



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CRIMINAL APPEAL NO. 69 OF 2014**

**BETWEEN**

**KN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Mombasa(Muya,J.) dated  
26<sup>th</sup> June,2014*

*in*

*Criminal Appeal. No. 67 of 2013)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellant pleaded guilty to a charge of defilement contrary to **section 8(1)** as read with **sub-section (3)** of the Sexual Offences Act. Following that plea he was sentenced to 20 years imprisonment as the child was said to be 15 years old. His first appeal to the High Court was dismissed and he has brought this second appeal arguing that the High Court erred in upholding the conviction and sentence without noting that the trial language was not interpreted to him and also failing to see that the plea was not properly taken and lastly that the complainant's age was not proved beyond reasonable doubt.

During the hearing of this appeal the appellant relied on his written submissions which reiterated the above grounds and on the cases of **Antony Njeru Katiari& another v Rep** (2007) eKLR for the proposition that where proceedings are conducted in a language the accused does not understand, the fact that it was interpreted to him must be apparent on record, **Adan v R** (1973) CA 445, and **Abadada v R**, Cr.App.No.372 of 2012, on the proper procedure of recording a plea of guilty as well as **Kaingu Alias Kasomo v R** Criminal Appeal No.504 of 2010 to demonstrate the mandatory requirement for proof of age of the victim of a sexual offence under the Sexual Offences Act.

Mr.Kiprop, learned counsel for the respondent opposed the appeal arguing that the trial court record is clear that there was interpretation from English to Kiswahili; that the age of the complainant was assessed and a report filed in court; and that since the sentence was lawful the appellant could not, under section 348 of the Criminal Procedure Act, appeal from a conviction arising from a plea of guilty.

Starting with the last submission, it is now settled that **section 348** aforesaid is not an absolute bar to challenging a conviction from a plea of guilty on some ground other than the extent and legality of the sentence. In **Ndede v R** (1991) KLR 567 this Court explained that the first appellate court is not bound to accept the accused person's admission of the truth of the charge as there may be an unusual circumstance, such as injury to the accused, or the accused is confused, or there has been inordinate delay in bringing the accused person to court from the date of arrest.

We think, in the circumstances of this case that this appeal is not barred by the provisions of **section 348** for the reasons we shall shortly revert to.

The procedure for taking plea follows a well-beaten path. The leading case, **Adan v R** (1973) EA 445 emphasises that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in **Adan** (supra) in **Hando S/o Akunaay v Rex** (1951) 18 EACA 307 as follows;

***"...before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent."***

Where an accused person who has been called upon to plead under **section 207** of the Criminal Procedure Code in the subordinate court admits the charge, the proviso to **subsection (2)** requires the prosecution to outline the facts upon which the charge is founded. The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information, as the case may be, as well as the facts outlined where the accused pleads guilty. The facts therefore are as important part of a plea as the charge itself

The nature and elements of the offence in totality must be understood by the accused and the trial court must be satisfied about this before accepting them as true. We

think the court should also explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence.

In outlining the facts the prosecution's role is to present the evidence that could have been proven if the case had gone to trial. Therefore for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond any reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibits that they would have relied on at the trial.

In the matter before us, the appellant having pleaded guilty to a charge of defilement contrary to **section 8(1) (3)**, the following facts were outlined by the prosecution:

Facts:

***"The complainant M my aunt is a girl aged 15 years. She comes from a village known as [particulars withheld] in Mamba Location. Sometime in June 2013 she was staying with the accused who is like her grandfather. The accused turned her into a wife and later paid dowry of Kshs.13,200/= to the complainants parents. Sometimes on 18/10/13 the complainant fled the accused; homestead and later made a report at Tsimba AP Camp about the early marriage. She was later taken to Kinango District Hospital when on examination she was found to be 5 months pregnant. AP's form (sic) confirming pregnancy was also confirmed. (sic) I wish to produce it as exhibit Exh.1. Accused was later arrested and charged with the offence before court." (our emphasis)***

To these facts the appellant replied; **“Facts are true”** and with that he was convicted and sentenced as explained earlier. For the offence with which the appellant was charged, the facts were expected to disclose the following elements,

- i) that the appellant committed an act causing penetration,
- ii) that the act was with a child, and,
- iii) for purposes of sentence, that the child was between the age of twelve and fifteen years

The facts reproduced above omit a critical element of the offence of defilement, namely, penetration. That element could not be assumed from the facts outlined, namely, that the appellant had turned the complainant into a wife and later paid dowry; and that after the complainant fled the appellant’s home was, upon examination found to be five (5) months pregnant.

It ought to have been made clear from the facts that during the period the complainant lived in the appellant’s home, the latter committed an act that amounted to a partial or complete insertion of his genital organs into those of the complainant, constituting penetration in order to prove the offence against the appellant beyond any reasonable doubt.

The learned Judge, like the trial Magistrate perhaps assumed that the complainant having lived with the appellant as his wife and the latter having been found to be expectant, must have been defiled by the appellant. Proof of a criminal offence cannot be based on assumptions.

In the result we come to the conclusion that the plea of guilty was not unequivocal. We allow the appeal quash the conviction and set aside the sentence. However in the circumstances of this case and in the interest of justice we order that there be a retrial of the case. The appellant will be produced before the Magistrate’s Court at Kwale for a fresh plea by a Magistrate with jurisdiction other than A.O.Aminga, Senior Resident Magistrate.

***Dated and delivered at Mombasa this 11<sup>th</sup> day of March 2016***

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M’INOTI**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**