REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 381 of 2004

(From Original Conviction and Sentence in Criminal Case No.679 of 2004 of the Senior Resident Magistrate's Court at Kikuyu).

YUSUF ABAGALANA ALI …..……..……..APPLICANT

VERSUS

REPUBLIC……..….RESPONDENT

JUDGMENT

The Appellant, **YUSUF ABAGALANA ALI**, was charged with two counts of defilement of a girl contrary to Section 145 (1) of the Penal Code. The Appellant pleaded guilty to both counts. The precise words that were recorded by the Court were as follows:-

COURT: Charge read over and explained to the accused

Who replies:

Count 1: it is true

Count 2: it is true

COURT: Plea of guilty entered.

Thereafter the prosecution read out the facts of the case. The verbati record of the Court after the facts were read out is as follows:-

Accused: The facts are correct Court:

Accused convicted on own plea.

Prosecutor: He may be treated as a first offender.

Accused in mitigation: I am sorry. I am 18 years.

The trial Magistrate then proceeded to sentence the Appellant 30 years imprisonment on each count. He also ordered that the sentences do run concurrently.

The Appellant was aggrieved by the said conviction and sentence. He has therefore lodged this Appeal against both the conviction and sentence.

In his petition of Appeal the Appellant has set forth the following grounds faulting the conviction and sentence by the trial Magistrate.

> **1. THAT although the Appellant was convicted on his own plea of guilty, the charge was not read over and explained to the Appellant in a language he understands**
>
> **. 2. THAT the Appellant was not informed of the consequences of pleading guilty to the charge.**
>
> **3. THAT the sentence imposed was harsh and excessive.**

At the hearing of the Appeal, Mrs. Kagiri, Learned State Counsel appeared for the state, whereas the Appellant who was unrepresented appeared in person. The Appellant with the permission of the Court handed in written submissions in support of the Appeal. The state opposed the Appeal. The Learned State Counsel submitted that the Appellant defiled two minor children aged 7 and 9 years respectively. That when the Appellant was arraigned in Court and the charge read to him, he pleaded guilty. According to the proceedings when the facts were read out in Court, the Appellant responded that the facts were correct. In mitigation the Appellant said he was sorry.

It was Counsel's submissions therefore that based on the foregoing, the Appellant participated fully in the trial; and that the plea was properly taken and was unequivocal. As regards sentence, Counsel submitted that the sentence of 30 years imprisonment was proper. She therefore urged the Court to dismiss the Appeal.

I have carefully considered the written submissions presented by the Applicant and the oral submissions by Mrs. Kagiri.

As I see it, the issue for determination is really whether or not the plea taken by the trial Magistrate was unequivocal. Section 207 (2) of the Criminal Procedure Code provides the manner in which a plea of guilty should be recorded. Further in the case of **ADAN VS REPUBLIC (1973) E.A 445** The Court of Appeal lied down the guidelines on how a plea of guilty should be entered. The Court of Appeal stated:-

> ***"……..When a person is charged, the charge and particulars should be read out to him so far as possible in his own language which he can speak and understand.***
>
> ***The Magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all these essential elements, the Magistrate should record what the accused has said as nearly as possible in his own words, and then formally enter a plea of guilty. The Magistrate should next ask the Prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or adopt any relevant facts….. if the accused does not deny the alleged facts in any material respect, the Magistrate should record a conviction and proceed to hear any further facts relevant to the sentence. The statement of acts and accused's reply must of course be recorded.***
>
> ***The statement of facts serves two purposes, it enables the Magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the Magistrate basic material on which to assess sentence….."***

In the case of **LUSITI VS REPUBLIC (1977) KLR 143,** the High Court stated:-

> ***"The attention of the trial Magistrate is drawn to the decision of LEBIRINGIN VS REPUBLIC (1974) E.A. 103 where Sir James Wilks CJ and Hancox J very succinctly reviewed the various authorities on the taking of the plea, and pointed out that it was important that there should be no ambiguity in the plea and that the magistrate, is so to speak, a trustee to ensure that the accused person wishes to admit his guilt, and to satisfy himself on this point, and thus relieve the prosecution of that may sometime be the onerous task of proving all that they alleged beyond reasonable doubt……."***

From the record of the trial magistrate, it is evident that the Magistrate did not strictly follow the provisions of Section 207 (2) when taking the plea. The language in which the plea was taken is not indicated. All we have is " ***…….charge read over and explained to the accused who replies…..***"

Similarly the language that the charge was read to the Appellant is not stated.

Regarding the facts of the case, it should not be forgotten that the Appellant was facing two counts.Each count should have attracted its own set of facts. The trial Magistrate ought to have cautioned the Prosecutor to read the facts in respect of each count. However in the instant case the prosecution led facts only in relation to one count. However the Learned trial Magistrate went ahead to convict the Appellant on both counts when the facts read out by the prosecution could only have supported one count. The trial Magistrate thereby fell into error. The Appellant ought to have been required to state his position in relation to each set of facts relating to each count.

Due to the aforesaid omissions by the trial Magistrate, I constrained to hold that the guilty plea entered may have not have been unequivocal and consequently this Appeal ought to be allowed. I therefore allow the Appeal, quash the conviction and set aside the sentence.

In the case of **FATEHALI MANJI –VS- REPUBLIC (1965) EA 343 t**he Court of Appeal held interalia:

> ***"…..Retrial may be ordered where the original trial was illegal, defective or null and void due to the mistake of either the trial Court or the Prosecutor. The underlying principle should be in the interest of justice."***

The mistake that occasioned this Appeal was made by the Court. In those circumstances, I think that this would be proper case for an order of retrial. The Appellant has in his submissions in support of the Appeal prayed for an order of retrial. This is how he put it I submit that the interest of justice would require for retrial in view of my Complaint that I did not understand the language of the Court.

I would therefore remit the case back to the Senior Resident Magistrate's Court at Garissa for retrial. The retrial shall be conducted before another Magistrate with competent jurisdiction apart from J. G. King'ori who heard the initial case. The case shall be mentioned before the said Court on 27th July, 2005 for purposes of the re-trial commencing. In the meantime and pending his appearance in Court as aforesaid, the Appellant shall be held in custody.

Dated at Nairobi this 14th day of July 2005.

M. S. A. MAKHANDIA

JUDGE