SOLOMON MUCHIRI WAIRIMU…….APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT

Solomon Muchiri Wairimu the appellant herein was charged with the offence of **defilement of a girl** contrary to **section 145(1) of the Penal Code**. The particulars of the offence state that on the 5th day of January 2005 at Magumu Village in Nyandarua District within the Central Province, unlawfully had carnal knowledge of J WK a girl under the age of sixteen years. The appellant was also charged with a second count of wilfully infringing on the rights of a child and of sexual exploitation contrary to section 15 as read with section 20 of the Child Act No. 8 of 2001Laws of Kenya. The particulars of offence state that on the 6th day of January 2005 at M village in Nyandarua District within Central Province, unlawfully engaged into sexual activities with a child under the age of 18 years and protected from sexual exploitation namely JW K and exposing her to pregnancy.

The appellant was convicted on his own plea of guilt and sentenced to ten (10) years imprisonment with hard labour for the first count and eight months imprisonment for the second count and both sentences to run concurrently. The appellant has now appealed against the conviction and sentence.

On the part of the State the learned State Counsel Mr. Mugambi conceded to the appeal on the grounds that the plea as recorded by the learned trial magistrate was not unequivocal. The language the trial court used to take the plea is not indicated and since the appellant pleaded guilty it is imperative that the court should have been satisfied that he understood the ingredients of the charge.

I have gone through the proceedings before the trial magistrate especially the proceedings of 20th June 2005 when the plea was taken and the appellant was convicted on his own plea of guilty. The language used by the court is not indicated. It is mandatory that the substance of the charge and all the elements thereto are read and explained to an accused person in a language that he understands. The Court of Appeal in numerous decisions has reiterated these fundamental principles, which are also guaranteed under **section 77(2) of the Constitution of Kenya and section 198(1) of the Criminal Procedure Code.** One such leading authority is the case of **Swahibu Simbauni Simiyu & Anor. Vs. Republic CA Criminal Appeal No. 243 of 2005 (Kisumu)** where the court of appeal reiterated the fundamental principles contained in the **Constitution of Kenya Section 77(2) and Section 198(1) of the Criminal Procedure Code.** Moreover in the celebrated case of **Adan vs. Republic [1973] E. A .445** where the Court of Appeal held as 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 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 the facts or raises any question of his 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 the facts relevant to sentence together with the accused's reply should be recorded."

Having found that the proceedings were a nullity because of failure by the trial court to indicate the language used by the court, the other issue to consider is whether this matter should be referred for retrial. The principles to take into consideration on whether to refer the matter for retrial are set out in the case of **Ekimat vs. Republic C. A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)** where the Court of Appeal reiterated the principles that:

"***In the case of*** *Ahmed Sumar v Republic [1964] E.A. 481*, ***at page 483, the predecessor to this court stated as follows:***

'***It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.'***

The court continued at the same page paragraph H and stated:

"***We are also referred to the judgment in*** *Pascal Clement Braganza v. R [1957] E.A. 152.* ***In this judgment the court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.'***

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

The facts of this case show that the offence took place in January 2005, which is over four years ago. The appellant was convicted on 20th June 2005. He has served almost 4 years of the sentence, which is a substantial portion of the sentence imposed by the trial court. I am of the view that a retrial will not serve the ends of justice since the appellant has served a substantial portion of sentence and due to the passage of time, it might not be easy to locate the witnesses. Furthermore, as at the time the offence took place, the complainant was aged 16 years. If the retrial were to take place she is now aged 21 years. It is for the above reasons that I will not order a retrial but allow this appeal, set aside the conviction and sentence. Unless the appellant is otherwise lawfully held he is to be set at liberty.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE