REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 151 OF 2004

(From Original Conviction and Sentence in Criminal Case No. 285 of 2004 of the Chief Magistrate's Court at Nakuru –G. A. Ndeda (C. M .

JOHN WANYOIKE KIMANI……..APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT OF THE COURT

The Appellant, John Wanyoike Kimani, was charged with the offence of attempted rape contrary to **Section 141 of the Penal Code**. The particulars of the offence were that on the 2nd February 2004 at Wiyumirire area of Nakuru District the Appellant attempted to have carnal knowledge of Monica Njambi without her consent. The Appellant was alternatively charged with the offence of indecent assault of a female contrary to **Section 144(1) of the Penal Code**. The particulars of the alternative charge were that on the same day and at the same place, the Appellant indecently assaulted Monica Njambi by touching her private parts. The Appellant pleaded guilty to the main charge and was duly convicted on his own plea of guilty. He was sentenced to serve fourteen years imprisonment. The Appellant being aggrieved by the said conviction and sentence has appealed to this Court.

The Appellant has raised two grounds of Appeal faulting the decision of the trial magistrate in convicting and sentencing him. The first ground is that the trial magistrate erred in convicting the Appellant on a plea that was not unequivocal. The other ground is that the trial magistrate erred in sentencing the Appellant to serve fourteen years imprisonment, which sentence, according to him, was manifestly excessive considering the factors and the circumstances of the case. At the hearing of the Appeal, Mr Kimatta, Learned Counsel for the Appellant submitted that the plea on which the Appellant was convicted was taken contrary to the directions for the taking of plea that was laid down in the case of **Adan –versus- Republic [1973] E. A. 445**. Mr Kimatta urged this Court to order that the Appellant be retried. Mr Koech, Learned State Counsel conceded to the Appeal. He submitted that it appeared that the charge was not read to the Appellant. He supported the Appellant's submission that the Appellant should be retried.

We have considered the submissions made by the Learned Counsel for the Appellant and the Learned State Counsel. The issue for determination by this Court is whether the plea of guilty that was recorded was in accordance with the laid down procedure. **Section 207 of the Criminal Procedure Code** provides the procedure of recording pleas in a criminal case. The procedure of recording a plea in a criminal case, especially a plea of guilty was restated and clarified in the case of **Adan –versus- Republic [1973] E. A. 445** by the then Court of Appeal of East Africa. The Vice President of the Court, Spry J. A. stated at page 446 paragraph H:

"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language w hich 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 those essential elements, the magistrate should record what the accused has sa id, 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 di spute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not gu ilty" and proceed to hold a trial. 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 sentence.

The statement of facts and the accused's repl y 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 the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."

In the present case the proceedings were taken as follows:

"6.2.2004

Before G. A. Ndeda C. M.

C/P Sp Miyienda

c.c. Gachunji

Accused present

It is true

G. A. NDEDA C. M."

The facts were then read to the Appellant. The facts disclosed the offence of attempted rape. When the Appellant was asked if the facts were correct, he answered

"Facts are true"

In mitigation the Appellant stated

"I have nothing to say".

From the above record of proceedings, it is clear that the procedure as laid down by the law was not followed. The language in which the plea was taken was not stated. Neither was the charge read to the Appellant. It is not evident from the record if the Appellant understood the charge and made the informed decision to plead guilty to the same. We cannot therefore state with certainty that the Appellant actually pleaded guilty to the charge of attempted rape nor the alternative charge of indecent assault. It is clear from the aforegoing that the plea taken by the Appellant was equivocal. The conviction and the sentence imposed on the Appellant cannot therefore stand. We therefore allow the Appeal, quash the conviction and set aside the sentence imposed.

We have read the facts that the Appellant admitted to in the vitiated trial. We are of the view that the said facts disclose a serious offence, which ought to be ventilated in a trial legally conducted. In the premises therefore the order that commends itself to us is the order that the Appellant be retried. He shall appear before the Chief Magistrate's Court, Nakuru on the 19th of October 2004 to take plea in the retried case.

It is so ordered.

DATED at NAKURU this 15th day of October, 2004.

MUGA APONDI

JUDGE

L. KIMARU

AG. JUDGE