



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 180 of 2005

GRACE MUKIRI BAITOME 1ST APPELLANT
MOSES KAUBA ITHIBUTU 2ND APPELLANT
KAUBA ITHIBUTU 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from a judgment of G. Oyugi R.M. Tigania,

Cr. Case No. 1535 of 2005 dated on 22nd August 2005

JUDGMENT

The appellants who were charged jointly pleaded guilty to a charge of subjecting a child to early marriage contrary to section 14 as read with section 20 of the Children’s Act Cap 586 Laws of Kenya. It was alleged in the charge sheet that between the month of August 2005 up to 17th September 2005 at Uringu area the appellants jointly willfully gave Nancy Makena Baritome a girl of 14 years to be married to Pastor Mark Kathumbumi therefore causing her to be in need of care and protection.

The appellants pleaded guilty and were convicted and each sentenced to ten (10) months imprisonment. Both were aggrieved and filed separate appeals. The appeals were subsequently consolidated. However, the second appellant has since absconded and warrant for his arrest issued. This ruling is therefore in respect of 1st appellant. Two grounds are raised in this appeal, namely that the plea was not unequivocal and secondly that the sentence was excessive.

The appeal was opposed by counsel for the respondent who argued that the plea was unequivocal; that having pleaded guilty to the charge the appellant was not entitled to an appeal.

I have considered the appeal, the foregoing submissions and I hold the following view on the same. The first issue is whether the appellant having pleaded guilty was barred by dint of section 348 Criminal Procedure Code from bringing the present appeal.

Section 348 aforesaid provides that:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been

convicted on that plea by a subordinate court except as to the extent or legality of the sentence.”

This section on the face of it seems to suggest that where an accused person has pleaded guilty to a charge his appeal can only be entertained on the severity or legality of the sentence. But that is only on the face of the provision. In the case now well-known for holding that a suspect must be brought to court within the period spelt out under section 72(3) of the Constitution, ***Ndede V. R.*** (1991) KLR 567 the Court of Appeal stated the law in respect of section 348 as follows:-

“There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute. The case law was reviewed by the predecessor of this court in Adan V. Republic (1973) EA 445.”

The court continued to say:-

“In England the jurisdiction of the Court of Appeal to determine appeals against conviction is also provided for by statute. Appeals against pleas of guilty are also prohibited. It has been consistently held by that court, however, that the court has inherent and or residual powers to entertain appeals against guilty pleas where the proceedings are found to have been a nullity.”

The court further considered section 412 of the Code of Criminal Procedure of India 1898 which is in *pari materia* to our section 348 and it said:-

“It has been held that the principle underlying the provision is that a plea of guilty by the accused person operates as a waiver of his right to question the legality of the conviction based on such a plea. It has been held further that before a bar of this section can apply against a convicted person, it must be clear that the plea of guilty is really such a plea and that the appellant is not prevented or debarred from showing that the plea was not really a plea of guilty or did not amount to a plea of guilty – see The Air Manual 3rd Ed. Vol. 8 P. 569 – 70. We agree with and adopt these statements of principle.”

What emerges from all these decisions is that a plea of guilty is not an absolute bar to appealing against conviction on any ground which the court in its absolute discretion may find justifiable. In the instant appeal the appellant has alleged that her plea was not unequivocal. In such a case the court must try that allegation. The question therefore is whether the plea was unequivocal. The case of ***Adan V. R.*** (supra), the leading authority in this area set out the manner in which pleas of guilty should be recorded and the steps to be followed.

Section 207(2) of the Criminal Procedure Code provides:-

“(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 and pass sentence upon him, or make an order against him, unless there appears to it sufficient cause to the contrary” (emphasis added).

In the case of ***Ndede*** (supra) in which English Court of Appeal decisions were cited it was noted that the court can reject a plea of guilty if in its opinion:-

- (a) the plea was entered as a result of undue pressure (***R. V. King*** (1920) 15 Cr. App. R. 13);
- (b) there was doubt as to whether the accused had complete freedom of choice whether to plead guilty or not guilty – ***R. V. Turner*** (1970) 54 Cr. App. 2 352;
- (c) there has not been a free plea because the plea has been made under threats of pressure from the court – ***R. V. Inns*** (1974) 60 Cr. App. R. 231.

Those are examples in England.

Essentially, the appellant in this appeal has alleged that his plea was not unequivocal because the language was not recorded and that his answer to the charge did not amount to an unequivocal plea of guilty.

First, I find no merit on the question of language as the same is clearly recorded as Kimeru. Regarding the appellant's response to the facts as narrated by the prosecutor, I similarly find no merit on the complaint. The appellant confirmed that the facts were correct. Indeed in mitigation she explained that she was paid dowry in the form of a goat and a cow.

The maximum sentence provided under section 20 of the Children Act for the offence charged is twelve (12) months. The appellant was sentenced to ten months imprisonment.

In arguing the appeal counsel for the appellant submitted that the victim of the offence is now an adult and is in fact married to the person who had married her at 14 years. The person she was married to was not charged. Taking all this into consideration, I will reduce the sentence to five months, the period served before the grant of bail being taken into account. Save for this, the appeal fails and is dismissed.

Dated and delivered at Meru this ...28th ... day of ...May.. 2009.

W. OUKO

JUDGE