



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 100 OF 2016**

**TIMOTHY MADAGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(from the original conviction and sentence by W. K. Cheruiyot, RM, in Vihiga PMC Criminal Case No. 274 of 2016 dated 15/6/2016)*

**JUDGEMENT**

1. The appellant was convicted on his own plea of guilty of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve life imprisonment. He was dissatisfied with the conviction and the sentence and filed this appeal. The grounds of appeal are:-

1. ....

2. The trial magistrate erred in law by convicting the appellant on charges that were not explained properly.

3. That the appellant was misled by the prosecution to plead guilty.

4. That the prosecution failed in law by not complying with the provisions of Article 50 (2) (j) of the constitution.

5. That the trial magistrate failed in law by convicting the appellant on his own plea of guilty without considering that there was no medical evidence to prove penetration.

2. There were also supplementary grounds of appeal attached to the appellant's written submissions. They were that:-

1. The trial court failed to appreciate that there was lack of proper communication due to lack of interpretation.

2. The trial court failed to explain to me the consequences of pleading guilty.

3. The trial court failed to appreciate that the plea of guilty was as a result of deception and torture.

3. The state opposed the appeal.

4. The particulars of the charge against the appellant were that on the 23<sup>rd</sup> May, 2016 at [particulars withheld] Junction, Izava Sub location, Vihiga County he intentionally and unlawfully caused his penis to penetrate the anus of LJ (herein referred to as the child/complainant) a boy aged 8 years.

5. The first three grounds of appeal are that the trial court failed to explain properly the charges, to the appellant due to lack of interpretation; that the court failed to explain to the appellant the consequences of pleading guilty to the charge and that he was misled to pleading guilty.

6. The appellant appeared for plea on 26/5/16 when the charge and every element thereof were read to him in Kiswahili language and when asked whether he admitted or denied the charge replied in Kiswahili language that:-

***“Ni ukweli” (it is true).***

7. The magistrate then called for a mental assessment report. The same was done by a consultant psychiatrist Dr. Nyaura at Jaramogi Oginga

Odinga Teaching and Referral Hospital, Kisumu who found him fit to plead to the charges facing him. The appellant was returned to the court on 2/6/2016. The charge was then explained to him again in Kiswahili language and he replied:-

***“Ni ukweli” (it is true).***

8. The state counsel then gave the facts of the case. He replied that:-

***“Facts are correct”.***

9. The court then convicted him on his own plea of guilty. The state counsel then sought for time to check on the antecedents of the appellant. The matter was adjourned to 15/6/16 when the prosecutor reported that there were no previous records for the appellant. The appellant then went to mitigate that he was requesting for leniency, that he has a wife and children and that he would not repeat the offence. He was then sentenced.

### **Submissions**

10. The appellant submitted that it was necessary for the charges to be interpreted to him in mother tongue as there was no record that he understood “best swahili” language. That he might have been able to respond to a few kiswahili words but not the best kiswahili language where his life was at stake.

11. The appellant submitted that there is no record to show that all the ingredients of the charge were explained to him since there is only one response - **“Ni ukweli.”** That he was not given an opportunity to dispute or explain the facts or to add any relevant facts as was held in **Adan –Vs- Republic (1973) EA 445.**

12. It was submitted that the trial magistrate erred in law and fact in that he failed to warn the appellant of the consequences of pleading guilty to the charge. That he pleaded guilty to the charge as a result of torture at remand prison where he was being sodomised by fellow remandees in return of food and space due to congestion. That he was advised that the only way of escaping the affliction was to plead guilty to the charges only for him to become a fugitive of the law.

13. In opposing the appeal the learned prosecution counsel **Mr. Juma** submitted that the plea was unequivocal as the plea was taken as required by the law. That the proceedings were conducted in Kiswahili language which the appellant understood. That the appellant mitigated in the same language. That the facts stated by the prosecution proved an offence of defilement. That there was no evidence of torture as it was not raised during the hearing. That a mandatory sentence was imposed. The state counsel urged the court to dismiss the appeal.

