



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 102 OF 2014

BETWEEN

MICHAEL SIMIYU RONDE alias FENJWA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Dulu, J) dated 12th June 2014)

in

H. C. Cr. A. No. 94 of 2013)

JUDGMENT OF THE COURT

The appellant, **Michael Simiyu Ronde alias Fenjwa**, was charged in the Chief Magistrate's court with the offence of defilement of a girl contrary to **section 8 (1) and (2) of the Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on 15th December 2012 at **[particulars withheld]** village, Singoi sub-location, Bunyala Central Location, Navakholo District within Kakamega County, he intentionally and unlawfully forced his penis to penetrate the vagina of a girl aged 7 years namely, **FB (PW 1), the complainant**. He faced an alternative charge of indecent act with a child contrary to **section 11 (1)** of the same Act, the particulars of which were that he intentionally and unlawfully touched the vagina of FB.

The appellant pleaded guilty to the charge and was accordingly convicted and sentenced to life imprisonment. Being aggrieved, he appealed to the High Court which upheld the conviction of the trial court. He now appeals to this Court on the grounds that he was not represented by an advocate and as such was not able to properly defend himself; that upon arrest, he was subjected to harassment and duress by the police, and was coerced into pleading guilty on the pretext that he would be set at liberty; that the plea was not read and explained to him; that he was not provided an opportunity to reconsider his plea, and nor was his mental status examined; that no DNA test was carried out on him; that his defence of intoxication was not taken into account and finally that the trial court failed to consider all the mitigating circumstances of the case.

During the hearing of the appeal, the appellant presented his written submissions to the court and further submitted that at the time, the plea was read in English, a language that he did not understand, and therefore he had not understood what he had pleaded guilty to. It was his submission that he had requested for a Luhya interpreter which request was declined by the court.

Ms. Nyamosi, learned Senior Assistant Deputy Public Prosecutor, opposed the appeal and submitted that the plea was unequivocal. Counsel stated that the plea was read in English and translated into Kiswahili, which the appellant understood, whereupon he indicated that the facts were correct and that he was drunk. Counsel further submitted that drunkenness was not a defence for the commission of an offence.

On the issue that there was a land dispute between the appellant and the complainant's parents, counsel submitted that this was considered by the High Court and disregarded on the basis that it was an afterthought. With respect to the issue that the appellant had requested for an interpreter, counsel countered that there was no evidence of this from the record. Counsel concluded by stating that the trial court warned the appellant of the seriousness of the offence, which warning was, however, not heeded by the appellant who went ahead and pleaded guilty to the charge.

We have considered the evidence and the submissions and are of the view that the main issue for our consideration is whether or not the plea as taken was unequivocal.

The appellant was arraigned in court for plea on 17th July 2012. Before the plea was taken, the substance and every element of the charge was stated to the appellant by the Court in Kiswahili, a language that he understood, whereupon the appellant when called upon to plead replied:-

“Ni Kweli (true)”.

The facts of the case were read out to him which were that on 15th December 2013 at about 1 pm, the complainant, FB, aged 7 years had gone to the river to fetch water accompanied by her brother, UB, aged 5 years. On the way they were called by the appellant, a person they knew well, who gave them sugar cane. The appellant took the hand of FB and pulled her into a nearby sugar cane plantation and defiled her. Thereafter FB informed UB and her uncle of what had happened. The appellant was found and taken to Navakholo Police Station, while FB was examined at the Navakholo Sub-District Hospital. A P3 form was issued in which the degree of injury was assessed as harm. FB's age was also assessed as between 7 and 8 years old.

Faced with these facts, the appellant responded,

“Yes those facts are correct but I was drunk”.

The trial Court convicted him on his own plea of guilty, and sentenced him to life imprisonment.

Under **section 348** of the **Criminal Procedure Code**, a person has no right of appeal against a conviction resulting from his or her plea of guilty. Needless to say, there are exceptions to the rule, particularly where the plea is equivocal.

In ***P. Foster (Hallege) vs Roberts (1978) 2 All ER 751*** it was held;

“... a court cannot accept an equivocal plea of guilty: It... must either obtain an unequivocal plea or enter a plea of not guilty. For a plea to be equivocal the defendant must add to the plea of guilty qualification which, if true, show that he is not guilty of the offence charged.”

In our view, the plea could not be considered to be unequivocal. When the appellant stated that he was drunk at the time he committed the offence, it is apparent to us that he was raising a defence of intoxication. At that point, the trial court should have taken this into account, and entered a plea of not guilty, so that the case could proceed to trial. Having failed to do so, the trial court misdirected itself, and as a consequence, the conviction cannot be sustained. The High Court never considered this point.

In the premises, the appeal is allowed, the conviction quashed and the sentence imposed set aside. We further order that the case be remitted back for retrial before another magistrate of competent jurisdiction other than S. M. Shitubi, Chief Magistrate, who took the plea. We also order that pending appearance before retrial, the appellant shall remain in custody.

It is so ordered.

Dated and Delivered at Kisumu this 29th day of July, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR