



**IN THE COURT OF APPEAL**

**IN NAIROBI**

**CORAM: WAKI, NAMBUYE & J. MOHAMMED, JJ.A.**

**CRIMINAL APPEAL NO. 96 OF 2014**

**BETWEEN**

**JOB NTABO RATEMO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(An appeal from a judgment of the High Court of Kenya at Nairobi (Achode, J) dated 20<sup>th</sup> May, 2013**

**in**

**HC.CR.A 314 OF 2009)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**Background**

1. The appellant, **JOB NTABO RATEMO**, was charged and convicted of the offence of defilement contrary to **section 8 (1) & (2) of the Sexual Offences Act No. 3 of 2006**.
2. The particulars of the offence are that on diverse dates between 13<sup>th</sup> and 16<sup>th</sup> July, 2009 at Ongata Rongai Township in Kajiado District, the appellant intentionally and unlawfully committed an act by inserting his male genital organ into the female genital organ of BN, a child aged two (2) years, which caused penetration. In the alternative, the appellant faced a charge of an indecent act with a child by touching her private parts contrary to **section 11(1) of the Sexual offences Act No. 3 of 2006**.
3. When the appellant was brought before the trial Magistrate's Court (Chief Magistrate's Court at Kibera Criminal Case No. 3212 of 2009), he entered a plea of guilty to the main charge. The prosecutor read out the facts of the case which the appellant affirmed were correct.
4. A brief summary of the facts, are that on 16<sup>th</sup> July 2009, BN's mother while preparing to give BN a bath, noticed blood and a white discharge from BN's vagina. The child was in apparent pain and the vaginal area was red and bruised. BN's underwear was dirty and had blood stains. The appellant's t-shirt was also stained with blood. BN's mother took her to Nairobi Women's Hospital for treatment on 20<sup>th</sup>

July 2009, where the doctor found that BN had been defiled. The matter was reported to Ongata Rongai Police Station. BN was later further examined and a P3 form filled. The police pathologist confirmed that the child had been defiled. When interrogated, the appellant admitted to defiling his niece.

5. After these facts were stated by the prosecution to the appellant in Court, he admitted that they were indeed correct. The trial magistrate, Hon. Kasera, SRM, convicted the appellant on his own plea of “*guilty*”. During mitigation, the appellant claimed that “somebody had hit me in the night”. The trial magistrate, convicted the appellant on his own plea of “*guilty*” and sentenced him to life imprisonment as provided for under **Section 8(2) of the Sexual Offences Act**.

6. Aggrieved by that decision, the appellant filed an appeal to the High Court in **High Court Criminal Appeal No. 314 of 2009**, on the grounds that: the appellant failed to understand the charges against him and the consequences of pleading guilty; his fundamental rights and freedoms as enshrined in **Article 49(1) of the Constitution** were violated as he was detained in police custody for more than 24 hours; that his guilty plea was influenced by torture in the hands of the police while in custody; and his plea was therefore not unequivocal and for that reason he sought an order for a re-trial.

7. The High Court, (Achode, J) in considering the appeal, referred to **Section 348 of the Criminal Procedure Code** and the procedure laid out in **ADAN V R, [1973] EA 446** when considering a guilty plea entered by an accused person.

The learned Judge determined that the present appeal did not reveal a need for a re-trial as sought by the appellant and referred to the cases of **FATEHALI MANJI V R, [1966] EA 343** and **MUIRURI V R, [2003] KLR 552**. The learned Judge determined that the appellant’s plea was unequivocal and that he was properly convicted and that the sentence imposed on him was as provided by statute and was not at the trial court’s discretion and therefore, no appeal can lie. The learned Judge dismissed the appeal.

8. Aggrieved by the judgment of the High Court, the appellant now brings this second appeal to this Court, on the ground, *inter alia*, that **Section 207(1) of the Criminal Procedure Code** was not explained to him.

### **Submissions by counsel**

9. When the appeal came up for hearing on 11<sup>th</sup> March 2015, both parties were represented by learned counsel: the appellant by Mr Robert Amutallah whereas Mr Omondi, Senior Assistant Director of Public Prosecutions [SADPP], represented the respondent.

10. Mr Amutallah in his opening arguments, abandoned all other grounds in the Memorandum of Appeal filed on 6<sup>th</sup> June, 2013. Counsel argued on only one ground that **Section 207 of the Criminal Procedure Code** (the Code) was not explained to the appellant. Further, that the court failed to warn the appellant of the legal consequences of the charges levelled against him and consequently, the appellant failed to understand the charges made against him.

Counsel submitted that the statement of facts, as described by the Prosecutor, were also not explained to the appellant and he was not given an opportunity to admit or deny the facts. Counsel argued that it was the duty of the Court to record that the facts were explained to the appellant. In support of his arguments, counsel relied on the case of **ADAN V R, [1973] EA 445** and counsel urged the court to allow the appeal.

11. In opposing the appeal, Mr Omondi, submitted that after the appellant had pleaded guilty, the facts, which were self-explanatory, were read to him in a language that he understood. Counsel denied that the trial court had any duty imposed upon it to explain the nature of the sentence to be meted as a consequence of the offence charged. Counsel argued that both lower courts were guided by the guidelines laid down in **Adan v R, (supra)** which amplify the provision of **Section 207 of the Criminal Procedure Code**. Counsel urged us to dismiss the appeal.

### **Determination**

12. This being a second appeal, by dint of **section 361 of the Criminal Procedure Code**, this Court is enjoined to consider only matters of law and not of fact unless it is demonstrated that the trial court or the first appellate court considered matters that should not have been considered, or it did not consider matters that should have been considered or the decision was plainly wrong. In such situations those omissions or commissions become matters of law. See: **ANDREW APIYO DUNGA V R, [2010] eKLR.**

13. This Court in **M'RIUNGU V R, [1983] KLR 455** stated:

***“...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”***

14. The appellant's main ground of appeal is that **S. 207 of the Criminal Procedure Code** was not fully explained to him and therefore, the procedural guidelines outlined in the case of **Adan v R, (supra)** were not followed.

15. **Section 207 of the Code** provides as follows:

***“207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;***

***(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:***

***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.***

***(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.***

***(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.***

***(5) If the accused pleads -***

***(a) that he has been previously convicted or acquitted on the same facts of the same offence; or***

***(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.”***

16. The legal principles enunciated in the **locus classicus** case of **Adan v R, (supra)** are outlined 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 [with] the facts or raises any question of his guilt his reply must be recorded and change of plea entered; and***

***(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."***

17. Guided by the decision in ***Adan v R, (supra)*** and according to ***Section 207 of the Code***, the substance of the charge against the appellant was read to him in a language that he understood. In his words, he answered, "*It is true*" and a plea of guilty was entered. The Prosecution proceeded to outline the facts upon which the charges were founded. The appellant was interrogated and he admitted to defiling BN between 13<sup>th</sup> July 2009 and 17<sup>th</sup> July 2009. After the facts were outlined by the Prosecutor, the appellant stated that the facts were correct. It is on the basis of his guilty plea that the trial court proceeded to convict the appellant of the offence of defilement. From a reading of ***Section 207 of the Code***, the procedure of the trial court on this issue cannot be faulted.

18. In a case of defilement, the main ingredient to the offence is penetration. The appellant did not say anything that would negate the main ingredient to the offence of defilement. The appellant had an opportunity to change his plea but did not do so. The plea was therefore unequivocal. Under the above cited case law and ***Section 207 of the Code***, there is no duty placed upon the court to explain the penalty imposed on the offence charged. All that is required of the Court is to ensure that the charge and all the essential ingredients of the offence are explained to the accused in a language that he understands which was done in this case. The minimum sentence for the offence of defilement as life sentence is prescribed in law, and thus leaves no room for discretion by the Court. The two lower courts cannot be faulted for finding as they did.

19. Accordingly, this appeal lacks merit and is dismissed in its entirety.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of June, 2015.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**