### **Analysis and Determination**

14. This is a first appeal and as such the court is guided by the principles set out in the case of **David Njuguna Wairimu -Vs- Republic [2010] eKLR** where the Court of Appeal stated:-

***“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”***

15. The manner of taking pleas was explained in the case of **Adan –Vs- Republic 1973 (EA) 445 at page 446** where it was held that:-

***“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 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 those 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 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 guilty, the magistrate should record a change of plea to “not guilty” 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 reply must, of course, be recorded.”***

16. In the appellant’s case the plea was taken in Kiswahili language. The appellant is not disputing that he understands Kiswahili language. He is only saying that he does not speak “best” Kiswahili language. It is not clear what he means by that. The fact is that the accused understands Kiswahili language. He admitted the charges in the said language. He mitigated in the same language. He conducted these proceedings before me in the same language. Neither in the lower court nor in this court did he request for the services of an interpreter. I thereby find no substance in the submission that the appellant was disadvantaged by the language the proceedings were conducted in.

17. The court record indicates that the substance of the charge and every element thereof were explained to the appellant in Kiswahili language. The appellant has not pin pointed out what was not explained to him. The facts in the case were that he was found red-handed by one Tony sodomising the complainant in the case. That the petroleum jelly that he had used to apply on his penis and on the anus of the

victim was found in his pocket after arrest. These facts were simple and were not complex in any way. One could either admit them or deny them. The appellant admitted them. He proceeded to plead for leniency and stating that he will not repeat it. I find that the court explained all the ingredients of the charge to the appellant who appeared to understand them and admitted them.

18. The appellant says that he was misled into pleading guilty. In his petition of appeal dated 5/9/2016 he blamed the prosecution for misleading him into pleading guilty. In his submissions he blamed the deception on fellow remandees who were sodomising him in remand and that he was advised that the only way to escape the affliction was to plead guilty to the charges. If the the appellant was being tortured by fellow remandees, he did not bring it to the attention of the trial court during plea taking. His assertions can only be a made up story. He cannot have blamed the deception on the prosecution in his grounds of appeal only for him to blame other people in his submissions. This ground of appeal does not stand.

19. The appellant faulted the trial court for convicting him when there was no medical evidence to prove penetration. The clinical officer who examined the complainant did not find any injuries, marks or cuts on the anus of the victim. There was thereby no medical evidence to support the charges of defilement. However the position of the law is that defilement can be proved without being corroborated by medical evidence. In **AML –Vs- Republic (2013) eKLR** the Court of Appeal held that:-

*“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”*

The court upheld the same in **Kassim Ali –Vs- Republic in Mombasa Criminal Appeal No. 84 of 2005** where it stated that:-

*“(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of the victim of rape or by circumstantial evidence.”*

20. In the premises the fact that the charges were not supported by medical evidence did not mean that there was no defilement. The facts as narrated by the prosecution were sufficient to prove the charge. That ground of appeal is therefore dismissed.

21. The appellant contended that the trial court failed to comply with the provisions of Article 50 (2) (j) of the Constitution of Kenya 2010. Article 50 (2) provides that:-

*“Every accused person has the right to a fair trial, which includes the right –*

*(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”*

22. Article 25 of the Constitution provides that the right to fair trial cannot be limited. The right to be provided with copies of the documents that the prosecution intends to rely on in a case was emphasized by the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley –Vs- Republic Nairobi CA Criminal Appeal No. 116 of 2007 (2008) eKLR**, which case was decided under the former constitution, that:-

*“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under .... our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”*

23. In **Joseph Ndungu Kagiri –Vs- Republic (2016) eKLR**, Mativo J. cited the English case of **R –Vs- Ward (1993) 2All ER 557** where the Court of Appeal held that:-

*“.....Furthermore, the prosecution were under a duty which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses.”*

24. In **Joshua Njiiri –Vs- Republic, Criminal Revision No. 11 of 2017 (2017) eKLR**, Nyakundi J. held that the right to supply of information and witness statements ought to be fulfilled before a court takes any step in the case.

25. I am in agreement with the above cited authorities. In my considered view, a trial in a criminal case starts at the time of taking plea in court. If at that stage the accused person does not know the nature of the charge facing him or the evidence that the prosecution has against him/her, he/she cannot be expected to make an informed decision on whether or not to plead guilty to the charge. The duty to inform the accused in advance of the evidence the prosecution intends to rely on in the case therefore extends to the period before a plea is taken in court.

