bond on such terms as the trial magistrate will determine.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT ELDORET THIS 17TH DAY OF MARCH, 2011.

**F. AZANGALALA
JUDGE**

Read in the presence of:-
The appellant and Mr. Oluoch for the Republic.

**F. AZANGALALA
JUDGE**

17/03/2011

Coram - F. Azanglala, Judge

C.C. - Japheth Kemboi

Judgment read in the presence of Mr. Oluoch for the Republic and the Appellant in person.

F. AZANGALALA

JUDGE
17/03/2011