



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL APPEAL NO. 11 OF 2015

(BEING APPEAL FROM CRIMINAL CASE NO. 885 OF 2013 OF THE CHIEF MAGISTRATE'S COURT AT NAROK)

MBITHUKA KINGOLA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged before the Principal Magistrate's Court Narok on 24/7/2014 with Defilement of a child aged 16 years contrary to section 8 (1) (4) (sic) of the Sexual Offences Act. The particulars stated that on 21st July, 2013 at [particulars withheld] Area, Narok County, he caused his penis to penetrate the vagina of FC a child aged 16 years. The alternative charge was Committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.
2. The Appellant pleaded guilty to the main count, but rather than adduce the facts relevant to the charge the prosecutor stated to the court:

“No special facts. Facts as per charge sheet. P3 form and medical chits to be Exhibit 1, 2, 3.”
3. Thereafter the record does not reflect that the court called upon the Appellant to respond to the scanty “facts” nor is there any record of a conviction being entered against the accused. After mitigation a sentence of ten years imprisonment was meted out.
4. Although the Appellant's grounds of appeal, save ground 1, make no reference to the plea, while emphasising mitigation factors also included in his submissions, it is proper that the state has conceded this appeal. The plea taking procedure as recorded in the proceedings was defective in every detail.
5. As stated in the case of **Republic –Vs- Adan [1973] EA 445** a trial court taking plea must satisfy itself that the accused understands the charge and plea of admission of guilt offered by the accused is unequivocal. That requirement cannot be satisfied where the particular facts in respect of a charge are not read out by the prosecutor upon the accused pleading guilty to the charge read out and explained.
6. The court outlined the correct procedure for plea taking as follows in **Adan –Vs- Republic [1973]**

EA 445 as restated in **Kariuki –Vs- Republic (1984) KLR 809** at page 810 as follows:

- “a) The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he understands;**
- b. He should then record the accused’s own words and if they are an admission, a plea of guilty should be recorded;**
- c. The prosecution may 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;**
- d. If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused’s reply.”**
7. For the foregoing reasons the conviction (unstated in this case) and sentence against the Appellant cannot stand. The same are quashed and set aside respectively. I have given due consideration to the question whether or not to order a retrial in this case.
8. The Court of Appeal in **Pius Olima & another –Vs- Republic [1993] eKLR** in considering a similar issue stated:

“Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar –Vs- Republic [1964] EA 481; Manji –Vs-Republic [1966] EA 343; Mujimba –Vs- Uganda, [1969] and Merali & Others –Vs- Republic, [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court.....is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.”

9. In this case the procedure adopted by the lower court in taking the Appellant’s plea to the charge was defective and even though the Appellant has served almost two years of his sentence, I think the charges facing him were serious and the general interests of justice justify a retrial order.
10. In the circumstances, I would direct that the Appellant be produced before the Chief Magistrate’s Court at Narok on 29th June, 2015 for purposes of pleading a fresh to the charges. The prosecution will need to address its mind to the proper framing of the statement of the offence and particulars under the Sexual Offences Act.

Delivered and signed at Naivasha, this 11th day of June, 2015.

In the presence of:-

State Counsel : Mr. Kibelion

For the Accused : In person

C/C : Steven

Accused : Present

C. MEOLI

JUDGE