



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 95 OF 2011

BETWEEN

BENARD INJENDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from conviction and sentence in Butali SRMC CR. Case No. 301 of 2011 dated 06.06.2011 by Hon. S. N. Abuya, SRM)

JUDGMENT

Introduction

1. The appellant was convicted on his own plea of guilty to the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the SOA No. 3 of 2006, the particulars being that on the 23rd day of November, 2010 in Kakamea North District within Western Province intentionally and unlawfully inserted his genital organ namely penis to the genital organ namely vagina of K.K.L a child aged 14 years.

The Facts

2. The facts of the case are that on the 22 day of November, 2010 at 2.00pm, the complainant who was by then aged 14 years and a pupil at [particulars withheld], Primary School was approached by the appellant and offered Ksh.100/- in exchange for sex. The two set off to a nearby bush where the appellant penetrated the complainant. While they were in the act, a neighbour found them and on seeing the neighbour, the appellant ran away. After one month, the complainant discovered here periods were not coming and later on, her parents discovered that the complainant was pregnant. She was taken to the hospital where it was confirmed that the complainant was pregnant. The P3 form was produced as an exhibit. Thereafter, the appellant was arrested and charged. Upon conviction, the appellant was sentenced to twenty (20) years imprisonment.

The Appeal

3.The appellant felt aggrieved by both conviction and sentence and filed this appeal premised on grounds that:-

- (1) The trial court erred in law in convicting the appellant in respect of the charge of defilement

when the plea was not unequivocal.

(2) The trial Magistrate erred in law in convicting the appellant for the charge of defilement when the charge was stated in English Language which the appellant did not understand.

(3) The learned trial Magistrate erred in law in totally ignoring all the mandatory requirement governing the taking of pleas.

(4) The learned trial Magistrate erred in law in convicting the appellant on the charge of defilement when the facts as appearing on the proceedings did not support the charge.

(5) The learned trial Magistrate erred in law in failure to explain at all the ingredients of the offence of defilement at the time of taking the plea.

Reasons wherefore the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

Submissions

4. At the hearing of this appeal the appellant was represented by Mr. Shivega Advocate, while the respondent was represented by Mr. Samson Ng'etich prosecution counsel. Mr. Shivega continued grounds 1 and 2 to form ground 1, while grounds 3 stood alone as ground 2 and grounds 4 and 5 formed ground 3. In essence counsel contended that the plea was not unequivocal and that the facts were not clear so that the appellant, though admitting the facts did not understand what he was admitting to.

5. Counsel further submitted that the lower court record does not show in which language the proceedings were, nor is there a record of the language which the appellant preferred to use.

6. Counsel also submitted that the facts as given by the prosecutor did not support the charge sheet and particularly when the facts were silent as what the ward "penetrated" was referring to. Finally it was submitted on behalf of the appellant. That the age of the complainant was not proved since no birth certificate or such other documents as would prove age of the complainant was produced in evidence.

7. To support his arguments, counsel for the appellant cited two authorities; **Harold Wilson Omollo – Vs – Republic – Criminal Appeal No. 192 of 2007 (Mwera – J as he then was);' Paul Matungu – vs – Republic Court of Appeal at Nairobi – Criminal Appeal No. 127 of 2006[2006] eKLR**

8. In the Omollo Case (above) the court held that the language in which a plea is taken is not a matter for the discretion of the trial Magistrate; that the language must be indicated so that it is clear. "From the beginning of the trial the language which an accused person has chosen to speak" see **Dugow Munow – Vs – Republic CRA No. 233 of 2005 cited by Mwera J in the Omollo case.** In the case, the appellant had been convicted on his own plea of guilty to a charge of being found in possession of Narcotic drug contrary to Section 3(1) as read with Section 3(2) of the Narcotic and Psychotropic Substances Control Act No. 4/94. He was sentenced to one year in prison.

9. In the Paul Matungu Case (above) the appellant who was charged before the Chief Magistrate at Nairobi with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. He convicted on his own plea of guilty and sentenced to death. On second appeal, the court set out the principles to be applied in taking pleas in capital offences, one of which is that, "the Courts have always been concerned that an accused person should not be convicted on his own plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court."

10. So in cases of a serious nature, the court taking the plea must ensure the following.

(i) The person pleading guilty fully understands the offence with which he is charged. The court before where he is taken to be pleading guilty must in its record show that the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language that he understands and that with the understanding and out of his own free will the pleader admits the charge. This requirement applies not only to offences punishable by death, but to all types of offences.

(ii) Where the offence is one punishable by death, the court recording the plea of guilty must show in its record that the person pleading guilty understands the consequences of his plea.....”

Response to Appellant’s Submissions

11. Counsel for the respondent conceded the appeal for reasons that the language in which the plea was not taken was not indicated. Counsel however pleaded with this court to order a retrial. Counsel submitted that if a retrial is ordered, it is very unlikely that the appellant would plead guilty and that a retrial would serve the ends of justice.

Analysis and Determination

12. From the record, it is clear that there is no indication of any language at all. The record for 6.6.2011 reads as follows:-

“Before S. N. Abuya SRM

CP CI; Moliuka

C/Clerk;- Mildred

Accused called present

COURT;- The substance of the charge and every element thereof has been stated by the court to the accused person who being asked whether he admits/denies the charge he replies;-

Accused;- Ni Ukweli”

13. So, a part from the appellant’s reply which was in Kiswahili, there is no indication on the record, whether the charge was read in Kiswahili or in English or in some other language. Based on the principles already set out above, I am in agreement with counsel that the appellant’s plea was not unequivocal thereby rendering the whole trial null and void.

14. Further, after the facts were read out to the appellant the answer given by him was, “the facts are true.” Where upon the court entered a plea of guilty and convicted the appellant. Whether the plea was taken in Kiswahili or English, whatever the case, the trial court failed to indicate the language for the plea and complicated matters further when it recorded the appellant’s answers both Kiswahili and English. In this regard, grounds 1 and 2 of the appeal succeed. Ground 3 as reframed by appellant’s counsel also falls in this same category and succeeds because the trial court did not observe the principle for taking a plea as set out in Adan’s case (above).

15. It is also my considered view that grounds 4 and 5 of the appeal have merit. It is clear from the record that a part from mentioning the complainant’s age in passing, no evidence was tendered by the prosecution as proof of the complainant’s age. Without proof of the age of the complainant there is already a hole in the prosecution case, and the benefit of that hole goes to the appellant. Secondly, the way the facts were framed is such that to simply say the appellant “Penetrated” the complainant creates doubt in the mind of the court as alleged in the charge sheet that the appellant inserted his penis into the complainant’s vagina, then the facts should have said so and also indicated that by so doing the appellant penetrated the complainant’s vagina. In effect, I hold that the facts did not clearly and fully set out the

ingredients of the charge of defilement. The sole beneficiary of the lack of such detail is the appellant.

16. Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the **Paul Matungu case (above) the Court of Appeal quoted from Boit vs- Republic [2002] IKLR 815** and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words "as nearly as possible in his own words.". I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty.

17. In light of all the above, I am satisfied beyond any doubt that the appellant's appeal has merit. The same is allowed on both conviction and sentence. The conviction is quashed and the imprisonment of twenty years is set aside.

18. What next? Should the appellant be tried afresh as submitted by counsel for the respondent? To answer this question, I will borrow the words of **Makhandia J. (as he then was) in the case of Issa Abdi Mohammed –vs – Republic [2006]eKLR** to the effect that:-

"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

19. I totally agree with Makhandia J (as he then was) and have nothing more useful to add. The appellant herein shall be set at liberty unless otherwise lawfully held.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 3rd day of May 2017

RUTH N. SITATI

JUDGE

In the presence of:-

Mrs. Muleshe for Shivega (present) for Appellant

Mr. Juma (present) for Respondent

Mr. Polycap Court Assistant