



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 84 OF 2015

BETWEEN

TITUS MAKUBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence of life imprisonment in a judgment delivered on 15th July, 2015 by the Chief Magistrate's Court at Kakamega in Criminal Case No. 54 of 2015 by Hon. R. Kimingi, Chief Magistrate)

J U D G M E N T

Introduction

1. On the 15.07.2015, the appellant herein appeared before Hon. R. Kimingi, Chief Magistrate, on a charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence are that on the 13th day of July, 2015, in Kakamega East District within Kakamega County, he intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely anus of W.L, a child aged 4 years old.

2. When the appellant was called upon to indicate whether he admitted or denied the charge, after the same was read and explained to him, he replied in Kiswahili;-"It is true. I did the bad act to the child in court when I was drunk"

3. During the proceedings on the morning of 15.07.2015 the court wondered whether the appellant ought not to have been charged under the SOA No. 3 of 2006 instead of being charged under the Penal Code. The prosecutor Mr. Omwenga, prosecution counsel was of the view that the appellant ought to have been charged under the SOA. The matter was stood over to 2.00pm the same day when the substituted charges under the SOA were read out to the appellant who admitted the same. Initially the appellant had been charged with committing on unnatural offence contrary to Section 162(a) of the Penal Code.

Facts of the Case

4. The facts of the case were that on 13.07.2015 at about 5.00pm, the complainant in this case was playing with other children near his home when the appellant took him and led him to the nearby bushes where he committed the offence against the minor. Later when the complainant was returning home, he

met his mother who noticed that he had a lot of dust on him and she enquired what had happened to him. The complainant told his mother that he was experiencing a lot of pain in the stomach. The complainant was also crying. When they got home the mother removed the complainant's trouser and on close scrutiny, she saw some whitish liquid as well as blood around the complainant's anus. The complainant then opened up and told his mother that the appellant had sodomised him. The complainant's mother quickly reported the matter to Kakamega police station. The complainant was issued with a p3 form after which his mother took him to Shinyalu Health Centre where he was treated and discharged.

5. The age of the complainant was assessed and established to be 4 years. The P3 form was filled and the mother returned it to the police station. The appellant was thereafter arrested and charged. The P3 form issued on 13.07.2015 and duly filled on 14.07.2015 was produced as Pexhibit 1 while the medical records dated 14.07.2015 were produced as Pexhibit 2.

6. In response to the facts, the appellant stated, "The facts are true. I did it because I was very drunk". On admission of the facts as above stated the appellant was convicted on his own plea and sentenced to serve life imprisonment.

7. The proceedings in respect of the alternative charge were terminated under Section 87(a) of the CPC and Section 40 of the Sexual Offences Act.

The Appeal

8. The appellant was dissatisfied with both conviction and sentence and filed this appeal on the following home-made grounds.

1. THAT I pleaded not guilty to the above appended charge
2. THAT the sentence meted out was very harsh and excessive in the circumstances.
3. THAT I was the first offender and I was advised by the police to plead guilty before court so that I can be released.
4. THAT the trial court erred both in law and fact by not warning me [of] the consequences of pleading guilty to the above appended charges.
5. THAT the trial court did not consider that I am the first offender
6. THAT the trial court did not consider my mitigation
8. THAT I pray for full trial before court
9. THAT more grounds will be adduced at the hearing thereof (sic)
10. The appellant prays that the appeal be allowed so that a [more] lenient sentence is ordered.

Duty of this Court.

10. This is the first appellate court and as such it is expected to hear the appellant's case afresh see **Pandya vs. Rex [1957]E A 336.** In the instant case, this court is under a duty to determine whether the plea of guilty entered against the appellant was unequivocal. The procedure for taking plea of guilty was set out in the case of **Chege vs. Republic [1983]KLR 425.** The High Court in Nairobi (Porter Ag J) persuasively held that "pleas of guilty must be taken cautiously and the record should clearly reveal the facts were read out to the accused and that he understood the facts and knew what he was admitting to....." It was also held by the Court of Appeal sitting in Nairobi in the case of **Baya vs. Republic [1984]KLR 657** that for a plea of guilty to be unequivocal, the following parameters must be demonstrated from the record;-

a) The charge and its essential ingredients must be explained to the accused in vernacular or some other language that he understands.

b) The accused's own words in reply should be correctly translated into English and carefully recorded.

