



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO: 14 OF 2017

JAMES MUIGAI KIARIE.....APPELLANT

-V E R S U S-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgment in **Criminal Appeal no. 14 of 2017**. The appellant **JAMES MUIGAI KIARIE** was initially charged for the offence of Defilement contrary to **Section 8 (1)** as read with **Section 8 (4)** of the Sexual Offences Act No. 3 of 2006.

The particulars thereof were on **30th day of August, 2015** at **2.00 p.m.** at **Kinale forest** within **Kiambu County** , intentionally and unlawfully defiled **A C**, a girl aged **16** years, inserting his penis into her vagina.

2. Alternative charge, he was charged with; indecent act with a child, contrary to **Section 11 (1)** of the Sexual Offence Act No. 3 of 2006.

The particulars thereof were that on the **30th day of August, 2015** at around **2.00 p.m.** at **Kinale forest** in **Kiambu County**, intentionally and unlawfully committed indecent act with **A C**, a child aged **16** years by causing his penis to touch her vagina.

3. The appellant pleaded guilty to the charge and a plea of guilty was duly entered.

4. The court, accordingly, sentenced the accused to serve **15** years imprisonment.

5. **THE APPEAL**

The accused decided to appeal his case against the conviction and sentence despite having pleaded guilty which position precludes him from appealing against the conviction except the appeal against the sentence is allowable. The appellant represents himself in person.

6. **GROUND OF APPEAL are:**

1. **THAT** the trial court erred in law by failing to reconsider and re-evaluate the whole evidence afresh as provided by law.
2. **THAT** the trial court erred in law by failing to appreciate the crucial witnesses were not called by prosecution yet their evidence was vital for the just decision of the case.
3. **THAT** the trial court erred in law by failing to observe that the prosecution had failed to prove its case to the standard required in law to prove beyond reasonable doubt.
4. **THAT** the trial court erred in law by failing to observe that the case for the prosecution contained contradictions and inconsistencies.
5. **THAT** the trial court erred in law by failing to observe that the evidence relied upon by the prosecution fell too short of the certainty required in law in cases of this nature.
6. **THAT** the trial court erred in law in failing to observe that the provision of **Section 169 (1)** of **Criminal Penal Code** was contravened.

7. **SUPPLEMENTARY GROUNDS were:**

7. **THAT** the trial magistrate erred in both law and fact when convicting the accused person while relying on the facts adduced in court which facts were not proved to the required standards of law given that the accused pleaded guilty to the alleged charges.

8. **THAT** the judgement of the court was a nullity as the trial proceeded without the court warning that I, the appellant, had a right to a fair and impartial trial as enshrined in the constitution as per **Article 50 (2) (n)** i.e. the right to be represented by the advocate.

9. **THAT** the appellant was not accorded a fair and impartial trial as guaranteed by Article 25 (c) of the constitution as the trial commenced without the court having received a report as to “**my mental fitness**” to stand trial or prove to the court that my plea of guilty was voluntary.

8. **SUBMISSIONS**

a) The appellant submitted as follows by his written submissions that:

1. Although pleaded guilty, he was not warned by the court of the consequences of pleading guilty.

That my plea was not voluntary.

I was led to believe that if I pleaded guilty I would not go to jail.

That my right to an advocate was violated.

2. The plea of: “the charge is true

- We agreed
- I admit
- I plead guilty
- I am guilty; cannot be considered as unequivocal pleas”

b) The respondent, **Madam Wambwa** submitted that:

1. **On ground 2** of the appeal, I submit that there is no legal requirement to produce a certain number of witnesses to prove an issue of fact, **Section 143** of evidence.

2. **On grounds 3**, I submit that this is tenable, the accused pleaded guilty to the charge.

3. **On ground 4**, the accused pleaded guilty, so the contradictions and inconsistencies are not tenable. No evidence was tendered.

4. **On grounds 5**, similar arguments, as above are applicable to this ground.

5. **On ground 6**, the prosecution complied with law.

6. The issue of his mental capacity was not raised to the court or to the police before and at the time of plea taking.

I therefore, pray that the appeal be dismissed and the court proceed to uphold the conviction and the sentence.

9. **First Appeal**

This being a first appeal, this court has a duty of reconsidering and evaluating the evidence afresh with a view to reaching its own conclusions in the matter making allowance only for the fact that it neither saw nor heard the parties, Viva Voce, when they appeared before the trial court. **See generally Okeno -Vs- Republic [1972] E.A. page 32.**

10. **Issues for Determination**

a) Whether the plea herein was unequivocal?

b) If the answer to (a) above is no, whether the appellant’s case should be remitted for fresh trial?

11. **Proceedings: Analysis**

On **1/9/2015**, IN CAMERA.

When the charge was read to him, the accused answered: “**The charge is true. We had agreed.**”

The court: the plea of guilty entered.

First, the record does not indicate any warning given to the accused as to the consequences of pleading guilty to an offence whose jail sentence was 15 years imprisonment.

Second, “**We agreed**” by the accused can be construed to mean in common parlance that the accused pleaded guilty in expectation of either non jail term, or very short jail, and therefore this plea was not voluntary pleading.

Third, the need to have an advocate for the accused was not in court records of the proceedings.

Therefore, this leads itself to the consequences that the plea was neither unequivocal nor voluntary.

12. Legal Authority

The case of Adan -Vs- Republic [1973] E.A 445 is very pertinent to this case on the issue on a court recording a plea of guilty.

- (i) The charges and all the essential ingredients of the offence should be explained to the accused in the language he understands.
- (ii) The accused’s own words should be recorded and if they are admissible, a plea of guilty should be recorded.
- (iii) The prosecution should then immediately state the facts 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 question of his guilty, his reply must be recorded and change of plea entered.
- (v) If there is no change of plea a conviction should be recorded and statement of the facts relevant to the sentence together with the accused’s reply should be recorded.

The above is indeed the procedure to be followed by every court taking plea. It is particularly important in cases where English may not be the mother tongue of an accused person.

13. FINDINGS

I am of the considered view that the plea of guilty as recorded by the trial court was not unequivocal, although in certain cases which are not of a serious nature, the answer “**it is true**” to a charge could be sufficient. The charge against the appellant herein is an egregious offence, calling for a long sentence if convicted of the same.

Therefore, the appellant had no fair trial as per **Article 50 (2) (h)** of Constitution 2010.

14. **The** next issue is whether this is a proper case for retrial. Considering the seriousness of the charge facing the appellant, has led me to the conclusion that this is a proper case to be remitted for retrial. There is already evidence on record which could result in a conviction. Further, it is not like the prosecution will be going on a fishing expedition in an effort to piece together some evidence in support of the charge against the appellant. I am also satisfied that no prejudice shall accrue to the appellant should the case be remitted for retrial.

15. CONCLUSION

In the premises and for the reasons stated here above, the appeal on both conviction and sentence is allowed. The conviction is quashed and the sentence of 15 years imprisonment is set aside in lieu thereof this case shall be remitted to the Senior Principal Magistrate’s (SPM’s) Court **LIMURU** for fresh trial before a differently constituted court. The appellant shall however, remain in custody pending his appearance before the Principal Magistrate’s (PM’s) court at **LIMURU** for plea.

16. Orders accordingly.

JUDGMENT WRITTEN AND SIGNED BY:

C. B. NAGILLAH

JUDGE

JUDGMENT DELIVERED, DATED AND COUNTERSIGNED IN KIAMBU BY:

THIS 10TH DAY OF MAY 2017

JOEL NGUGI

JUDGE

In the Presence of:

.....the Appellant

.....for Respondent

.....for Court Assistant