



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 186 OF 2018

(Appeal from Judgment and Conviction by Hon. E. Malesi,

SRM in Kakamega CRC No. 2921 of 2018 on 6/12/18)

ESTHER KASITI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant was convicted on her own plea of guilty, for the offence of Conspiracy to defeat justice and interference with witnesses contrary to *section 117 (a)* of the penal code. The learned trial magistrate then sentenced her to imprisonment for a period of 3 years.
2. In her Petition of Appeal dated 18/12/2018, the appellant asserted that she was convicted yet the facts did not disclose any offence. She also contended that the facts read out in court did not disclose the offence of conspiracy between her and **Justus Okanga Oyolata**. It was also her contention that the facts as read did not establish that a case of defilement was not separate from the case of impregnating a minor.
3. The appeal was disposed of by way of written submission. **Mr. Momanyi** Learned Counsel for appellant submitted that the facts read in court on the 6/12/18 did not identify the person who conspired with the appellant and reading the proceedings there is an impression that the accused acted alone.
4. Secondly, counsel submitted that it is impossible to marry the facts read in court with those in the charge sheet as the facts do not disclose the role of **Justus Okanga Oyolata**. Counsel further submitted that the facts did not demonstrate defilement as an issue which caused the pregnancy.
5. The learned state counsel, **Mr. Ongige** opposed the appeal and submitted that the grounds of appeal are not merited and that the appellant was aware of the charges she pleaded guilty to as she conspired with the defiler to defeat justice.

The Determination

6. I have carefully considered this appeal. **Section 348 of the Criminal Procedure Code** provides that no appeal shall be allowed in the case of an Accused persons who has pleaded guilty and has been convicted on that plea by a subordinate Court, except to the extent of or legality of the sentence.

7. **Section 117** of the Penal Code that provides for the offence of conspiracy to defeat justice states thus:

Any person who —

(a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or

8. I have considered **Section 117(a)** of the **Penal Code** under which the appellant was charged. A crime of conspiracy is committed when any person accuses another falsely of any crime or does anything to obstruct, pervert or defeat the course of justice.

9. The Appellant herein was sentenced to serve 3 years imprisonment on conviction after she pleaded guilty and I have examined the plea of guilty which was unequivocal. She has not challenged the said plea of guilty on the basis that it was equivocal. Her appeal is based on the fact that the facts did not disclose an offence.

10. In a plea of guilty, witnesses are not expected to testify. The facts must however disclose an offence under the law. I have carefully looked at the charge sheet and the facts as stated in court. In the charge sheet it is indicated as follows:

“On the unknown date in the year 2018 at Shimanyiro area, in Kakamega central district within Kakamega County jointly with others not before court, conspired with Justus Okanga Oyolata to mislead the investigating officer No. 119929 PC BEATRICE Makori in order to prevent the cause of justice.”

In the statement read by the prosecutor it is stated as follows

“On unknown dates in 2018 the accused person’s daughter Phanice Kavetse was impregnated by one Justus. The said daughter is a minor. The accused took her daughter to the hospital when the minor was found pregnant. The accused interrogated the daughter and established the identity of the person responsible for the pregnancy. The accused person intervened and hid the said revelation as it was a taboo as that person had a filial relationship with the minor and the accused. The accused however went to report a case of attempted defilement and gave a different name from the one given by the daughter the information was given to a police officer number 119929 PC (W) BEATRICE Makori.”

11. The court of appeal in **Obedi Kilonzo Kevevo v Republic [2015]** stated as follows...

“The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.”

12. Similarly, in the celebrated case of **Adan V Republic**, (1973) EA 446 it was held as follows...

“...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...”

13. From the foregoing, I note that the statement contained in the charge sheet and the facts narrated by the prosecutor do not disclose any offence as it is not indicated when the offence of conspiracy took place and when the attempted defilement took place. Also, the role **Justus Okanga Oyolata** played in the conspiracy is not stated. Secondly, it is not indicated by the prosecution who was blamed for impregnating a minor and who was blamed for attempted defilement and what names the Appellant gave as the perpetrator of the attempted defilement and whether her version was different from that of her daughter.

14. It is the finding of this court that the particulars of the offence on the charge sheet and the facts read by the prosecutor in court do not disclose an offence. The failure of the particulars of the offence to disclose an offence is very material. It goes to the root of the charges facing the appellant and therefore fatal to the plea of guilty entered against the Appellant rendering it equivocal.

15. The charge having been fatally defective for failure to disclose an offence, I allow this appeal, I quash the conviction of the appellant, and set aside the sentence of 3 years imprisonment. The appellant is ordered released unless held for some other reason not relevant to this case.

Orders accordingly.

Dated, Signed and Delivered at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE