



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

H.C.CR.A NO. 19 OF 2015

(J.A. MAKAU – J.)

DENNIS OGOLLA OKOTH.....APPELLANT

VERSES

REPUBLICRESPONDENT

(An Appeal from the Original Conviction and Sentence dated 21.4.2015 in Criminal Case No. 791 of 2014 of P.M'S Court At Bondo By M.M. Nafula (S.R.M.)

JUDGMENT

1. **DENNIS OGOLA** was charged with the offence of attempted defilement contrary to **Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 10th day of August 2014, in Bondo District, within Siaya County intentionally attempted to course his penis to penetrate the vagina of **J A O** a child aged 14 years. The Appellant faced an alternative charge of committing an indecent Act with a child contrary to **Section II (I) of the Sexual Offences Act No. 3 of 2006**. The particulars of the alternative charge are that on the 10th day of August 2014, in Bondo District within Siaya County intentionally touched the buttock/breast/vagina of **J A O** a child aged 14 years with his penis. The appellant faced a further charge of **entering in a dwelling House with Intent to Commit a Felony contrary to Section 305(1) of the Penal Code**. The particulars of the offence are that on 10th day of August 2014 at about 12.00 p.m. in Bondo District within Siaya County entered in a dwelling house of **S O O** with intent to Commit a felony namely Defilement therein. I must state from the onset that the charges as framed did have count I and count II as required, how the matter proceeded before the trial court with the charges as drawn without indication of count 1, and count II.
2. That when the appellant was arraigned before the trial court, the language of the court was indicated as English/Kiswahili/Luo and the court record states as follows:-

“The substance of the charges and every element there of has been stated by the court to the accused person in language that he/she understands, who being asked whether he/she admits or denies the truth charges replies”

3. The Appellant denied the main count and plea of not guilty was accordingly entered. That on the alternative charge the appellant stated **“true”** and a plea of guilty was entered. The prosecution gave facts and the appellant stated **“Facts are true.”** and the appellant proceeded to mitigate. The prosecution stated the appellant was a first offender and court proceeded to sentence the appellant to serve 5 years imprisonment for an offence of committing an **indecent act with a child C/S to section 11(1) of the Sexual Offences Act, No. 3 Of 2006**.
4. The court ordered the main count to proceed to hearing on 26.8.2014 however on 9.10.2011 after

PW1, J O gave evidence, the prosecution applied to substitute the charges as the evidence by the witness was inconsistent with the contents of the charge sheet. On 10.10.2014 the prosecution without putting on record the purported substituted charge stated that it had substituted the charge. The alleged substituted charge was not read to the appellant and plea taken. The court records read as follows:-

“10.10.2014:

Before Hon. M.M. Nafula - SRM,

Prosecution: Ip Rono, Court Clerk Koundo,

Accused: Present, Interpretation-Eng/Kisw/Luo,

Court: Case for mention.

Proses: I have the substituted charge sheet.

Accused: Not true

Court: Plea of not guilty entered.”

5. That upon the appellant being put on his defence he opted to give sworn defence.
6. The trial magistrate evaluated the prosecution evidence and the appellant defence for the offence of entering in a dwelling house with **intent to commit a felony contrary to Section 305(1) Of The Penal Code** and acquitted the appellant. It is important at this stage to point out that in the judgment of the trial magistrate made no comment on the main charge of the alleged substituted charge and that in the court record there is no copy of the alleged substituted charge from which this court can find out whether the main count in this case was ever substituted or what become of it, however from the court record the said count is deleted which means or indicates that it was the one that was either intended to be substituted or was done away with. I will leave that at that point.
7. The appellant being aggrieved by conviction and sentence on the alternative Count preferred this appeal setting out the following grounds of appeal in his petition of appeal filed on 11.3.2015:-
 1. ***The trial court erred in law and fact by convicting him on a defaulted charge sheet.***
 2. ***The trial court did not give him a chance to understand the charge against him hence a plea of guilty was immediately entered.***
 3. ***The case that he was convicted upon is still under the same trial court now herewith another charge despite his sentence hence infringement of his right on Article 50 of the Constitution of Kenya.***
 4. ***His conviction and sentencing was totally relied upon on a defective charge sheet.***
 5. ***The trial court erred in law and fact in convicting him in a case that was not investigated.***
 6. ***The trial magistrate erred in matter of law in accepting amendment on a charge sheet that had already convicted him.***
8. At the hearing of the appeal the appellant appeared in person while M/s. Maurine Odumba learned Prosecution Counsel appeared for the State.
9. The appellant submitted that he was appealing against both the conviction and sentence, he submitted the charge sheet was defective as the evidence of the complainant was in variance with the charge sheet, that PW4 did not witness the incident and that the language used was Kiswahili language which the appellant did not understand.
10. The learned state counsel M/s. Maurine Odumba conceded the appeal as the plea taking was not proper and the evidence given after trial could not support conviction as the facts are at variance with the charge sheet, that the alleged substituted charge remains unknown, that the sentence was not proper and that on matter going for retrial chances of sustaining conviction is not there.

