



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 25 OF 2010

JOSEPH AYIENAYI.....APPELLANT

VESRUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A perusal of the paper work placed before this court reveals that the appellant was charged in the lower court with the offences of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. **“In that on the 5th day of January 2010 at T petrol station in Kisumu district, within Nyanza province penetrated the vagina of S.A a child aged 13 years with his penis”.**

In the alternative the appellant faced the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya, **“ in that on the 5th day of January 2010 at T petrol station in Kisumu district, within Nyanza province committed indecent act to S.A by touching her vagina with his finger”.**

The appellant appeared in court on the 13-1-2010 when the charge is stated to have been read to him in Swahili language which was indicated that he understood. He is indicated to have pleaded not guilty to both the main and alternative charge.

In the course of the proceedings on 8-2-2010, the appellant is indicated to have asked for time to go through the witnesses statements which were handed to him. Thereafter trial commenced on 22-2-2010 when PW1, 2 and 3 testified and are indicated to have been cross examined by the appellant. Thereafter the matter was adjourned to enable the prosecution avail other witnesses.

On 1-3-2010 when the trial resumed, the appellant is alleged to have stated:-

“I admit I did a mistake by sleeping with a girl and I am very sorry”. The court is indicated to have given the appellant 15 minutes to deliberate on his change of plea. One hour later he appellant is indicated to have stated this:-

“I admit I had slept with the child. I was drunk, (it was 5.30 p.m.) It ended later. The child used to come to me”.

The prosecutor is indicated to have stated to court that “The facts are as per the evidence on record.

I produce the P3 form as an exhibit. The appellant is stated to have responded:-

“What the witnesses said is true”. The appellant is indicated to have been convicted on own plea of guilty. The prosecution is indicated to have stated that the appellant was a first offender as there were no records. In mitigation, the appellant is indicated to have said that he is 46 years of age having been born in 1964. He had five children then the learned trial magistrate made the following order:-

Sentence

“Accused first offender. Offence very grave. He needs a deterrent sentence. He shall serve 30 years in jail”.

The appellant thereby became aggrieved and filed this appeal citing two grounds of appeal namely:-

- (1) I was convicted of defilement and sentenced to serve 30 years of imprisonment.**
- (2) That I initially pleaded not guilty but later on pleaded guilty due to the following reasons:-**

- (i) I did not understand the language which was used in court, my request to be granted an interpreter was ignored.**
- (ii) I was forced to admit ignorantly to the allegations from the witnesses since I could not understand anything at all.**
- (iii) My pleading guilty was due to the fact that I considered it a waste of time attending court time and again, yet I could not get the proceedings against me hence being forced to admit.**

In consequence thereof the appellant prayed for a retrial of the case and asked to be present during the hearing of the appeal.

When the appellant appeared in court on 22-9-2011 for the hearing of the appeal, he requested to be accorded a Turkana interpreter before he could proceed with his appeal. The court made effort to procure one for him.

In the appellant’s representation through the interpreter, he reiterated the grounds of appeal to the effect that:-

- (a)He was Turkana by tribe**
- (b)He can only understand the Turkana language.**
- (c)The proceedings were conducted in a language he did not understand and he does not know what transpired in the lower court.**
- (d)He did not even know that he had been convicted and sentenced to serve a prison sentence. He learned of this when he arrived at prison to serve his sentence.**

He asks for a retrial during which he requests to be availed a Turkana interpreter and secondly that the trial to be revolved to his home area where he can be in touch with his family members who do not know where he is and they may be assuming he is dead.

The state on the other hand supports the conviction on the ground that the proceedings are proper and the appellant changed plea to one of guilty after listening to the testimonies of the witnesses.

- (2) But alternatively that should this court find otherwise, then they ask for a retrial.**

The court has given due consideration to the above afore set out rival submissions and the same considered in the light of the content of the record as assessed herein and the court proceeds to make the following findings on the same:-

- (1) A perusal of the entire record does not reveal any where, where the appellant is indicated to have**

asked the lower court to provide him with a Turkana interpreter. However, that notwithstanding it is now an accepted principle of law that an accused person is entitled to the services of an interpreter of a language he is conversant with when he is being processed through legal proceedings especially criminal proceedings like the one the appellant is facing. It matters not at what stage the services are requested for.

In the case of this jurisdiction there are rounds are enshrined in Article 50 of the current Kenyan, Constitution vide Article 50 (2 (b) and (m) the appellant was entitled to be informed of the charge with sufficient particulars to enable him answer them and also to have the services of an interpreter. Although the record does not bear out that these services were requested, now that the appellant has raised it on appeal, and it is a matter which touches on fundamental rights of the appellant, this court cannot take it for granted.

(2) It is borne out on the record that midway the trial the appellant decided to change plea. He has explained both in the grounds of appeal and oral representation, that it is because he did not understand the proceedings. It is now trite law and this court has judicial notice of the same that an accused person has a right to change plea at any stage of the proceeding. It therefore fallen that had the issue of not understanding the proceedings due to a language barrier, the court would have taken this to be perfectly in order.

(3) It is however clear from the record that there are apparent glaring irregularities committed by the court when accepting and processing the appellant for conviction on the intention of the alleged desire to change plea. The correct procedure should have been for the court to follow the following steps:-

(1) Have the appellant who was the accused indicate the language he wanted the charge reminded to him and then have this indicated on the record. When the services of an interpreter is used indicate the name of the interpreter.

(2) Then read the main charge to the accused and if accepted to be true then proceed to ask the prosecutor to outline the facts and if facts are accepted proceed to make a finding of guilty receive representation on the accused past record, followed by mitigation and then conviction. Herein it was irregular for the learned trial magistrate just to state that facts as per the evidence of witnesses. This procedure cut out narration of the content of the P3 form which was crucial to the determination as to whether the offence disclosed was for the main count or the alternative count.

(3) Where there is an alternative charge, the record has to indicate clearly whether the plea if guilty of any is entered on the main charge the alternative charge. Likewise the conviction also has to indicate whether it is on the main charge or the alternative charge. Where the conviction is on the main charge, there should be indication that there is no finding on the alternative charge,

(4) Herein there is no indication as to whether the change of plea and conviction was on the main charge or alternative charge. This coupled with the allegation of lack of understanding of proceedings makes the conviction unsafe.

(5) It is mandatory to reflect on the record that the accused person is informed of the consequences of pleading guilty in the first instance or subsequently after the commencement of trial to the effect that upon pleading guilty initially or subsequently he loses the right to cross examine witnesses and give his defence as well as the right to challenge the conviction. This procedure was also not undertaken by the learned trial magistrate.

For the reasons given in the findings above, the conviction is unsafe.

The state rightly concedes in the alternative and asks for a retrial. The appellant faced a severe charge and it is only in the interests of justice that both him and the victim be vindicated on equal arms the court therefore proceeds to quash the conviction entered by the lower court sets aside the sentence and orders a re-trial before another magistrate of competent jurisdiction other than the one who conducted the faulted proceedings. This procedural step has been undertaken to avoid a misapprehension on the part of the

appellant that the trial magistrate may be prejudiced against him because he already knows the case.

Dated, delivered and signed at Kisumu this 28th day of September, 2011.

**ROSELYN N. NAMBUYE
JUDGE**

RNN/va