



FRANCIS KAMAU NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Francis Kamau Njuguna, the appellant herein was charged with the offence of **defilement of a girl** contrary to **section 8(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence state that on the diverse dates between 21st day of March 2008 and 24th day of March 2008 at unknown time at Kwa-Haraka trading centre in Nyandarua South District within central province unlawfully had carnal knowledge of ANW a girl aged 17 years.

The appellant was alternatively charged with the offence of **indecent assault** contrary to **section 11 of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence state that on the diverse dates between 21st day of March 2008 and the 24th day of March 2008 at unknown time at Kwa-Haraka trading centre, in Nyandarua South District within Central Province unlawfully and indecently assaulted ANW a girl aged 17 years by touching her private parts namely her vagina.

The appellant was convicted on his own plea of guilty. Upon conviction he was sentenced to ten years imprisonment. The record does not indicate what happened to the alternative charge. The appellant has now appealed and pleaded for leniency. On the part of the State the learned State counsel Mr. Njogu conceded to this appeal on the basis that the language used by the court when plea was taken was not indicated thus there is a possibility that the appellant did not understand the charge and the facts of the matter when plea was taken.

The record of proceedings shows that the proceedings were conducted in English/Swahili. However the court did not indicate that the charge was read in Kiswahili although the appellant responded in Kiswahili. There is a possibility that the charge was read in Kiswahili and so are the facts. However since the appellant pleaded guilty it is imperative that the language of the court should be stated. Failure to indicate the language of the court is a serious anomaly, which has been held fatal to the proceedings of the trial court.

It is trite that the substance of the charge should be explained to the accused person in a language that he understands. These fundamental principles are guaranteed under **section 77(2) of the Constitution of Kenya and Section 198(1) of the Criminal Procedure Code**. The Court of Appeal has also reiterated these principles in several decisions. 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 to indicate the language of the court the other issue to consider is whether this matter should be referred for retrial.

The principles to bring to bear when considering whether a matter should be referred to a 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 circumstances of this case can be discerned from the facts that were given by the prosecution as follows:

"Complainant is aged 17 years. She is in Form 2. On 21st March 2008 the accused called complainant. Complainant sneaked from school and went to his house. They had carnal knowledge on several occasions. Girl eventually ran away from school and went to live with accused. Accused sent messages to girl's parents. Accused was arrested and charged..."

From the above facts the complainant is now over 18 years old. It is not possible for this court to know whether she would be willing to pursue the charge. The appellant also gave mitigation that he was remorseful for his mistaken belief of the age of the complainant who was his girlfriend. Bearing in mind these circumstances I am not satisfied that the ends of justice will be served by a retrial. The appellant has served a portion of over 1 year of the sentence. That is reasonable punishment for the offence that was based on his mistaken belief that the complainant was his girlfriend.

Accordingly the appeal is allowed, the sentence imposed by the trial court is set aside and 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