11. Also see the case **Ombewa –vs. Republic [1981]KLR 450** and **Boit vs. Republic [2002] KLR 814**. In the latter case, the plea of guilty related to a charge involving the sentence of death upon conviction. The court held and quite rightly so, that before a plea of guilty is accepted on a serious charge, the court must observe certain vital safeguards, such as the court ensuring that the person pleading guilty fully understands the offence with which he is charged and further that the accused must be told in detail and in a familiar language to him or her the substance of the offence the elements or ingredients which constitute it, the date and approximate time on which the offence was committed and the person against whom the offence was committed. The court further held that the accused person must understand the consequences of his plea of guilty.

Analysis and Determination

12. With the above principles in mind, I now return to the case in hand. When the appellant appeared for plea at 2.30pm on 15.07.2015, the record shows that “substance of the new charge(s) and every element of the charges stated to the accused person in Kiswahili which he understands and he states in Kiswahili:-

Main charge;- It is true I did what is stated to the child.”

13. The prosecutor then proceeded to give the facts of the case where upon the appellant stated; “the facts are true. I did it because I was drunk.” From the record, the plea was taken 2 days after the alleged offence. He was found guilty on his own plea after which he was convicted. He offered no mitigation.

14. It is to be noted that the record does not show that the trial court directly put the appellant on notice regarding the consequence of his plea of guilty. The trial court only recorded the following;-

“The accused understands the charge and every element. He has admitted the charge and the facts stated to him in Kiswahili, which he understands. The court find (sic) the accused guilty on his plea of guilty and convict (sic) him accordingly.”

15. It is the considered view of this court, that the guilty plea entered by the trial court was not unequivocal. The record shows that the trial court did not warn the appellant of the consequence of his guilty plea namely that he would be sentenced to life imprisonment. As rightly submitted by prosecution counsel, the trial court's failure to warn the appellant of the very serious consequence of being imprisoned for life deprived the appellant of a fair trial as provided under Article 50(2) (g) of the Constitution of Kenya 2010. It is clear in the mind of the court that if the appellant had been so warned, or if he was represented by an advocate, he would not have with persisted the guilty plea. In any event, the appellant's contention that he committed the offence while under, the influence of alcohol was a negation of his plea of guilty.

16. For the reasons above stated, I am satisfied that this appeal ought to be allowed. I accordingly allow the appeal, quash the conviction and set aside the sentence of life imprisonment.

What next?

17. Prosecution counsel asked the court to order a retrial. The question that arises here is when may a retrial be ordered? In the case of **Kitsao vs. Republic [2007]1EA 157** the Court of Appeal, Kenya held that where witnesses are easily available and where the error leading to the appeal is an error on the part of the trial court, and where the need of justice so demands, then the appellate court should order a retrial.

18. In the instant case, the offence was committed in July, 2015, just about 1½ years ago, the offence was

serious, the same having been committed against a 4 year old boy. A retrial would therefore be in order.

Conclusion

19. For the above reasons, I allow the appeal, quash the conviction and set aside the sentence of life imprisonment. I hereby order that this case shall be tried afresh but by a Magistrate other than Hon. R. Kimingi, Chief Magistrate who took the plea on 15.7.2015. To expedite the process, the appellant shall appear before the Chief Magistrate’s Court on Thursday 26.01.2017 for directions as to fresh plea and taking of hearing dates, if any. In the meantime, the appellant shall remain in custody.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 17th day of January, 2017

RUTH N. SITATI

JUDGE

In the present of;-

.....Present in person.....for Appellant

.....Mr. Oroni(present).....for State

.....Mr. Polycap.....Court Assistant