REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
Criminal Appeal 38 of 2003
(From Original Busia SRM No. 1667 of 2001)

)JOSEPHAT ODUOR OLUMBE……………………..…….APPELLANT

VS

REPUBLIC………………………………………..………RESPONDENT

J U D G M E N T

The appellant, Josephat Oduor Olumbe, faced a charge of defilement of a girl contrary to section 145 (1) of the Penal Code. It is evident that he pleaded guilty to the charge and he was subsequently convicted and sentenced to serve 7 years imprisonment. Being dissatisfied he now appeals against both the conviction and sentence. The first ground argued was to the effect that the trial court failed to make inquiry as to the language the accused person understood and hence it would have avoided a miscarriaged of justice occurring. The Respondent was of the view that the appellant understood the language of the court hence he properly pleaded guilty to the charge thus losing his right to appeal.

The record reveals that the trial court used English as well as Kiswahili languages when taking the plea. There is no mention of the language used by the accused person. There is also no mention of the language used by the court prosecutor when reading the facts to the accused and the court. The court of appeal for East Africa in the case of ADAN VS REPUBLIC (1973) E.A 445 considered the manner in which pleas of guilty should be recorded and the steps which should be followed. It laid down the following guidelines:

(i) The charge and all the essential ingredients of the offence should be explained in the language of the accused person or in a language which 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 be given an opportunity to dispute or explain the facts, or to add any relevant facts.

(iv) If the accused does not agree with the facts or raises any question of his guilty 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 facts relevant to sentence together with the accused’s reply should be recorded.

In this appeal the appellant admitted all the ingredients of the charge and the facts therein. The point of contention now is that the language used by the appellant and the court prosecutor is not indicated. As to whether the accused understood or not the language of the court, is a question which can only be answered by the trial court. The trial magistrate is placed in a fiduciary position to make sure that the accused person who wishes to admit his guilt does so with no ambiguity. It is also always important to avoid doubt on appeal for the trial court to record the language used by the accused while admitting the charge and the facts.

The record clearly shows that the appellant understood the language of the court. He was able to address the court on three occasions i.e. after the charge was read and explained, two, after the facts were read and thirdly at the point of mitigation. This clearly shows that the appellant understood and spoke the language of the court. However the failure of the trial magistrate to record the language used by the appellant and

the prosecutor has created doubt in my mind as to whether the accused really understood the language of the court. This alone in my view has convinced me to conclude that the plea was not unequivocal. Some ambiguity and doubt is hanging in the air over the plea.

The appellant further argued that the facts read did not establish the ingredients of the offence he was charged with under S.145 of the Penal Code. The learned senior state counsel was of the view that the facts read disclosed an offence under Section 146 of the penal code whose ingredients were similar to the offence under section 145(1) of the Penal Code. He saw nothing wrong about the charge.

The record shows that the appellant was charged under Section 145 (1) of the Penal Code. The facts presented to court by the court prosecutor supported an offence under section 146 of the penal code. I agree that most of the ingredients under Section 145 (1) were set out in the facts read out by the court prosecutor. The point of departure is the complainant. Under Section 145 (1) the law presumes the court would be dealing with girl of sound mind below the age of 16 years. However the law under section 146 presupposes that the complainant is either an idiot or an imbecile. The facts therefore did not support the charge under Section 145 of the Penal Code. In a nutshell the charge was not proved hence the appellant was wrongly convicted. It was incumbent upon the prosecution to ensure that the facts read agreed with the charge facing the accused. The final ground raised touch on sentence. It is stated that the sentence was harsh and excessive. The Respondent is of the view that the sentence is not harsh nor excessive. I have examined the record of appeal and the same shows that the trial court considered the appellant’s mitigation and the fact that the appellant was a first offender. I find that the trial magistrate considered all the principles of sentencing and there is nothing that has convinced me that it is necessary to interfere with the discretion on sentence.

In the end I will allow the appeal on conviction by quashing the conviction and setting aside the sentence.

The appellant is hereby set free forthwith unless lawfully held for other lawful purposes.

DATED AND DELIVERED THIS 4th DAY OF March 2005

J.K. SERGON

JUDGE