



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 38 OF 2018**

**(CORAM: R. E. ABURILI - J.)**

**SAMUEL OGUNDA OTOMO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the sentence on a judgment delivered on 20.03.2017 in Cr. Case No. 11 of 2017 at SIAYA Law Court, PM's Court before Hon. H. Wandere - PM)*

**JUDGMENT**

1. The appeal arises from the conviction and sentence by the PM's Court Siaya (Hon. Wandere PM made on 20/3/2017 vide Siaya PM Cr. Case No. 11 of 2017).
2. In the said criminal case, the appellant herein Samuel Agunda Otomo was charged with the offence of defilement of a child contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. He also faced the alternative count of committing an indecent act with a child contrary **Section 11(1) of the Sexual Offences Act No. 3 of 2006**.
3. In both counts, the appellant is alleged to have defiled and or committed an indecent act with a child aged 11 years by intentionally causing his penis to penetrate the vagina of LAO.
4. On 14/3/2017 at [particulars withheld] sub-location, Siaya District within Siaya County. In the alternative count he was accused of intentionally touching the vagina of LAO, a child aged 11 years.
5. The Appellant, according to the charge sheet registered in court on 17/3/2017 and arraigned in the PM's court on 17/3/2017.
6. On his first appearance unrepresented, the charge was read to him in Kiswahili as recorded and he stated "**ni kweli**", - "**it is true.**" The court recorded a guilty plea and the matter was adjourned for 20/3/2017 for facts. The appellant did not object. On 20/3/2017, the plea was taken afresh and again in Kiswahili, the appellant stated: "**ukweli**" - true and a plea of guilty was entered on the main charge.
7. When the alternative charge was read to the Appellant, he responded to the Appellant, he responded in Kiswahili "**ukweli**" which translates to: True; and a plea of guilty was entered against him.
8. The prosecution counsel then read out the facts of the case, and produced a P3Form in respect of the Complainant as PEx1.
9. He also produced laboratory tests results as PEx 2 and the Complainant's birth Certificate showing she was born on 28/5/2008 produced as PEx 3.
10. The facts as admitted to be correct disclosed that on 14/3/2017 at 7.13 pm the Complainant child LAO was walking to her home from Bama Trading Centre when she met the Appellant. He was well known to her. The Appellant approached the Complainant and asked her to go to his house. He gave her the house keys. She obliged. He went to the said house at 8.00 pm, cooked food comprising Sukuma wiki and Ugali but the child refused to eat. He later forced her to undress and he defiled her and kept her in his house the whole night. The next day, members of the public rescued her and escorted to Siaya County Referral Hospital where she was examined. A P3 form filled on 17/3/2017. She was given treatment notes and a lab test receipt. He was convicted accordingly.
11. In mitigation, the appellant stated that he was 31 years of age and asked the court to forgive him. That the devil mislead him. The prosecutor reported that the accused was a first offender.

12. In the sentencing remarks, the PM considered the mitigation and the fact that he was a first offender but considered the seriousness of the offence and the need for a deterrent sentence given that he was 31 years of age. She sentenced him to life imprisonment and explained to the Accused/Appellant his right of appeal.

13. Being dissatisfied with the said conviction and sentence, the appellant lodged the appeal herein on 4/2017 complaining that: -

1. *I was under duress to plead guilty to the offence and sentence imposed by the trial court.*
2. *The learned trial magistrate erred in law and fact by failing to consider my mitigation.*
3. *I cannot recall all that transverse during the trial hence pray for trial proceedings to adduce sufficient grounds.*

14. He urged the court to allow the appeal in its entirety, quash the conviction and send him back for a retrial and *Habeas corpus* (sic).

15. The appeal was canvassed orally on 1/10/2018 by the appellant in person who stated in Kiswahili, urging the court to acquit him because when he was first taken to court for plea he was beaten and that although he could talk, he could not hear properly. He also did not know that he would end up where he was.

16. In opposing the appeal, the prosecution represented by Mr. Okachi, SPPC submitted that the plea was unequivocal and that the appellant was not credible, he knew the victim and the victim knew him that the age of the victim was proved by a birth certificate produced and medical evidence of defilement was produced.

