REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 57 OF 2015

(CORAM: J. A. MAKAU – J.)

TITUS OKUMU TITO ….…..... APPELLANT

VERSUS

REPUBLIC ….…..... RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 333 of 2015 in Ukwala Law Court before Hon. R.M. Oanda – S.R.M.)

JUDGMENT

1. The Appellant **TITUS OKUMU TITO** was charged with an offence of defilement contrary to Section 8 (1) (4) of The Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 23rd day of April, 2015 in Rumbuta Sub-location in Ugunja District within Siaya County, intentionally caused his penis to penetrate the vagina of **N A O** a Child aged 16 years. The Appellant faced on alternative Count of **Committing an indecent act with a child contrary to section 11(1) of The Sexual Offences Act No. 3 Of 2006.** The particulars were that at the same date and same place the appellant intentionally touched the vagina of **N A O** a child aged 16 years with his penis.

2. That when the charge was read and explained to the appellant in English/Kiswahili language the appellant replied in English/Kiswahili, true for both the main count and the alternative Count. The trial Court entered a plea of guilty without indicating the plea of guilty was for main Count or the alternative Count. On 14th July, 2015, the learned State Counsel gave the facts of the case and the appellant replied that facts were true. The Learned trial Court then proceed to convict the appellant on his own plea of guilty. The appellant mitigated and was sentenced to fifteen (15) years imprisonment.

3. Aggrieved by both conviction and sentence the appellant preferred this appeal through a petition of appeal dated 3rd August, 2015, in which he set out the following grounds of appeal.

> ***"1. That he pleaded guilty to the offence.***
>
> ***2. That he did not fully understand the offence with which he was charged due to language barrier and an interpreter was offered hence Article 50 (2) b and Article 50 (2)m of the constitution were not complied with as required in law.***

3. That the learned Magistrate erred in law by convicting him without considering that the prosecution or complainant did not outline the facts of the case upon which the charge is founded.

4. That the learned Magistrate erred in law and in facts to convict him without considering that the age factor was not put into consideration before making the findings or judgment as regards him and excessive as a whole.

5. That he wished to attend the hearing of this appeal.

4. The appellant appeared in person and relied on written submission which he produced before the Court. The appellant before proceeding on with the appeal insisted that the only language he could understand was Kisoga Language as he was a resident of Uganda. It later came to Court understanding Kisoga and Samaia language are closely related and he could understand Samia language leading to getting a Samia Interpreter. The appellant confirmed understands the Samia language and that he was ready to proceed with his appeal using Samia language.

5. The Appellant submitted that he was not satisfied with the trial Court, Judgment as he was not accorded a fair trial. He denied the charge and the particulars in support of the charge adding that he did not understand the Kiswahili and English language used during the trial. He prayed his appeal be allowed.

6. The State was represented by Mr. Ombati learned State Counsel. He submitted that the trial at the Lower Court as per Court's record were conducted in English language after the Court enquired whether the appellant understood the language, he however submitted in view of the appellant's submission the respondent is not sure whether the appellant understands English Language. He submitted in light of the appellant's submission his rights to a fair trial might not have been achieved. He stated he concedes to part of the appeal being allowed but without the appellant being released but Court ordering a retrial, so that the appellant can be accorded a fair trial by being accorded an interpreter. He added that would achieve a fair trial for both the victim and the appellant.

7. In the instant appeal the proceedings before the Learned trial Magistrate were conducted in English/Kiswahili language which the Learned trial Magistrate noted the appellant understood. That was on 13th July, 2015 when plea was being taken. The trial Magistrate took plea on both the main count and the alternative charge and entered plea of guilty presumably for both. The facts were given in a language that the proceedings did not disclose. The Court convicted the appellant after facts were given and sentenced him to serve fifteen (15) years imprisonment. It appears from the sentence the appellant though pleaded guilty to both main counts and the alternative count he was sentenced on the main count. In cases where an accused is charged with main count with an alternative count and he pleads guilty to the main count, the trial count should not proceed to take plea on the alternative count as Court cannot enter a plead of guilty on both the main count and the alternative charge at the same time. The learned trial Magistrate erred when he entered a plea of guilty on both the main count and the alternative count as he should not have done so. However, he was correct in convicting and sentencing the appellant on the main count though the record do not show that the conviction was on the main count having entered a plead of guilty on both the main count and the alternative charge.

8. On plea taking I would like to state that it is not a mere mechanical process. It is an integral part of the trial process. It must be done correctly and properly in accordance with the provisions of the law. (on the subject see **BGM HC REVISIONS APPLICATION NO. 744 OF 2013 ABRAHAM WAAFULA V R thus:-**

"Taking of a plea in a criminal trial is not an abstract concept or a mere technicality. It is a substantive requirement of the Law and an integral component of fair trial. That is why it is done in a particular manner which adheres to defined prescriptions and principles in law in order for it to [give] produce desired results the plea."

9. The way the plea should be taken and the essentials phases in the phases of plea-taking were described

with absolute simplicity and clarity in the case of **ADAN V. REPUBLIC [1973] E.A. 445,** thus:-

> ***"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."***

10. I feel that it would be appropriate to state that plea taking is in two successive levels. I will make reference to the illumination of these steps in the cases **MERU HCCRA 164 OF 2010 SILAS ITHALE MURIUKI V. REPUBLIC and BGM HC REVISION APPLICATION NO. 744 OF 2013 ABRAHAM WAAFULA V. REPUBLIC.** In the later case, the Court rendered itself thus:-

> ***"The Start-line is when the trial Court enquires as to the language the accused understands and which he wishes to be used in the proceeding. That fact must be specifically recorded by the Court and the answer given therein, for it is a constitutional requirement under Article 50 and more specifically 2(b) and (m) of the constitution ---------- trial Court's should adopt the simple, clear and proper practice where an inquiry and to the language the accused understands is made and his presence recorded appropriately."***

11. It is my view therefore the trial Court is under a constitutional duty to enquire from the accused from the on set the language he understands and the language he wishes to be used in the proceedings. The enquiry should be recorded together with the reply from the accused with regard to the language he understands and language of his choice. The indicating of the language the accused understand and wishes to use is not an onerous or discretionary task, it is not a procedural issue or pleasing exercise but is a constitutional requirement as it goes to the root of ones constitutional rights in criminal matters and must always without any exception be adhered to.

