



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 3 OF 2014

BETWEEN

KENNEDY ODHIAMBO NYANGILE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 182 of 2013 at Senior Principal Magistrates Court at Migori, Hon. D. K. Kemei, SPM dated on 3rd May 2013)

JUDGMENT

1. In the subordinate court, the appellant faced the principal charge of defilement contrary to **section 8(1) and (3) of the *Sexual Offences Act, 2006***. The particulars were that on 21st April 2013 in Migori County he intentionally caused his penis to penetrate the vagina of MAO, a child aged 14 years. An alternative charge of committing an indecent act with a child contrary to **section 11(1) of the *Sexual Offences Act, 2006*** based on the same facts was preferred.
2. The appellant was convicted on his own plea of guilty and sentenced to 20 years imprisonment on the principal charge. He now appeals to this court against the conviction on the following grounds:
 - i. *The interpretation was in three languages which confused the appellant.*
 - ii. *What the appellant responded to was whether he knew the accused.*
 - iii. *The words as they are imputed to have been agreed to by the appellant are not as unequivocal as the honorable court relied on them.*
2. Mr Nyauke, counsel for the appellant, submitted the subordinate court did not follow the procedure for taking a plea outlined in ***Adan v Republic [1973] EA 445*** in two ways. First, he argued that the court should have read to the appellant the facts and given him the opportunity to explain his circumstances rather than asking him to admit or deny the offence. Second, that the appellant was not told how he defiled the complainant as the offence of defilement entailed specific elements. Counsel cited the case of ***Judy Nkirote v Republic Meru HCCR Appeal No. 48 of 2010 [2013]eKLR*** to support his arguments.
3. In opposing the appeal and supporting the conviction, Ms Owenga, learned counsel for the State, submitted that the charge and elements thereof were read to the appellant and the plea was unequivocal. She further stated that the issue of clarification was not raised during plea taking and that appellant understood the language used.

4. The proceedings leading to this appeal are as follows;

5/5/2013

Before D.K. Kemei SPM

CC: Margaret

Accused: present

Interpretation: English/ Kiswahili /Dholuo

Court:

Charge read over and every element explained in Dholuo language

Principal Charge:

It is true

Alternative Charge:

It is true

Facts

On the 21/4/2013 at Rapar Village complainant herein was sent by her parents to the shops. She met the accused on the way and the accused was armed with a panga. He confronted the complainant and forced her into a nearby bush where he ripped her underpants and defiled her. The complainant later reported the incident to her parents. She was escorted to the hospital for treatment. Accused was later arrested and charged. The p3 form and treatment notes confirmed that there was penetration and are now produced as exhibits 1 and 2 respectively

D.K. Kemei SPM

Accused: *Facts are correct.*

D. K Kemei SPM

Court

Plea of guilty is entered and accused is convicted on his own unequivocal plea of guilty

D.K. Kemei SPM

3/5/2013

Prosecution

The accused is a first offender but the offence is prevalent.

D.K. Kemei SPM

Mitigation

Accused: *It is the devil which lured me. I had never done such a thing before.*

D.K. Kemei SPM

Court

Mitigation facts are considered. Offence is serious but prevalent. There is need for deterrence to protect vulnerable children from harm. Accused is ordered to serve twenty years of imprisonment.

Right of appeal within 14 days.

D. K. Kemei SPM

3/5/2013

5. 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.
6. Regarding the facts of the case, the court **Judy Nkirote v Republic (Supra)** 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."*
7. 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** stated 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."*
8. The proceedings show that the procedure for recording a guilty plea was adhered to. The principal and alternative charges were read to the appellant in **Dholuo** which is the language he understood and he stated that *'it is true'*. From the proceedings I have set out in paragraph 4 above, the facts were read to the appellant and he confirmed them as correct. However when asked to mitigate, the appellant blamed the devil for his actions. In my view, the appellant's statement that, *"It is the devil which lured me. I had never done such a thing before"* negated the offence. This clearly

indicated the appellant did not take responsibility for his actions. The plea was therefore equivocal and the court ought to have recorded a change of the plea to one of not guilty.

9. Having studied the record, I am satisfied that the appellant's plea of guilty was equivocal and as a result I allow the appeal and quash the conviction.

10. 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 Migori Senior Principal Magistrates Court to plead to the charges on **2nd September 2014**.

DATED and DELIVERED at MIGORI this 1st day of September 2014

D.S. MAJANJA

JUDGE

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

Ms Owenga instructed by the Office of the Director of Public Prosecutions for the respondent.