17. Further, that the appellant mitigated which mitigations were considered by the trial magistrate hence the conviction was sound and sentence lawful. Owing to the seriousness of the offence which was traumatizing to both the victim, family and society at large, counsel urged the court to uphold the conviction and sentence.

18. In a rejoinder, the appellant submitted that he was not in his house when he was arrested and that he pleads for leniency.

#### **DETERMINATION**

19. I have carefully considered the appeal herein, and the submission for and against the appeal. As a First Appellate Court, I must comply into the principles laid out in **Okeno Vs Republic [1972] EA 32**.

20. The issue for determination are whether the plea was unequivocal and whether the sentence was lawful and proportionate to the offence. **Section 348 of the Criminal Procedure Code** bars an appeal against conviction on a plea of guilty except on the extent of legality of sentence. However, it is now trite law that for a plea of guilty to be unequivocal and to amount to a plea of guilty, the charge and the particulars thereof should be read out to the accused person, so far as possible in his own language, but if that is not possible, then in the language which he can speak and understand.

21. The trial court should then explain to the accused person all the essential elements of the offence charged. If the accused then admits all those essential elements, the trial court 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 then ask the Prosecution to state the facts of the alleged offence and after that, give the accused person an opportunity to dispute or explain the facts or add any relevant facts. See **Kariuki Vs Republic [1984] 809**.

22. If the Accused person does not agree with the facts or asserts other additional facts which if true, might raise a question as to his guilt, the trial court should record a charge of plea to Not Guilty and proceed to conduct a full trial where witnesses are called to adduce evidence to prove the prosecution case beyond reasonable doubt. If the accused admits the facts read out to be true and correct, then the Magistrate should record a conviction and proceed to hear any other additional facts relevant to the sentence, while recording the accused person's reply (see **Adan V Republic [1973] EA 445 at 446**).

23. In **Ombena V Republic [1981] I KLR 450** he court stated that whether a plea of guilty is unequivocal or not depends on the circumstances of the case and that therefore the appellate court must take into account all circumstances in determining the equivocability or otherwise of a guilty plea in this case, the proceedings in the lower court clearly show that the charge was read over and explained to accused in Kiswahili language and his plea in Kiswahili was recorded verbatim, "*ukweli*", and a plea of guilty was entered.

24. The alternative charge was also read to him and he responded, "*ukweli*", and a plea of guilty was entered. Facts of the case were read to him on a different date - 3 days later and exhibits were produced including a medical report - P3 showing penetration into the complainant's vagina and her birth certificate showing she was 11 years and that the Appellant and Complainant knew each other and the trial court recorded: "*I admit all the facts*" and conviction recorded against him. The Appellant's language in '*admitting the facts*' was not recorded.

25. In addition, the Appellant having been unrepresented, it was essential that the court was under an obligation to ensure that the accused person understands the consequences of such plea of guilty as the minimum sentence under **Section 8(1)(2)** for defilement of a child aged 11 years and below is life imprisonment.

26. I note that the court took no extra caution to caution the Appellant on the consequences of pleading guilty to such a serious crime. (See **Paulo Malimi Mbusi V Republic, Kiambu Cr. App. No. 8 of 2016**).

27. Accordingly, I find and hold that the Plea of Guilty entered against the appellant was unsafe in those circumstances.

28. I find and hold that the plea was not unequivocal and therefore the conviction of the appellant on such plea was unsafe. I quash the conviction and set aside sentence meted out on the Appellant.

29. However, in this case, the interest of justice demand that I order for a retrial. The Appellant too asked for a retrial. This is because the conviction and sentence as quashed were on the basis of a legal technicality and not on the merits of the case (*See Fatelah Manji and Mwangi V R[1983] KLR 522 Vs R [1966] EA 343*).

30. Accordingly, I discharge the Appellant who shall remain in custody remand and order that a new trial / retrial shall take place before the PM's Court at Siaya. The Appellant shall be produced before Siaya PM's Court on 4/12/2018 to take a fresh plea. This order to be served upon the Prosecution for necessary action.

**Orders accordingly.**

*Dated, Signed and Delivered at SIAYA this 3<sup>rd</sup> day of December 2018.*

**R.E. ABURILI**

**JUDGE**