REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 94 of 2006

(From Original Conviction and Sentence in Criminal Case No. 11 of 2006 of the

Resident Magistrate's Court at Wajir, Wakumile, RM.).

ISSA ABDI MOHAMED ……..…….....…….APPELLANT

VERSUS

REPUBLIC..…….....……RESPONDENT

JUDGMENT

ISSA ABDI MOHAMED, hereinafter referred to as "***the Appellant"*** was with two others jointly charged with one count of attempted rape contrary to section 141 of the Penal Code. In the alternative they were also charged with the offence of indecent assault on a female contrary to Section 141 (1) of the Penal Code. Upon arraignment as aforesaid the Appellant pleaded guilty to both charges and was accordingly convicted on his own plea and sentenced to five years imprisonment. His co-accused pleaded not guilty to the charges and accordingly the case was set down for hearing. It is not clear from the record on which count the Appellant was convicted. But since the second count was an alternative to the first count, it can safely be assumed that the conviction was in respect of the main count. However, I need to point out that where an accused person faces both main and alternative counts it is desirable and a good thing to do for the presiding Magistrate to specifically point out on which count he/she has entered a conviction.

Be that as it may, the Appellant was aggrieved by both the conviction and sentence and hence lodged the instant Appeal through Messrs Onesmus Githinji & Co. Advocates. In his petition of Appeal, the Appellant faults his conviction by the Learned Magistrate on the following grounds:-

1. **THAT** the Learned Magistrate erred in law and in fact in failing to have the charge read out to the accused in a language he understands that is Somali language.

2. **THAT** the Learned Magistrate erred in law and in fact in failing to find and hold that the facts do not support the charge for which he was convicted.

3. **THAT** the Learned Magistrate erred in law and in fact in failing to hold that the plea was unequivocal and,

4. **THAT** the Learned Magistrate erred in Law and in fact by not giving the Appellant a chance to mitigate.

At the hearing of the Appeal, the Appellant abandoned ground one in the petition of Appeal and elected to proceed with the remaining three grounds. Mr. Githinji, Counsel for the Appellant submitted in

support of the Appeal that the facts read in support of the charge were scanty and did support the charge. That the words "***demand***" and "***fondled"*** were inconsistent with an attempt to rape. For a conviction on attempted rape to be found, the Prosecution must prove an overt act on the part of an accused person that goes to show that the accused intended to rape the Complainant. Such an overt act would include perhaps knocking down the Complainant, ripping off her underpants or clothes e. t. c. There was no such an overt act in the instant case according to the Learned State Counsel.

On mitigation, Counsel submitted that the Appellant was not given an opportunity by the trial Magistrate to offer mitigation before sentence. As to the importance to be attached on mitigation, Counsel relied on the case of ***AGODEJE OLWALE BALOGUN VS REPUBLIC, CR. APP. NO. 577 OF 2004.*** As to how the plea should be taken and whether it was unequivocal or not Counsel relied on the celebrated case of ***ADAN VS REPUBLIC (1973) EA 445.***

Mr. Imbali, Learned State Counsel opposed the Appeal. Counsel submitted that the plea was properly taken. That the plea was interpreted in Somali language which the Appellant is versed in. Counsel further submitted that the sentence imposed by the trial Magistrate was lenient considering that the offence upon conviction attracts a maximum sentence of life imprisonment. Counsel conceded that the Appellant was not offered an opportunity to mitigate. However considering the sentence that was ultimately imposed, the Appellant did not suffer any prejudice by being denied an opportunity to mitigate.

Having carefully considered the rival argument in this Appeal, I would say as follows:-

The Appellant was convicted for the offence of attempted rape on his own plea of guilty. According to the record when the charge was read to him he responded thus "…***it is true..*" "….I am guilty as charged…."*** 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:-

"*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…."***

During the hearing of this Appeal, the Appellant struck me as a person who was oblivious of what was going in Court. He was totally ignorant and confused regarding what was going on in Court. I am certain, he exhibited similar characteristics and or tendencies during the taking of the plea. In the premises I doubt very much whether the Appellant understood the charge so as to respond "…***it is true…" I am guilty as charged…"*** In my view, these words were a creation of the presiding Magistrate. In the case of ***ADAN VS REPUBLIC (SUPRA),*** the Court stated:-

"…….***The Courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is limited in education and does not speak the language of the Court. For this reason, it has long been a rule of practice that where a plea appears to be one of guilty, it must be recorded in the words of the accused…. The word "guilty" is one to be treated with the greatest caution; it is a technical expression and it was said, in BYARAFU GATA VS REPUBLIC (1950), 17 EACA 125, and M'MWENDA VS REPUBLIC (1957) EA 429, that there is no word exactly corresponding to it in any of the languages of Uganda or Kenya respectively….."***

These remarks were made over thirty years ago, but I think that with any such necessary modification to suit our times they still represent solid reasoning and common sense. Those remarks are on all fours with the circumstances of this case. I need not say more. Suffice to say that the plea was in the premises not unequivocal.

