



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 46 OF 2015

GILBERT KIMUTAI MITEI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable B. KIPTOO in Kapsabet Criminal Case No. 3042 of 2015, dated 22nd June 2015)

JUDGMENT

1. The appellant was convicted on his own plea of guilty with the offence of trafficking in persons contrary to *Section 3(1) (b)* as read with *Section 3(5)* of the *Counter Trafficking in persons Act No. 8 of 2010*. He was sentenced to 30 years imprisonment.
2. The particulars of the offence alleged that on 6th October, 2014 at 3 p.m at [particulars withheld] village in Nandi Hills of Nandi County, the appellant knowingly and intentionally arranged for the transportation of M.C (Name withheld), a child aged 17 years to [particulars withheld] village for purposes of sexual exploitation.
3. The appellant was aggrieved by his conviction and sentence. He filed a petition of appeal to this court on 2nd April, 2015 raising a total of six grounds. He complained in the main that the learned trial magistrate erred in failing to comply with the procedures of plea taking prescribed by the *Criminal Procedure Code* ; that his plea was equivocal as the charges were read in a language he did not understand and that the sentence imposed on him was harsh in the circumstances of the case. He urged the court to allow the appeal and order a retrial.
4. The appeal is opposed by the state. Learned prosecuting counsel *Mr. Mulati* contended that the charge was read to the appellant in Nandi language but when facts were read, he responded in Swahili; that the appellant understood the proceedings given the manner in which he sought to be supplied with witness statements and his plea in mitigation. He invited the court to dismiss the appeal for lack of merit.
5. The appellant in response maintained that he did not understand the charge that was facing him; that he thought he was pleading to a charge of defilement and that he was only conversant with Kipsigis language and not Nandi; and, that he was not fully proficient in the Swahili language.
6. I have carefully considered the record of the lower court; the grounds of appeal and the rival submissions made by the appellant and the state.

The manner in which a plea of guilty should be recorded and the steps to be taken by the plea court are

clearly set out in *Section 207 of the Criminal Procedure Code*. That procedure was re-iterated in the case of ***Adan V Republic (1973) EA 445*** which was adopted by our Court of Appeal in ***Kariuki V Republic (1984) KLR 809***.

7. For a plea of guilty to be unequivocal, the following steps must be followed by the plea court;

(i) The charge and all the essential ingredients of the offence must be explained to the accused in his language or in a language that 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 of the case 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 questions 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 the facts relevant to sentence together with the accused's reply should be recorded.

8. In this case, the appellant has complained that the above steps were not followed as the charge was not read out to him in his language or in a language that he understood. He claimed that he was not fully proficient in Swahili and that he only understood the Kipsigis language.

9. I have scrutinized the lower court's proceedings on the date that plea was taken and facts read to the appellant. I note that on 19th March, 2015 when the plea of guilty was recorded, the trial court indicated that the charge was read to the appellant in Nandi language. But the appellant's response was recorded in English. On 23rd March, 2015, the record does not show which language was used by the court in narrating the facts supporting the charge. The appellant's response to the facts was recorded in Swahili.

10. The duty of the plea court went beyond just reading the charge and the facts to the appellant. It included a duty to ensure that the appellant understood not only the charge but also all its ingredients. That is why the law requires that the charge and its ingredients be explained to an accused person in either his language or in a language that he understood.

In this case, the record does not show that the appellant intimated to the trial court that he understood the Nandi language which was used to read the charge to him. The record does not also show which language was used on the day that facts were read.

11. In view of the foregoing, this court is not certain that the charges and facts were read and explained to the appellant in a language that he understood. It is therefore not clear whether the appellant fully understood the charge and all its ingredients before he was asked to plead to it. No wonder the appellant claims that he thought he was pleading to a charge of defilement.

12. The offence which the appellant was charged with is serious. It attracts a minimum sentence of 30 years imprisonment or a fine of not less than Kshs. thirty (30) million or both. The sentence is enhanced to life imprisonment in the event of a subsequent conviction. The learned trial magistrate fell into error when she failed to satisfy herself that the charge and the facts supporting such a serious offence had been explained to the appellant in a language that he understood.

In the premises, I am unable to uphold *Mr. Mulati's* submission that the plea of guilty entered in this case was unequivocal. I am therefore persuaded to find that the appeal is merited and it is hereby allowed. The appellant's conviction is consequently quashed and the sentence set aside.

13. Having allowed the appeal, the question that arises is whether or not I should order a retrial. Though

this was a prayer specifically made by the appellant, the state did not respond to it.

The Principles that guides an appellate court in deciding whether or not to order a retrial are well settled.

A retrial will be ordered where the interests of justice requires it and if it is unlikely to cause injustice to the appellant. Each case must however be considered on its own merit depending on the peculiar circumstances of the case. See *Mwangi V Republic (1983KLR 522; Muiruri V Republic (2003) KLR 552.*

14. I have considered that the appellant was convicted and sentenced in March, 2015 which is hardly two years ago. As noted earlier, the offence preferred against him is serious. Considering that it is the appellant himself who sought a retrial, I find that a retrial in this matter would not occasion any prejudice on the appellant. In the circumstances, I remit this case to the lower court for retrial. The appellant shall be released into police custody and shall be escorted to the Principal Magistrate's court at Kapsabet on 21st February, 2017 for plea and further orders.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 15th day of February, 2017

In the presence of:

The appellant

Mr. Mwaura for the State

Mr. Lobolia Court Clerk.