



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 150 OF 2016

HAMISI JUMA MAHENDO ZANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon C. M. Njagi RM delivered on 21st December 2015 in Criminal Case No. 1364 of 2015 in the Senior Principal Magistrate's Court at Kwale)

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve life imprisonment for the offence of defilement, contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 6th of December 2015 at around 1800hrs at [particulars withheld], Kwale County within Coast region, he unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of B A C, a girl aged 10 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.
3. The Appellant pleaded to the charge in the trial court on 21st December 2015, and was convicted of the main charge and sentenced on his own plea of guilty. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal and Amended Grounds of Appeal that he filed in Court are as follows:
 - a. That the trial magistrate erred in law and fact by convicting and sentencing him on his own plea without considering that he was not awarded a chance to think what to reply to the charges.
 - b. That the trial magistrate erred in law and fact by convicting and sentencing him without considering that he was promised by the police officers that when he pleaded guilty he could be acquitted.
 - c. That the trial magistrate erred in law and fact by convicting and sentencing him without considering that Article 50(1) (h) of the Constitution was not considered hence the life imprisonment imposed upon him was unsafe.
4. The appeal proceeded for hearing on 20th July, 2017, and the Appellant submitted that he would wholly rely on written submissions that he had availed to the Court. Mr. Fundi, the learned prosecution counsel, made oral submissions.
5. The Appellant in his written submissions contended that he was a first offender, and he did not know anything about law in terms of court procedure, and that he did not intend to plead guilty. Further, that he was convinced or misled by the investigating officer, who while in custody told him to plead guilty when taken to court and he would be acquitted. That since he was a lay man, he followed what the police told him.
6. Lastly, the Appellant submitted that he was not awarded a fair trial contrary to Article 50(1) (h) of the Constitution, as he was not informed of the rights enshrined in the said Article. He requested this court to consider his age because in his view the sentence was too heavy.
7. Mr. Fundi submitted that the Appellant had pleaded guilty to the charge, and that the trial Court cautioned him that the offence carries a penalty of life imprisonment. Further, that the trial Court gave him more time after which the charge was again read to him in a language that he understands most (Swahili), and he again pleaded guilty.

8. Mr. Fundi further indicated that the Appellant was not remorseful in his mitigation, and he only indicated that he was not married and was unemployed.

9. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic** [1973] EA 32).

10. I have considered the arguments by the Appellant and Prosecution, and I am alive to the provisions in section 348 of the Criminal Procedure Code that no appeal shall be allowed in the case of an accused person who pleaded guilty, and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

11. I therefore find that the issues for determination by the court are firstly, whether the plea of guilty by the Appellant was unequivocal; secondly, whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute; and lastly, whether the said sentence is amenable to reduction and/or variation.

12. The procedure to be applied in taking a plea of guilty was well enunciated in the case of **Adan vs Republic**, [1973] EA 445 where the Court held as follows:-

“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”

13. The procedure as laid out in **Adan vs Republic** (supra) is also provided for under section 207 of the Criminal Procedure Code which provides as follows:

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

14. Coming to the present appeal, the record of the trial Court shows that after the main charge was explained to the Appellant he replied that it was true, and a plea of guilty was entered. The trial court cautioned the Appellant that the offence carried a penalty of life imprisonment, and directed that the charge be read to the Appellant again in Kiswahili, who again stated in Kiswahili that it was true. A plea of guilty was again entered.

15. The proceedings continued with the facts being given as follows :

“On the 6/12/2015 at around 6:00 pm, the accused Hamisi Juma Zani, a Digo male aged 71 years was at a wedding when he sent the complainant B A to go buy cigarettes costing 2 shillings. He gave her Kshs 10/=. She went and bought the cigarettes and he said that she takes them inside the house. The complainant went into the house of the accused and placed the 2 cigarettes on the table. While leaving the house, the accused walked in and locked the house and then threatened the complainant who wanted to scream. He threatened to stab the complainant if she screamed. The Accused removed the pants of the complainant and removed his pants and defiled the complainant several times on his bed. He then after defiling her gave her 30 Kshs and helped her to leave. He opened his back door and let her out at around 8pm. The complainant went home dragging herself in pain. The complainant feared to tell the mother due to the threat of being stabbed by the Accused. The complainant’s mother asked her what was wrong and she said Babu defiled her. They went to Kwale Police Station, issued with a P3 form and taken to Kwale District Hospital. She was referred to Diani Hospital for further treatment. The accused was arrested and charged with the offence in Court.”

16. The Prosecution then proceeded to produce the complainant's birth certificate showing she was born on 1/8/2005, the P3 form and treatment notes as exhibits in court. The Appellant then stated in Kiswahili language that the explanation given by the police was true, whereupon he was convicted of the main charge on his plea of guilty.

17. The applicable law requires that the prosecution outlines the facts upon which the charge is founded after a plea of guilty is entered. I note in this regard that the prosecution stated that the Appellant "defiled the complainant several times on his bed" in the facts that were given in the trial Court.

18. Defilement and to defile is the offence as stated in law and in the charge sheet, and is a technical and legal term. The facts giving rise to that offence and showing that the essential ingredients of that offence, which is penetration, took place, needed to have been given by the prosecution, and explained to the Appellant in a language and manner that he understood, for him to have an opportunity to admit or challenge the same. I therefore find that the Appellant's plea of guilty was not unequivocal to this extent, and the sentence imposed upon him was also unlawful to this extent and not merited.

19. I cannot in the circumstances therefore proceed to consider the remaining issues as regards the sentence meted out on the Appellant, and the only outstanding issue is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

20. In **Mwangi v Republic [1983] KLR 522** the Court of Appeal held that:

"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

21. I have reviewed the evidence before the trial Court and it is my view that it raises the possibility of a conviction. In addition, it is my view that taking into account the time that has lapsed, the witnesses will not be difficult to secure and a retrial will therefore not be difficult.

22. I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court for the offence of defilement, contrary to section(1) as read with section 8(2) of the Sexual Offences Act. I direct that the Appellant shall be retried by any magistrate other than Hon. C.M.Njagi RM at the Kwale Law Courts, and for that purpose he shall remain in custody, and shall be taken before the Resident Magistrate at Kwale Law Courts on a date to be given by this Court to plead to fresh charges.

23. It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF APRIL 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE 2018

D. O. CHEPKWONY

JUDGE