11. I have considered the petition of appeal and submissions by the appellant and learned State Counsel and I propose to deal directly with the issues raised by the appellant herein and the State Counsel.
12. The appellant was convicted on the alternative charge for an **offence of Committing an indecent Act with a child contrary to II(I) of the Sexual Offences Act No. 3 of 2006**. The particulars are:-

“On the 10th day of August 2014, in Bondo District within Siaya County intentionally touched the buttock/breast/vagina of J A O a child aged 14 years with his penis”

13. The facts given by the prosecution at the time of plea taking were in complete variance with the charge sheet in that it did not state the appellant intentionally touched the buttock, breast and vagina of J A O. nor was the age of the complainant stated. The prosecution stated the appellant touched the buttock of the complainant's only with his hands, it is not necessary that all the three mentioned parts in the charge sheet be touched, but bearing in mind that the charge talked of three key parts which the appellant had touched with his penis it was important that all fact in support of the charge be put forward to clear any doubts. Further more the complainants gave evidence in support of the counts the appellant faced on 9.10.2011 and stated that on 10.8.2014 at 12 noon the appellant went to her place and after conversation held only her neck, wanting to have Sex with her and had attempted to remove her skirt. The prosecution sought to substitute the charge stating that the evidence was inconsistent with the charge sheet.
14. **“Indecent Act”** is defined as follows:-

“Indecent Act” means an unlawful intentionally act which causes-

(a) any contact between any part of the body of a person with the genital organs, breast or buttocks of another, but does not include an act that causes penetration.

(b) exposure or display of any pornographic material to any person against his or her will;

The complainant testified the appellant touched her neck with his hand. The evidence is in variance with the charge sheet in that there was no mention of touching of the complainants buttocks, breast or sexual organs by the appellant and after all the evidence was not subjected to cross-examination as PW1 was not recalled. I therefore agree with the learned State Counsel and the appellant that the facts as given did not support the charge. The trial court was in error in convicting the appellant when the facts were in total variance with the charge sheet. There were no facts upon which a conviction could stand. The Plea-taking is not a mere mechanical process but is an integral part of trial process. It must be in accordance with the law. Its importance need not be over emphasized. The way a plea should be taken and the essential phase in the process of plea taking were described with absolute simplicity and clarity in the case of **ADAN V REPUBLIC [1973] E.A. 443** that:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged.”

15. The starting point in taking a plea is when the trial court enquires as to the language the accused understands and/or the language he wishes to be used in the proceedings. The trial Court is supposed to promptly record the specific language the accused understands and wishes the proceedings to be conducted, in as this is a Constitutional requirement under **Article 50 (2) (b), (j), (k) and (m) of the Constitution of Kenya 2010**. The accused may understand more than one language and in such a situation the court should adopt a simple, clear and proper practice by enquiring from the accused as to the actual language that the accused feels comfortable with and understands better or prefers to be used and record should show the language of choice of the accused but the record should not to read as in the instant case thus English/Kiswahili/Dholuo as it would be difficulty to know out of the three (3) languages which language the accused

understands, preferred and chose as the language of his choice in conducting the proceedings.

