REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 187 of 2005

(From original conviction and sentence in Criminal Case number 2559 of 2005 of the Chief Magistrate's Court at Kibera-Mrs Muketi PM)

PAUL MUTUKU …….....…….…….…
APPELLANT

VERSUS

REPUBLIC …….....…….…….……..RESPONDENT

JUDGMENT

The Appellant, ***PAUL MUTUKU*** was arraigned before the Senior Principal Magistrate's Court at Kibera on a charge of abduction of a girl under the age of sixteen years contrary to Section 143 as read with Section 36 of the Penal Code. The particulars of the offence were that on diverse dates between 9th day of January, 2005 and 7th February, 2005 at Kabaria Village in Riruta within Nairobi Area Province unlawfully took ***KEZIAH WAMBUI MUTHONI*** an unmarried girl under the age of sixteen years out of the custody of her grandmother against the will of the her grandmother.

The Appellant pleaded guilty to the charge and a plea of guilty was entered against him. The facts were read to him and he confirmed that the facts as read were true. He was convicted and after mitigation he was sentenced to serve 15 months imprisonment. The Appellant was aggrieved with the said conviction and sentence and through Messrs D. K. Thuo & Company Advocates filed the instant Appeal citing various grounds.

When the Appeal came up for hearing, Miss Nyamosi Learned State Counsel conceded to the same on behalf of the State. Counsel submitted that the facts read out by the Prosecution did not disclose the offence charged. The plea was thus equivocal. Counsel further submitted that in his mitigation the Appellant stated that the he did not know that getting married was wrong. According to the Learned State Counsel, the trial Magistrate ought at this stage to have entered a plea of not guilty.

Mr. Thuo, Learned Counsel for the Appellant welcomed the state's gesture. He however added that the facts as narrated by the Prosecution did not at all disclose the offence of abduction. Secondly, that the plea was equivocal because the Appellant's explanation was that he had married the girl.

In my view, the state was right in conceding to the Appeal. There is a litany of errors in the manner in which the plea was taken. First and foremost, the Learned Magistrate failed to record the language in which the charge sheet was read to the Appellant. This was a grave error. It is difficult therefore to tell whether the Appellant understood what he was told to plead to or indeed what was going on in Court.

Upon the charge being read to the Appellant he Responded as follows:-

"***...It is true…"***

As held in the case of ***WANJIRU VS REPUBLIC (1957) EA 5*** the words "…***It is true…"*** may not amount to a plea of guilty after all. The Court stated that the words "…***it is true…"*** are a poor foundation for a conviction and they ought to be explored in all save the simplest charge and where they are relied upon, a Court should readily permit a change of plea where the facts are challenged or there is a possibility of a misunderstanding. In the circumstances of this case it is difficult to understand exactly in what context the Appellant stated the words "…***it is true…"*** It is imperative that an accused person should be asked to admit or deny every one of the ingredients going to make up a crime. In the instant case it is clear from what the Appellant told the Magistrate in mitigation that he admitted to having committed no offence. Accordingly it is my view that the Learned Principal Magistrate erred in failing to appreciate that the plea of guilty recorded was not unequivocal.

The facts given in support of the charge by the Prosecution were as follows:-

"….***On diverse date between 9th January, and February, 2005, the Complainant, the Complainant's grandmother had a problem. The girl started disappearing. She had disappeared for 2 weeks. The accused was found living with the girl. She went and got her from there and he was charged…."***

Clearly these facts do not support the charge of abduction. In my view abduction presupposes removal of a person by force or in a cunning manner or even by kidnapping. From the facts, nowhere is it stated that the Appellant forcefully or cunningly took away the Complainant from the custody of her grandmother. If anything it would appear that the Complainant willingly and voluntarily went to cohabit with the Appellant. Further the Prosecution did not establish the age of the Complainant. According to the charge sheet, the Complainant is supposed to be an unmarried girl under the age of 16 years. However apart from making the allegation in the charge sheet no evidence was let to establish that the girl was unmarried and below the age of 16 years. This is an essential ingredient of the offence which must be proved. It cannot be left to the Court to speculate. This being so, the Appellant should not have been convicted upon his plea.

When the Appellant was called upon to mitigate he stated:-

"….***I did not know it was wrong to get married. I am a mechanic…"***

What the Appellant is saying is that he committed no offence. He had actually married the Complainant. At this stage the Court ought to have changed the plea from guilty to not guilty. It has been held that a plea can be changed at any time before sentence is imposed. See ***KAMUNDI VS REPUBLIC (1973) EA 540.*** Whatever may have been the position before the Appellant addressed the Court, once he had done so there was no possible doubt that a proper defence to the charge had been raised which required a plea of not guilty to be entered.

That being my view of the matter and the state having not asked for a retrial, I would allow the Appeal, quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith.

Dated at Nairobi this 27th day of September, 2006.

……

MAKHANDIA

JUDGE