The Second phase is plea taking entails the reading out the substance of the charge and explaining every essential element of the offence to the accused in the language he understands. The trial Court in my view must enquire from the accused whether he has understood the essential elements of the offence before proceedings to taking of the plea. See the case of **ADAN V**. **R. (Supra) and Meru HCCRA No. 164 of 2010 (Supra)** in the former case, where Lesiit and Makau J.J. **f**urther 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 Count of plea should in particular have an eye for details."***

13. I have taken a lot of pain in setting out the legal dimensions on plea-taking. I can in view of what I have stated in this judgment categorically state that where plea is not taken properly, the proceedings is totally defective. I have perused the learned trial Magistrate record and I have observed the said Magistrate did not record the language the Appellant understood. It is clearly recorded:

> ***"Accused: Present"***

14. I also note on all the occasion the appellant appeared before trial Court thus 13th July 2015, 14th July 2015, 17th July, 2015 and 21st July 2015, it was only on 13th July 2015 when the language used was indicated for the Appellant during plea-taking, was English/Kiswahili. The indication of language as English/Kiswahili obscured the particular language that was used and even more so whether the language used is one that the appellant understood and wished to be used in the proceedings. I have not hesitation to state that record of the trial Court with regard to the language used during plea-taking and thereafter is generally wanting, and conflicting and that lapse in my view affected the tenor of the proceeding, thereby diverting the cause of fair trial. **Article 50 (1) (2) (m) of the constitution of Kenya 2010** provides:-

> ***"50 (1) Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a Court or, if appropriate, another***

independent and impartial tribunal or body.

(2) Every accused person has the right to fair trial, which includes the right: ..."

"(m)"(quote)

15. The above article requires Courts to use a language or interpret the proceedings into a language that accused understands. The silence on the language appellant understands and wished to use did not satisfy that constitutional requirement bearing in mind the record do not show whether the appellant had been asked the language he understands and the language he wished to use. The issue here is not about the language used only but is also whether it was the language the appellant understood and wished used. That is what the trial Magistrate didnot record, thus making the proceedings thereby defective.

16. I have considered the proceedings and the appellant's petition of appeal as well as the submissions by the learned State Counsel who conceded the appeal on the ground that the appellant was not accorded a fair trial. I have for reasons, stated in this judgment found that the trial learned Magistrate violated the constitution,particularly under Article 50 of the constitution of Kenya 2010, which deals with fair trial, thereby making the proceedings a mistrial. I accordingly find merits in this appeal and quash the conviction and set aside the sentence.

17. The only question that remains for determination by this Court is whether I should order a retrial. The learned State Counsel rooted for retrial. While the appellant left the entire matter at the hands of Court. I have to state that before making an order for retrial I must be satisfied that the case is apt for a retrial. The principle which should guide the Court in this issue is not new as it was settled long ago by the **Court of Appeal in the case of Bernard Kilimo Ekimat V R Criminal Appeal No. 15 of 2004 (unreported)** that:

"..... the principle that has been acceptable to Courts is that each case must depend on the particular facts and circumstances of that case but on order for retrial should only be made where interest of Justice require it."

18. In the aforesaid judgment the Court of Appeal, amplified further the principle that has been acceptable by enumerating some specific considerations, which the Court should take into account in deciding whether a retrial should be ordered. Those considerations included a determination:-

1) Whether a retrial will occasion injustice or prejudice to the Appellant;

2) Whether it will accord the prosecution an opportunity to fill up gaps in its evidence in the first trial and:

3) Whether upon consideration of the admissible or potentially admissible evidence a conviction may result.

19. The Appellant was charged with the offence of defilement on 10.7.2015. Plea was taken on 13th July, 2015. That in view of the age of this matter prosecution witnesses wont be hard to getConsidering the errors herein were Judicial errors, and in the overall, there is no likelihood that the Appellant will suffer any prejudice by retrial, I hereby order a retrial of this case by a magistrate of competent Jurisdiction, other than the trial magistrate who presided over and rendered the decision appealed from.

20. The original file shall be remitted immediately to Ukwala principal Magistrate's Court for the Appellant to take plea in accordance with the law for the same charges of defilement contrary to Section 8 (1) (4) of **The Sexual Offences Act No. 3 Of 2006** with 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.**

21. Being guided by **Article 4 9(1) (f) and (h) of the Constitution**, I hereby order that, the Appellant should remain in custody until he is produced before the trial Court for plea-taking in accordance with the

constitution. The Appellant shall be produced before the trial Court for the taking of plea and determination of the issue of bail or bond not later than 24 hours from the date of this judgment or if the twenty-four hours ends outside ordinary Court hours, or on a day that is not an ordinary Court day, then by the end of the next Court day. The release from remand will then depend on an order for release or bond or bail by the trial Court, and once bond is granted, on Appellant's bound by the terms of bond or bail set by the trial Court.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 3RD DAY OF DECEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 3RD DAY OF DECEMBER, 2015.

In the presence of:

Mr. Ombati State Counsel – present

Appellant – Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akidae

J. A. MAKAU

JUDGE

19.