



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 11 OF 2012

BETWEEN

JUMA OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT.

[Appeal from the Conviction and sentence in Criminal case of the Chief Magistrate's court dated 5.12.2012 at HOMA BAY: HON. S. ONGERI ESQ., - S.R.M.]

IN

CM'S C. HOM BAY NO. 1123 OF 2012]

JUDGMENT

1. The appellant was on 8th October, 2012 arraigned before the Senior Resident Magistrate's court with two offences namely:-

COUNT 1: defilement of a child Contrary to **Section 8(1)(2)** of the Sexual Offences Act.

The particulars were that on 5th October, 2012 at [particulars withheld] village, Asego Location unlawfully did an act which caused penetration with your genital organ namely penis into the genital organ of T W O namely vagina, a child of 4 years.

ALTERNATIVE CHARGE: Indecent Act Contrary to **Section 11(1)** of the Sexual Offences Act.

PARTICULARS: On the 5th day of October, at [particulars withheld] Village Asego Location in Homa Bay District committed an indecent act with T W O a child aged 4 years by touching your penis against her vagina.

2. He pleaded not guilty to both charges and his trial fixed for 22nd October, 2012 with a routine mention on 5th November, 2012. On the day of the mention he told the court he was sick and the court made an order that he be taken to the Homa Bay District Hospital for treatment. His trial was confirmed to commence on 5th December, 2012 but come that day he asked the trial magistrate to read the charges to him whereupon he pleaded guilty, was convicted and sentenced to life imprisonment. He has now appealed against the conviction and sentence.
3. His petition sets out 6 grounds of appeal namely:
 1. ***Your honour I did not plead guilty for the offence and charges preferred against me by***

the prosecution.

2. *That I did not have sound mind and was brought to Homa Bay Township to stay with sister to my mother 'Aunt' to come and give out a helping hand but never gave instead threw me out.*
 3. *my Lord the prosecution and trial magistrate never gave me a fair hearing, this is contained in chapter four part two Article 50 Section 2(g) to choose and be represented by an advocate and to be informed of this right promptly, and (h) to have an advocate assigned to the accused person by the State at State expense, if substantial justice would otherwise result, and to be informed of this right promptly.*
 4. *That I changed plea after few mentions and hearing was asked to go and make up my mind over the matter. My Lord the prosecution and the trial Magistrate error in law were not fair in justice by awarding me such a sentence. They both should have exhausted all the loopholes by sending me to a medical attention for a full and comprehensive psychiatric evaluation as to my mental fitness before standing trial but this never happened.*
 5. *My Lord the complainant knew very well that I'm like orphan after my father passed on and left with my sick ling mother as I am and hence hopping that I would get support but took the advantage of my status and now I am serving sentence. There is no help as well as no justice done at my trial.*
 6. *That I kindly request humble before this honourable court to quash the sentence and set aside the conviction and set me free unless lawfully held.*
4. At the hearing Mr. Ongoso, Advocate for the appellant abandoned grounds 1,2,3 and proceeded only on grounds 4,5,6.

He submitted that the appellant only entered a plea on the main count but not on the alternative count. That on 26th November, 2012 the trial magistrate acknowledged that the appellant had been sick and directed he be taken to hospital for treatment but on the date of plea he did not confirm whether he was fit to plead to the charges. Further that the appellant was not subjected to psychiatric evaluation to confirm his status and that he did not get a fair trial.

On ground six he submitted that the sentence was manifestly excessive as it did not take the appellant's age or his mitigation into account. He submitted that the appellant was remorseful and urged this court to quash the conviction and set aside the sentence.

5. The appeal was opposed. Mr. Oluoch for the State submitted that the plea of guilty in the court below was unequivocal. That the appellant was clear and that the charge was read over to him in a language which he understood. Further that the facts disclosed the offence charged. He submitted that the appellant actively participated in the trial and at no time did he inform the court that he was suffering from a defect of the mind but only stated that he was unwell. Mr. Oluoch submitted that there would be no good reasons to interfere with the finding of the lower court. He also contended that by dint of **Section 348** of the Criminal Procedure Code this appeal cannot stand. On the sentence he submitted that it was the minimum provided by the law and no amount of mitigation could have reduced the sentence. He urged this court to dismiss the appeal for lack of merit.
6. The manner in which a plea of guilty should be recorded and the steps that should be followed was laid down in **Adan V. Republic [1973] EA 445** and are restated in **KARIUKI V. REPUBLIC [1984]KLR 809** at page 810 as follows:-

2. *The manner in which a plea of guilty should be recorded is:*

- 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 – ADAN V. REPUBLIC [1973]EA 445.***

It is only once these steps have been taken that a plea can be said to be unequivocal. In the instant case when the accused requested that the charge be read to him the trial magistrate recorded CRO a E in Dholuo. The accused is then indicated as stating "It is true" whereupon the court entered a plea of guilty. The prosecutor then narrated the facts to which the accused replied the facts are true. Mr. Oluoch the Counsel for the Republic contends that this plea was unequivocal but the appellant contends that it was not. That he was not given a fair trial. It behoves this court therefore to determine whether the plea was unequivocal. It is my finding that it was not. To begin with **Art 50(2) (b)** of the Constitution bestowed upon an accused person the right to be informed of the charge, with sufficient detail to answer it. The duty of the court goes beyond reading over and explaining the charge to the accused person as the trial magistrate in this case did. Informing the accused of the charge with sufficient detail to answer it is what was envisaged by the court of Appeal in **Kariuki V. Republic (Suppra)** when it stated:

"(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."

It is not evident that in this case the trial magistrate explained all the ingredients of the charge to the accused person as he merely states that he read over and explained the charge to the accused. It was also his duty to inquire if the accused understood all the elements of the charge before recording the plea as nearly as possible in the accused's own words even if in English. Here the accused is merely recorded as stating "it is true" but what he said is true is not indicated.

In **ATITO V. R [1975] EA 278** it was noted that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence. In **Kariuki V. R (suppra)** the court stated as follows:-

"The narration and interpretation of the facts of the alleged offence before the entry of convictions and asking the appellant if he agreed with the facts is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."

The offence with which the appellant was charged is serious. It behoved the trial magistrate to satisfy himself that the appellant understood those facts. It is instructive that although the victim was stated to be a child of four years no evidence of age was availed to the court. A P3 form is itself not proof of age. It is only medical evidence that there was penetration.

7. Mr. Ongoso submitted that the appellant should have been subjected to a psychiatric evaluation. On this I agree with Mr. Oluoch that there was nothing to suggest that the appellant suffered from a mental illness. He only told the court that he was sick. The court saw he was sickly and granted him the order for treatment. That ground of appeal would therefore fail as would the ground that the sentence was manifestly excessive as that was the minimum provided.
8. Indeed **Section 348** of the Criminal Procedure Code provides that no appeal shall lie where an accused person has pleaded guilty. It is my finding however that the plea in this case was not unequivocal. I accordingly quash the conviction, set aside the sentence and remit the matter to the lower court for a retrial. The accused shall be escorted to the Chief Magistrate's court at Homa Bay on 17th March, 2014 towards that end. In the meantime he shall remain in custody.

E. N. MAINA

JUDGE

Signed, dated and delivered at Homa Bay this 13th day of March, 2014

In the presence of:

Mr. Oluoch for the Republic

Mr. Ongoso for Appellant

Appellant

Risper – Dholuo Interpreter.