



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 129 OF 2012

BETWEEN

JAMES OKETA KIBEE.....APPELLANT

AND

REPUBLICRESPONDENT

(Being appeal from the conviction and sentence of Hon. J. Macharia SRM dated 4th May 2012 in the original Keroka Criminal Case No.616 of 2012).

JUDGMENT

1. The appellant James Oketa Kibee was charged with the offence of rape contrary to Section 3(1) as read with subsection (3) of the sexual offences Act No. 3 of 2006 the particulars of which were that on 4th day of May 2012 at [particulars withheld] sub-location in Masaba South District location Kisii County intentionally and unlawfully caused his penis to penetrate the anus of C M O woman aged 28 years.
2. He faced an alternative charge of indecent assault of a female contrary to Section 11(1) of the sexual offences Act No. 3 of 2006 the particulars of which were that on 4th day of May 2012 at [particulars withheld] sub-location in South Masaba District within Kisii County unlawfully and indecently assaulted C M O a female aged 28 years by touching her private parts namely anus.
3. He pleaded guilty to the main charge and was convicted on his own plea of guilty and sentenced to 20 years imprisonment. Being aggrieved by the sentence he filed this appeal and raised the following grounds:-
 - (a) He pleaded guilty without knowing the consequences of the charge.
 - (b) The nature of the offence was not explained to him.
 - (c) He was lured to plead guilty with intent that he will be freed.
4. The issue for determination the appellant having pleaded guilty to the charges is whether the plea was unequivocal. In the case of **Adan V Republic (1973) EA 445** the court of appellant set out the steps to be taken where an accused person pleads guilty to the charge as provided for under Section 281 of criminal procedure code in the following term.

“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. If the accused then admits all those essential elements, the magistrate shall 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 prosecution 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 guilty 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 reply must be recorded...”

5. From the proceedings herein there is no indication of the language the plea was taken into save that the appellant was asked and replied in kiswahili the court having recorded that Article 50(2) g and h, of the constitution complied with. Further the facts as need stated that the complaints was the accused girlfriend whereas the P3 form and the appellants submissions before me were that the complainant was the appellants wife.

6. I am therefore persuaded that and hold that the appellant being a layman did not understand the motions he went through while taking plea and therefore his plea of guilty was not unequivocal and would therefore allow the appeal set aside the conviction and quash the sentence herein.

7. In the interest of justice I hereby order a retrial of the appellant herein before any other magistrate at Keroka Principal Magistrate court rather than J. Macharia. The accused shall therefore appear before the Principal Magistrate Keroka for purposes of taking plea.

Delivered, signed and dated at Kisii this 2nd day of July 2015.

J. WAKIAGA

JUDGE

In the presence of:

Mr. Majale advocate for the state.

Appellant in person.