26. In the instant case there is no evidence that the appellant was provided with the charge sheet and documentary exhibits before the plea was taken. There was thereby no compliance with Article 50 (2) (j) of the Constitution. Failure to comply with the article violated the rights of the appellant to fair trial.

27. The appellant faulted the trial court for not warning him of the consequences of pleading guilty to the charge. It is not in record as to whether the court warned the appellant of the seriousness of the charge and that if he pleaded guilty to it he was liable to be sentenced to a minimum sentence of life imprisonment.

28. In **Elijah Njihia Wakianda –Vs- Republic Nakuru Criminal Appeal Number No. 437 of 2010 (2016) eKLR** the Court of Appeal held that:-

*“... We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare.*

*... The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process.”*

29. In **Simon Gitau Kinene –Vs- Republic [2016] eKLR** Joel Ngugi J. held as follows:-

*“In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.”*

30. In **Fidel Malecha Weluchi –Vs- Republic [2019] eKLR** Odunga J. held that:-

*“In this case since the charge which the appellant faced carried a prima facie minimum sentence of twenty years, it is my view that in such serious offences where the sentences may either be long or indefinite, the Court must ensure not only that the accused understands the ingredients of the offence with which he is charged at all the stages of the plea taking but that he also understands the sentence he faces where he opts to plead guilty. That in my view is what is contemplated under Article 50(2) of the Constitution which provides for the right to a fair trial. Whereas the said Article prescribes certain ingredients of a fair trial, the Article employs the use of the word “includes” which means that what is prescribed thereunder is not exclusive but just inclusive since Article 19(3) of the Constitution provides that (3) The rights and fundamental freedoms in the Bill of Rights “do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter” while Article 20(3)(a) thereof enjoins the Court to “develop the law to the extent that it does not give effect to a right or fundamental freedom”.*

31. In **Bernard Injendi –Vs- Republic [2017] eKLR** where the appellant was charged with defilement, Sitati J. held that:

*“Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case (above) the Court of Appeal quoted from Boit vs- Republic [2002] IKLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words “as nearly as possible in his own words”. I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty.”*

32. It is clear from these authorities that where an accused person is charged with a serious offence that carries a long term sentence it is the duty of the trial court to warn him/her of the consequences of pleading guilty to the charge. The trial magistrate herein did not warn the appellant of the consequences of pleading guilty to the charge and that the offence carried a mandatory sentence of life imprisonment. I find that the proceedings in the case were conducted in a manner that was prejudicial to the appellant and caused him grave injustice.

33. The upshot is that the appellant was not accorded a fair trial in the case and therefore the plea was not unequivocal. The conviction is thereby quashed and sentence set aside.

35. Having come to that conclusion, the question is whether the court should set the appellant at liberty or order a re-trial.

36. The general principle in regard to re-trials is that a re-trial should only be ordered where the justice of the case demands so. In **Obedi Kilonzo Kevevo –Vs- Republic (2015) eKLR** the Court of Appeal held that:-

*“Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of Muiruri –Vs- Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:-*

*“Generally whether a re-trial should be ordered or not must depend on the circumstances of the case.*

*It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant;*

*whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”*

*In the criminal justice system, the law requires that the right of the appellant must be weighed against the victim’s right. In this case the appellant has been in confinement for three (3) years. Balancing the two competing interests, we believe justice demands that the case be re-heard in the subordinate court.”*

37. In **Samuel Wahini Ngugi –Vs- Republic (2012) eKLR** the said court held that:-

*“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:*

*‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person’*

*That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:*

*‘...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.’”*

38. The appellant in the instant case was facing a serious charge of defilement that carried a sentence of life imprisonment. He was convicted in June, 2016 and has thereby served three years imprisonment. A re-trial is unlikely to cause any injustice to him. The court thereby orders that the appellant be re-tried of the offence. The appellant is to be presented before the Chief Magistrate’s Court at Kakamega for the purpose of taking a fresh plea to the charge by a magistrate of competent jurisdiction other than the one who handled the case.

**Delivered, dated and signed in open court at Kakamega this 4<sup>th</sup> day of July, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Juma for state

Appellant - present

Court Assistant - George

14 days right of appeal.