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

"……..On the 2nd January, 2006 at around 8 p. m. the Complainant was at Dambas Wells where she had gone to water her father's goats.

At around 8.30 p. m. the 1st and 2nd accused approached and demanded to have sex with her but she turned them down. Accused 1 left accused 2 after they murmured something. Accused 2 insisted on having sex with the Complainant once again but she turned him down. He also left but returned shortly afterwards in the company of accused 3. Without altering any word, accused 3 punched her in the mouth and started struggling (sic) her while demanding for sex as he fondled her breast. The Complainant screamed and villagers responded, accused 1 and 3 fled. She reported the matter to the local AP Camp and all the three suspects were arrested when the Complainant identified them positively to the APs. She was referred to Wajir Police Station where she recorded a statement and was issued with a P3 form, which I wish to be marked MFI -1. Her degree of injury was ascertained to be harm. Consequently accused persons were charged…."

For the record, accused 3 is the Appellant.

The above facts in my view and as correctly submitted by Learned Counsel for the Appellant does not support the charge of attempted rape. According to the Prosecutor and the trial Court, the act of demanding sex and fondling the Complainant in the process by the Appellant amounted to attempted rape. That cannot possibly be correct. Demand and fondling in my view is inconsistent with rape or attempted rape. In rape or for that matter attempted rape, there must be an element of violence. As correctly submitted by Learned Counsel for the Appellant, there must be an overt act in the process such as knocking down the Complaint, violently removing her clothes, pants etc. In the instant case what the Appellant is alleged to have done is to have punched the Complainant in the mouth without provocation, demanded sex and fondled her breasts. According to the dictionary, to fondle means:-

"….to gently touch and move your fingers over part of someone's body in a way that shows love….."

And demand means:-

"….a very firm request for something that you think someone should give you or think you have a right to….

Obviously these definitions come nowhere near attempted rape as we understand it and in the context of violence and overt acts already alluded to. Accordingly and as already stated, the facts aforesaid did not support the charge. In a way perhaps they would have supported the alternative count of indecent assault of a female contrary to Section 141 (1) of the Penal Code or even assault causing actual bodily harm contrary to Section 251 of the Penal Code. However in view of my earlier holding that the plea was not equivocal I will say no more.

The record of the proceedings show that the Appellant was not given an opportunity to mitigate. Mitigation is a very important aspect in sentencing. It enables the Court to determine the appropriate sentence to mete out. And in the case of where the accused person ahs pleaded guilty it is all the more important since from mitigation the Court may be able to determine the equivocability of the plea. It may emerge in the process of mitigation that infact the plea of not guilty ought to be entered instead. Dealing with a similar scenario, Justice Ochieng in the case of ***OYODEJE OLWALE BALOGUN (Supra)*** delivered himself thus:-

"……When an accused person pleads guilty, and is convicted on the plea, the only material that is then placed before the Court are the facts, as set out in the charge sheet and the particulars thereto. Therefore, if the Court I did not then accord the accused person, the opportunity to mitigate, the Court would not become aware of the circumstances of the case…."

I totally agree and endorse these sentiments. Had the Appellant been granted opportunity to mitigate I am not so sure whether the sentence would have been the same. the doubt must ofcourse be resolved in favour of the Appellant.

An order for retrial would have been the most appropriate in the circumstances of this case. To do so however in the circumstances of this case would cause irreparable prejudice to the Appellant since the Prosecution may have become wiser and would wish to plug the loopholes already alluded to in this Judgment. In the result, there is only one channel left to this Court and that is to allow the Appeal, quash the conviction and set aside the sentence. The Appellant may be set at liberty forthwith unless otherwise held on a lawful warrant.

Dated at Nairobi this 6th day of November, 2006.

…….

MAKHANDIA

JUDGE