REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.72 OF 2015

(An appeal from original conviction and sentence of Kilgoris PM'S C Criminal Case No. 1214 of 2014 by Hon. M. MUNYENDO - SITATI RM dated 1st September, 2015)

ZACHARY OUKO ONTEGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein, **ZACHARIA OUKO ONTEGI,** was charged with the offence 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 were that on 28th August 2015 at Bassi Masige West Location, Gioseri Sub-location in Nyamache Sub- county within Kisii County, unlawfully did cause his penis to penetrate the vagina of **MBM** (name withheld) a girl aged 3 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences act No. 3 of 2006**. The particulars of the alternative charge were that on 28th August 2015 at Bassi Masige West Location, Gionseri Sub Location in Nyamache Sub-County within Kisii County intentionally touched the vagina of **MBM** (name withheld) a girl aged 3 years with his penis.

3. The appellant pleaded guilty to the main charge of defilement and was consequently convicted on his own plea of guilty and sentenced to life imprisonment.

4. The appellant has now appealed against both the conviction and sentence and has set out the following grounds of appeal:

> **1. That, I pleaded not guilty to the charges of defilement.**
>
> **2. That, the magistrate did not allow me back to retrial so that I can attend the witnesses of the victim.**
>
> **3. That, the the term imposed to me was harsh, the trial magistrate did not grant me fair sentence which will allow me to assist the family members who are suffering of insecurity and food since I was the bread winner.**

4. That, I be provided with High Court and law court proceedings to assist me adduce grounds during court of appeal submissions.

5. When the appeal came up for hearing before me on 15th September, 2016, the appellant, who appeared in person, submitted that he admitted a charge he did not commit because a mob had beaten him during his arrest. He denied having defiled the minor.

6. Mr. Otieno, counsel for the state, opposed the appeal and submitted that the appellant's plea of guilty was unequivocal as he admitted the offence twice even after the court read out the main charge to him and cautioned him of the grave consequences of a guilty plea on the charge of defilement of a girl below 11 years.

7. Mr. Otieno added that the appellant's claim that he pleaded guilty because he was beaten by a mob could not hold any water because this was an issue that he ought to have raised before the trial court at the time he took the plea. Mr. Otieno argued that the appellant had ample time to change his plea upon being warned of the possible life imprisonment and upon the facts of the case being read out to him.

8. On the sentence, Mr. Otieno submitted that life imprisonment is the only sentence provided for under **Section 8 (1)** and **Section 8 (2) of the Sexual Offence Act** in which case, the trial magistrate had no discretion to mete out a different sentence.

9. This being a first appeal, I am now under an obligation to re-evaluate and re-analyze the evidence tendered before the lower court with a view to arriving at my own independent findings. **See Okeno vs Republic (1972) EA, 32.**

10. In the instant case, no witnesses were called by the prosecution because the appellant pleaded guilty to the offence. I will however re-evaluate the proceedings taken before the lower court with a view to establishing if the plea was properly taken and was therefore unequivocal.

11. A careful scrutiny of the lower court record shows that when the case came up for plea on 31st august 2015, the plea was deferred to the following day to enable the prosecution to amend the charge sheet and that on 1st September, 2015 after the amendment of the charge, the plea was taken. The court recorded the proceedings as follows:

"**Prosecutor: I have amended charge sheet. I wish to substitute.**

Court: Application allowed as prayed. Charge sheet to be read in Kisii language as translated by Kemunto. Accused responds as follows:

MAIN CHARGE

Accused- it is true.

Court: The court explained to accused that upon him pleading to the main charge he is liable to life imprisonment. He is given a second chance for the same charge to be read to him.

MAIN CHARGE

Accused: it is true

Court: A plea of guilty entered."

12. From the above extract of trial court's proceedings, it is first and foremost not clear to any reader what kind of amendment the prosecution made to the charge sheet and if the accused understood the basis or import of the said amendment. It is also not clear if the new charge sheet was read out and every element

of it explained to the appellant.

13. The language that was actually used when reading the charge and if the appellant understood the said language has also not been disclosed as the trial court only recorded that the charge was to be read in Kisii language as translated by Kemunto.

14. **Section 207 (2) of the Criminal Procedure Code** sets out the procedure to be followed by courts in plea taking as follows:

> **"(2) If the accused person admits the truth of the charge otherwise than by a**
>
> **plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the fact upon which the charge is founded."**

15. The procedure for taking of a guilty plea was stated in the celebrated case of **Adan vs Republic (1973) EALR 445** as follows:

> **"When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused's reply must of course, be recorded."**

16. In the instance case, I am not satisfied that the guilty plea was unequivocal. Of critical importance is that it is not clear, from the court record, if the first step of reading and explaining the charge and all its essential ingredients to the appellant in his language or the language he understands was actually undertaken. Moreover, such statement as "It is true" in response to a charge, have never been construed to be an answer to the charge. **See Stephen Ouma Onyango & Another vs Republic [2012] eKLR**.

17. From the above analysis, it is clear that the plea of guilty was not unequivocal and accordingly the conviction was not safe as it was vitiated by irregularities on plea taking. The appeal is accordingly allowed, the conviction quashed and the sentence set aside.

18. Having allowed the appeal for the reasons given above, should this case go back to the lower court for retrial?

19. In the case of **Tajiri Kalume Kahindi vs Republic – CA at Mombasa Criminal Appeal No. 270 of 2006**, an appeal was allowed on the grounds that the conviction could not stand as it was vitiated by certain irregularities.

20. In the case of **Ahmed Sumar vs Republic (1964) E.A 481 at pg 485**, the court of appeal expressed itself on the question of a retrial as follows:

> **"It is true that where a conviction is vitiated by a gap in the evidence or other defect for**

which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered."

The court then continued at paragraph 11 of the same page as follows:

"We are also referred to the judgment in Pascal Clement Braganza vs Republic [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."

21. In the instant case, the facts and circumstances of the case, the appellant faced a serious charge of defilement of a girl aged 3 years which charge attracts a mandatory minimum sentence of life imprisonment upon conviction. It is about 1 year since the offence in question was allegedly committed and the appellant has thus been in custody for one year. That being the case, I am certain that the witnesses can still be traced in good time in order to mount a successful retrial.

22. The defect in the proceedings lay squarely at the door of the court and not the prosecution. Having perused the record in this appeal, I find that the interest of justice demands for a retrial. I dare not say more lest I prejudice the said retrial. Consequently, I allow the appeal, quash the appellant's conviction and set aside the life sentence imposed on him. The appellant shall be produced before another magistrate at Kilgoris Law Courts other than the magistrate who conducted the initial trial. I direct that Lower Court file be transmitted to Kilgoris Principal Magistrates Court as soon as possible for purposes of taking a fresh plea. In the interim the appellant shall remain in custody. Mention at Kilgoris court on 24/11/2016.

Dated, signed and delivered in open court this 9th day of November, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Appellant in person for the Appellant

Omwoyo Court Clerk