



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 113 OF 2014
(FORMERLY KISII HCCR NO. 219 OF 2012)

BETWEEN

STEPHEN OMONDI NGONDI APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 986 of 2012 at Principal Magistrates Court at Homa Bay, Hon. S. O. Ongeru, SRM dated on 10th September 2012)

JUDGMENT

1. In the subordinate court, the appellant faced a charge of defilement contrary to **section 8(1) and (4)** of the ***Sexual Offences Act, 2006***. The particulars were that between 26th August 2012 to 9th September 2012 at [Particulars Withheld] Village, Tonga Sub-location in Suba District within Homa Bay County, he intentionally and unlawfully did an act which caused penetration with his genital organ namely penis to penetrate into the female genital organ namely the vagina of MA, a child aged 14 years old.
2. The appellant was convicted on his own plea of guilty and sentenced to 20 years imprisonment. He now appeals to this court against the conviction on the following grounds set out in the amended petition of appeal dated 27th November 2014:
 - i. *The learned magistrate erred in law when he convicted the appellant to a charge that was not properly translated to the appellant.*
 - ii. *The learned trial magistrate misapprehended the law with regard to how a plea should be taken.*
 - iii. *The interpretation was not in a language known to the appellant and as such the plea was therefore unequivocal.*
 - iv. *That the learned magistrate erred in law and in fact.*
 - ii. Mr Nyauke, counsel for the appellant, relied on the grounds set out above and urged the court to find that the plea was unequivocal and should be set aside. In opposing the appeal and supporting the conviction, Mr Oluoch, learned counsel for the State, submitted that the charge and elements thereof were read to the appellant and the conviction was therefore proper.
3. The requirements recording a guilty plea provided for under **section 207** of the ***Criminal***

Procedure Code (Chapter 75 Laws of Kenya) were elucidated in **Adan v Republic [1973] E.A. 445** as follows:-

- i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language 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 immediately state the facts and the accused should be given an opportunity to dispute or explain the fact or add any relevant facts.
 - iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.
 - v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.
4. Regarding the facts of the case, the court **Judy Nkirote v Republic Meru HCCR Appeal No. 48 of 2010 [2013]eKLR** observed that, *"The facts of the prosecution case are supposed to give further details of what it is the accused person is accused of doing or failing to do which led to the circumstances which constitute the offence charged. The statements of facts given by the prosecution must be explained to the accused person by the court in order for the court to be certain that he has understood the facts. The accused is then given an opportunity to either admit or deny those facts. At that point the court should give the accused person an opportunity not merely to admit or deny but also to dispute the facts or explain the facts or add any relevant facts. If the accused person denies the facts then a plea of not guilty is entered. If he admits the facts then the court will enter a plea of guilty and convict him for the offence."*
5. Even where the accused has admitted the facts as read to him, the court may yet record a plea of not guilty where the accused says something in mitigation that negates the offence. The Court of Appeal in **John Muendo Musau v Republic NRB CA No. 365 of 2011 [2013]eKLR** observed that, *"We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence."*
6. The proceedings show that the procedure for recording a guilty plea was adhered to. The charge was read to the appellant in **Swahili** which is the language he understood and he stated that 'it is true'. From the proceedings, the following facts were read to the accused

Prosecutor:

The complainant who is aged 14 years was staying with a guardian called COO between 26.9.2012 and 9.8.2012 at [Particulars Withheld] village in Suba. The complainant disappeared to unknown place. The guardian received tip off that the accused is married to Stephen Omondi Ngudi.

The guardian went with one member of the community police on 9.8.2012 to the accused home and arrested the accused and the minor. They were escorted to Magunga Police station. The complainant was taken to Suba District hospital where she was treated and examined and the Doctor convinced that the girl was defiled (P3 form Exhibit 1).

7. The appellant in response to the statement of facts stated that, *"It is true."*
8. The facts narrated by the prosecutor do not disclose the offence of defilement as defined under the **Sexual Offences Act**. Under **section 8(1)** of the **Act**, the prosecution must establish that the person has committed an act which causes penetration with a child. *"Penetration"* under **section 2** of the **Act** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."* The facts do not allege any penetration which is an essential part of

the offence to enable the appellant admit or deny the same.

9. The Medical examination report, the P3 form, which was prepared after examination of the complainant, was of little assistance. In respect physical state of and any injuries to the genitalia, the clinical officer recorded “*hyperaemic vagina.*” The clinical officer also noted that there was the presence of, “*foul smelling whitish vaginal discharge.*” It is important for the accused to be informed of and explained the tenor of the medical report when it is relied upon and for the magistrate to ensure that it supports the charge. In this instance, the report without further explanation does not demonstrate that there was penetration or that the discharge had anything to do with the alleged defilement.

10. I am satisfied that the appellant’s plea of guilty was equivocal and as a result I allow the appeal and quash the conviction.

11. In view of the time that has elapsed, I think a retrial is still possible. In the circumstances, the appellant is remanded in custody until such time as he is taken before the Homa Bay Chief Magistrates Court to plead to the charges on **10th February 2015.**

DATED and DELIVERED at HOMA BAY this 9th day of February 2015

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke & Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecution instructed by the Office of the Director of Public Prosecutions for the respondent.