



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 52 of 2004

Arising from Original Mumias SRM Cr. Case No. 934 of 2004

JOSEPH MBANDA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

J U D G M E N T

On the 13th day of August 2004, P.K. Sultani, the learned Senior Resident Magistrate sitting at Mumias convicted Joseph Mbanda, the appellant herein, on his own plea of guilty to a charge of defilement of a girl under the age of 14 years contrary to the provisions of section 145 of the Penal Code. The particulars of this charge are that on the 1st day of August 2004 at [particulars withheld] in Butere – Mumias District within the western province had carnal knowledge of B.N a girl under the age of 14 years. The learned Senior Resident Magistrate then sentenced the appellant to serve 7 years imprisonment hence this appeal.

The appellant put forward 5 grounds of appeal in his petition dated 24th August 2004. The appeal is against both the conviction and sentence. However, Mr. Mwebi advocate for the appellant opted to argue the grounds against the conviction but remained mum on the grounds against sentence despite having been provoked by Mr. Onderi, the learned Principal state counsel while opposing the appeal.

The main ground argued on appeal by Mr. Mwebi for the appellant is to the effect that the learned senior Resident Magistrate erred when she convicted the appellant on an equivocal plea of guilty. The appellant's counsel gave three main reasons why he thought this court should hold that the plea taken before the trial court was equivocal. First, it was averred that the language used by the prosecutor while reading the facts was not specified in the proceedings. The learned Principal state counsel opposed this ground and invited this court to peruse the proceedings and come to the conclusion that the language used was Kiswahili which in his view was spoken and understood by the appellant.

I have perused the record of appeal and the same reveals that the charge was read and explained to the accused in Kiswahili language. The language of the subordinate court is stated to be either English or Kiswahili under Section 198 (4) of the Criminal Procedure Code. The proceedings do not state what language the appellant used to plead. Proceedings do not also state what language the prosecutor used to read the facts to the court. I wish to state that when recording a plea of guilty, the trial magistrate must always be conscious of the fact that there should be no ambiguity in the plea and should always ensure that the accused person wishes to admit his guilt. In so doing, a trial court must satisfy itself that the charge and the essential ingredients of the offence are explained to the accused in his language or in a language which he understands. In this appeal, it is clear that the charge was read and explained to the appellant in Kiswahili language. The appellant's counsel, did not allude that the appellant did not

understand Kiswahili language. The appellant's counsel also did not state what language was used by the prosecutor while reading the facts. The appellant's advocate did not state what prejudice his client suffered in whatever language that was used while reading the facts. It is not just enough to point out that the proceedings do not show the language used. An appellant must specify the prejudice he suffered.

On a parting note over this ground I wish to emphasize that it is always the duty of the trial magistrate to specify in the proceedings the language used by the court, the prosecutor and the accused. It may also be important to specify the language (s) understood by the accused person to avoid a plethora of appeals arising on grounds such as this. My conclusion over this matter is that I see no merit on this ground because the appellant has not shown me the prejudice he suffered. No miscarriage of justice was shown to have taken place.

The appellant has further complained that the plea was equivocal because he pleaded guilty to a charge which was defective in that it is premised on a replaced section. It is averred that Section 145 of the Penal Code does not exist. Mr. Onderi conceded to the fact that the charge was premised on a repealed section of the law but he argued that the defect is curable under Section 382, of the criminal Procedure Code. The learned Principal state counsel also complained that the defect should have been raised earlier before the trial court.

I have considered the submissions of both learned counsels over the issue. I have also perused the relevant provisions of the penal code. It is clear that the charge facing the appellant before the senior Resident Magistrate's court should have been under Section 145 (1) of the Penal Code. The crux of the matter is that the charge which the appellant pleaded guilty to was defective. The issue at hand is whether or not the defect is fatal.

The view I take in this ground is that the law anticipated such lapses when drafting and preparing inter alia charges. I refer to the provisions of Section 382 of the Criminal Procedure code which provides as follows:

“Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, Judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

In the light of the above provisions of the law I am of the view that the defect is not fatal. It is excusable and curable under Section 382 of the Criminal Procedure Code. I am of the view that such objections should have been raised before the trial court. I am aware the fact that the appellant was unrepresented before the trial court hence he may not have had the capacity to detect the irregularity. I further hold the view that the defect raised did not cause any miscarriage of justice to the appellant. Consequently the ground is rejected.

The third ground argued by the appellant is to the effect that the facts read plus the contents of P 3 form produced did not support the charge. Mr. Mwebi pointed out that the complainant's age was not proved by independent evidence. He also rubbished the contents of the P 3 form on the ground that the same stated that the complainant may have been defiled. He urged this court to rule that the P3 form was of no evidential value and further conclude that there was doubt whether the complainant was ever defiled. The learned Principal state counsel urged this court to reject this ground on the basis that the facts as read established all the ingredients of the offence the appellant was convicted for.

I have anxiously considered the arguments presented to this court by both counsels. I have also perused the proceedings on record. The recorded proceedings shows that the complainant's age was set out to be

10 years by the prosecutor while he was outlining the facts before the trial court. The record also shows that the prosecution produced the medical Examination report (P.3) as an exhibit in evidence. The medical report shows that the complainant was assessed to be 10 years old. The P3 also indicates that the complainant suffered a slight tear at the vaginal orifice though not actively bleeding.

The doctor who examined the complainant assessed degree of injury as 'harm'. He also formed the opinion that the complainant may have been defiled. It should be noted that all these facts were put to the notice and attention of the appellant and he admitted without the slightest objection. It is not alluded that he was sick or absent minded at the time he was pleading before the trial court. The truth of the matter is that the evidence in form of a medical examination report which was produced by the prosecution shows that the complainant was defiled. The P3 form shows that there was a slight tear at the vaginal orifice. I see no merit on this ground.

I will not make any finding on sentence because no arguments were put forward to contest the sentence. The parties did not also leave room to this court to consider the grounds against sentence *suo moto* though they are set out in the petition. I will not therefore wish to venture into where I was not invited either indirectly or directly to make a decision.

The upshot therefore is that the appeal has no merit. It is ordered dismissed in its entirety.

DATED AND DELIVERED THIS 24th DAY OF June 2005

J.K. SERGON

JUDGE