16. The second phase in plea-taking entails the recording out the substance of the charge and explaining every essential element of the offence to the accused in the language he understands and wishes to be used in the proceedings. The language used must not only be indicated but must be stated that substance of the charges and every element has been stated by the court to the accused person in the language that he/she understands. That without indicating the language that is not proper plea-taking. In **Meru HCCRA 164 of 2010 Silas Ithalie Muroki V Republic Lesitt and Makau J.J.** illuminated on this phase thus:-

“It is very important that the court takes interest to explain the accused every element of the charge and all its essential ingredients in a language he understands. The court of plea should in particular have an eye for details.”

17. I have purposely set out the legal dimensions on plea-taking. I can therefore categorically state that where plea is not taken properly, the proceedings is fatally defective. I have perused the trial Court's record and have observed that the trial magistrate did not record the language the Appellant understands. It only recorded:-

“Accused – present interpretation – English/Kiswahili/Luo

The substance of the charge and every element thereof has been stated by the court to the accused person in language that he/she understands who being asked whether he/she admits or denies the truth charges replies

18. The language indicated is English/Kiswahili/Luo, that in my view obscured the particular language that was used and even more so whether the language used is one that the appellant understand. The record of the trial court is confusing and that lapse affected the tenor of the proceedings thereby diverting the course of fair trial. Though constitution requires courts to use a language or interpret the proceedings into the language that accused understands the court in my view should record for example:-

“Accused - I understand English and Dholuo/Language. I wish the proceedings herein to be conducted in Dholuo Language which I prefer better than English”

In the instant case the trial court should have recorded the language the accused understands, wished and/or preferred used in the proceedings. That is the matter in issue as the trial court herein did not record the language preferred, by the accused and used in the conducting the proceedings, thus making the proceedings incurably defective.

19. The trial magistrate yet committed another serious judicial errors. There is nothing on record which shows that on 10.10.2014 the trial court read out the alleged substituted charge and the particulars thereof in a language which the Appellant understood. Further there is nothing on record which shows that the trial magistrate explained to the Appellant the substance of the charge and every element thereof in the language he can speak and understand and all the essential ingredients of the offence charged.

20. That even after facts on the alternative charge were read and purportedly admitted by the appellant the trial magistrate made further error by failing to convict the appellant on his own plea of guilty and proceeded to sentence the appellant to serve 5 years imprisonment without first convicting him. Then I believe the mistake occurred due to the trial magistrate not being conversant with plea-taking procedure and what is required after facts are admitted by an accused person.

21. In view of the above reasons, I find and hold that the trial violated the constitution, as regards to fair trial as enshrined under **Article 50 of the Constitution**, thereby making the proceedings a mistrial.

22. Whether I should order a retrial. The learned trial State Counsel conceded the appeal but did not root for a retrial. Urging a retrial may not result in a conviction. In the case of **Bennard Lolimo Ekimat V. R Cr. A No. 51 of 2014** (unreported) it stated that is required for ordering a retrial.

The principle which should guide the court in the issue were set out thus:-

“..... the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice requires it.”

23. The Court of Appeal amplified further the principles in the **Ekimat case (Ibid)** by enumerating some specific considerations, which a court should take into account in deciding whether a retrial should be ordered. Those considerations include a determination:-

- a. ***Whether a retrial will occasion injustice or prejudice to the appellant.***
- b. ***Whether it will accused the Prosecution an opportunity to fill up gaps in its evidence in the first trial, and***
- c. ***Whether upon consideration of the admissible on potentially admissible evidence a conviction may result.***

24. The appellant herein stood trial in 2014. M/s. Maurine Odumba Learned State Counsel did not court that witness will be available but stated it is not likely if the retrial is ordered to sustain a conviction. Considering the errors herein were judicial errors, and in the overall, there is likelihood that the appellant will suffer prejudice by retrial, that it would amount to according prosecution an opportunity to fill up gaps in the evidence in the first trial, and upon consideration of the admissible on potentially evidence a conviction may not result. I therefore decline to order a retrial.

25. Having come to the conclusion that I have to allow the appeal quash the conviction and sentence is set aside. The appellant should be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 12TH DAY OF MAY, 2016.

J. A. MAKAU

JUDGE.

DELIVERED IN THE OPEN COURT

IN THE PRESENCE OF:-

Appellant in person: Present

M/s Odumba for State: Present.

Court Clerk: 1. Kevin Odhiambo

2. Mohammed Akide:

J. A. MAKAU

JUDGE