



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 49 of 2012

SOLOMON MUTHURI

M'GAITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The appellant was charged with the offence of defilement, contrary to Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence as stated in the charge sheet are as follows:-

“On the 6th day of May 2012 at {particulars withheld} within Meru County, committed an act which caused penetration with his genital organ into the genital organ of MM child aged 14 years.”

The alternative charge against the appellant was that of indecent acts with a child, contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence as stated in the charge sheet are as follows:-

“On the 6th day of May 2012 [particulars withheld] Meru County, did an act of indecent with MM a child aged 14 years by touching her private parts namely vagina, buttocks and breasts.”

When the appellant was arraigned in court on 16th May 2012, he pleaded guilty to the main charge and hence he was convicted and sentenced to 20 years imprisonment. Consequently, on 4th June 2012 the appellant filed a chamber summons under Section 357 of the Criminal Procedure Code Cap 75 Laws of Kenya. The said application seeks the following orders:-

- 1. That this application be certified urgent and the same be heard expeditiously.***
- 2. That pending the hearing and determination of the appeal herein, the appellant be released on bail.***

During the hearing of the application, Mr. Mwirigi who appeared for the appellant stated that he was relying on the grounds, affidavit and the annexures. In addition to the above, the appellant's counsel submitted that his client was complaining that the charge sheet and the facts were not explained to him. Besides the above, he also submitted that the language that was used by the Nkubu court was not clear. He concluded by submitting that the appellant is applying for a retrial.

On the other hand, the State was represented by Mr. Motende who is a State Counsel. In his reply, the learned State Counsel did not object to the request for a retrial on the ground that the appellant had been

charged for a serious offence of defilement.

This court has carefully considered the submissions made by both counsels. It is apparent that the plea which was taken by the learned magistrate was not done properly. Apart from the above, it is not clear which language the court had used in communicating with the appellant. In the case of Adan Vs. Republic East Africa Law Reports [1973] E.A the Court of Appeal held as follows:-

- (i) ***The charge and all the essential ingredients of the offence should be explained 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 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.***
- (iv) ***If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
- (v) ***If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.***

It is apparent that in this particular case, the basic steps in taking of a plea were not taken by the trial magistrate. Given the fact that the appellant had been charged for a very serious offence, I hereby concede to the request for a retrial before another magistrate other than the original trial magistrate. It is only to that extent that I concede to the application. I hereby direct that the appellant be produced

before the Chief Magistrate Meru on 8th October 2012 for purposes of plea taking. In the event that the appellant opts to plead not guilty, then the trial magistrate should be at liberty to fix the case for hearing on a date suitable to all the parties.

Those are the orders of this court.

MUGA APONDI
JUDGE

Ruling read, signed and delivered in open court in the presence of:-

.....**APPELLANT**
..... **APPELLANT'S COUNSEL**
..... **STATE COUNSEL**

MUGA APONDI
JUDGE

4TH OCTOBER 2012