REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Criminal Appeal 28 of 2008

(Being an appeal from the conviction and sentence of Honourable Mr. E.K. Mwaita, SRM, on 24.10.2007, in the original HOMA BAY SRM CRI.CASE NO.1233 OF 2007

ZACHARY OTIENO KIBUSU.....APPELANT

VERSUS

REPUBLIC…….....…… RESPONDENT

JUDGMENT

The appellant was convicted on his own plea of guilty to a charge of defilement of a girl aged 12 years contrary to **section 8(1)** as read with **sub section (2)** of the **Sexual Offence Act.** He was sentenced to thirty (30) years' imprisonment. The appellant was dissatisfied with the conviction and sentence and preferred an appeal to this court. He raised the following grounds in his petition of appeal;

1. "The learned trial Magistrate erred in Law and in fact in failing to appreciate and uphold that the Appellant's purported trial, conviction and sentencing constituted a nullity in law, having been procured on the basis of gross violation of his constitutional right to a fair trial before a court of law within a reasonable time being within 24 hours of his arrest and instead brought to court only on 24.10. 2007 having been arrested on 14.10.2007 contrary to the express and mandatory provision of section 72(3) and 77 (1) of the Constitution of Kenya.

2. The Learned Trial Magistrate erred in law and in fact by failing to inquire from the police investigating officer and the prosecution as to why the Appellant was not arraigned in court promptly within the period required by law, with the result that no explanation was offered for this gross violation of the Appellant's rights thus rendering the trial

a nullity.

3. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the plea of guilty entered against the Appellant was wrong in circumstances where the facts read out to the Appellant by the prosecutor as read with the exhibits produced in court did not disclose the offence charged before the court.

4. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the purported plea of guilty entered against the Applicant was not unequivocal and could not justifiably found a legitimate basis for the plea of guilty in the absence of the accused having been informed with the requisite "detail" of the nature of the offence with the result that he was denied a valid and legitimate opportunity in law to understand the nature of his alleged offence and to make an informed plea in circumstances that in truth did not disclose the offence alleged".

Arguing the first ground of appeal, Ms Sewe for the appellant submitted that the appellant was arrested on 14th October, 2007 but was not arraigned in court until 24th October, 2007. no explanation was by the police for that delay which was well beyond the twenty-four hours as provided by **section 72 (3) (b)** of the **Constitution of Kenya**. The plea taken was therefore null and void. Counsel cited the court of Appeal decision in **ALBANUS MWASIA MUTUA –VS- REPUBLIC**, Criminal Appeal No. 120 of 2004 where the court held that unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of a charge.

Mr. Kemo, Senior Principal Prosecution Counsel, sought to rely on an affidavit sworn by Inspector Felistus Olando of Mbita police station who stated that the offence was committed in a very remote area where there are no Hospitals and the complainant had to be taken to Mbita. The police officer further stated that police officers in the station were engaged in other official duties and were thus unable to take the appellant to court in good time.

I must state that I found the police explanation for the delay in arraigning the accused in court wanting. The police should never trivialize an accused person's fundamental rights which are expressly provided for by the supreme law of this country, the Constitution. Having arrested the appellant, the police can not be heard to argue that they were engaged in other official

duties, as if taking the appellant to court promptly after his arrest was of little urgency to them. The P3 form shows that the appellant was examined and his P3 form filled on 18th October, 2007. Between 18th October and 24th October, 2003 there was no reason for any delay in arraigning the accused in court. The police therefore violated the appellant's constitutional right and that is sufficient ground for allowing this appeal.

I must however add that even though the appellant allegedly pleaded guilty to the charge which he faced, the record shows that he merely stated "**True".** There are many authorities in which it has been held that such a plea cannot be considered as unequivocal, see for example **NJOKI VS REPUBLIC** [1990] KLR 334.

Before convicting on a plea of guilty, the trial court should ensure that every constituent of the charge is explained to an accused person. The accused should also be required to admit or deny every element of the charge and what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to each and every element unequivocally, see **REPUBLIC –VS- YONASANI EGALU & OTHERS** [1942] EACA 65.

For the aforesaid reasons, I allow this appeal, quash the conviction and set aside the sentence that was imposed by the trial court. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF JULY, 2009.

D. MUSINGA

JUDGE.

24/7/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Kemo for the state.

Mr. Achoki for Miss Sewe for the Appellant.

Court: Judgment delivered in open court on 24th July, 2009.

D. MUSINGA

JUDGE.