



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 143 OF 2015

BETWEEN

JACOB ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. D.Chepkwony, SPM dated 25th March 2015 in Criminal Case No. 283 of 2015 at Senior Principal Magistrate's Court at Nyando)

JUDGMENT

1. The appellant **JACOB ODHIAMBO** was charged with attempted defilement contrary to **section 9(1) and (2)** of the ***Sexual Offences Act, 2006***. It was alleged that on 23rd March 2015 at about 4.40 pm at Ayweyo Sub-location, Wawidhi Location, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of LA, a child aged 10 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts. He was convicted on the two counts on his own plea of guilt and sentenced to serve 15 years' imprisonment on the principal count.
2. The appellant has now appealed against the conviction and sentence on the grounds he was not warned that of the consequences of pleading guilty and that he was confused when pleading guilty. He also filed amended grounds of appeal in which he stated he was threatened, coerced and intimidated to plead guilty. He submitted that his constitutional rights under **Article 50(2)(j)** of the Constitution were violated.
3. Counsel for the respondent, Mr Muia, opposed the appeal on the ground that the plea of guilty was unequivocal. He pointed out that the charge was read to the appellant in a language he understood and which he accepted as true. He submitted that the facts read to the appellant disclosed an offence and he accepted them as true.
4. What this court should ascertain is whether the plea was unequivocal. **Section 281** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** provides that an accused person may plead not guilty, guilty or guilty subject to a plea bargain. The requirements for recording a guilty plea provided for under **section 207** of the ***Criminal Procedure Code*** were elucidated in ***Adan v Republic* [1973] EA 445** as follows: -
 - i. The charge and all the essential ingredients of the offence should be read 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 immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts.

iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a 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. [Emphasis mine]

5. In the present case, the proceedings in the subordinate court show that when the charges were read and explained to the appellant in *Dholuo* for the first time, he responded, "It is true" whereupon a guilty plea was recorded. After the facts constituting the offence were read to him and exhibits presented, he responded, "The facts are true." The appellant was then convicted on his own plea of guilty. The prosecutor recommended that notwithstanding that he was a first offender, a deterrent sentence should be imposed whereupon the trial magistrate proceeded to pass the sentence.

6. It is clear from the record that the appellant was not given an opportunity to mitigate the before the sentence was handed down. **Section 329** of the *Criminal Procedure Code* provides that:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

7. Although couched in discretionary terms, the right to mitigate is accorded to an accused person who has been convicted. It is exercised before the court pronounces the sentence and is aimed at guiding or informing the court as to the proper sentence to be passed. In *Adan v Republic (Supra)*, the Court emphasized that the accused's reply to the sentence should be recorded (see para. 4(v) above). The right to mitigate is no less important merely because the sentence is mandatory. Where the accused has pleaded guilty, he may yet say something in mitigation that negates the offence. The Court of Appeal in *John Muendo Musau v Republic NRB CA No. 365 of 2011 [2013]eKLR* observed that;

We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence.

8. I do not agree with counsel for the respondent that the failure to give the appellant an opportunity to mitigate was not fatal to the case. It is possible that he would have said something that would have negated the offence. I allow the appeal on this basis.

9. I now turn to whether I should order a retrial. The principles governing whether the appellate court should order a retrial should were summarized by the East Africa Court of Appeal in *Fatehali Manji v Republic [1966]EA 343* 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.

10. As the proceedings were defective and having regard to the seriousness of the offence and the fact that

there is overwhelming evidence against the appellant and the length of time that has elapsed since the offence was committed, I shall order a retrial.

11. I allow the appeal, quash the conviction and sentence. I order a retrial and for that purpose, the appellant shall therefore remain in custody and shall be taken to plead before the Senior Resident Magistrate's Court at Nyando on **25th January 2017**.

DATED and DELIVERED at KISUMU this 23rd day of January 2017.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Muia, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.