IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE, & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 123 OF 2014

BETWEEN

JOSEPH MARANGU NJAU…….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Kenya at Meru (Gikonyo, J) dated 28th November, 2013

in

H.C.CR.A. NO. 226 OF 2011)

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JUDGMENT OF THE COURT

This appeal turns on the issue whether the appellant's plea of guilty to a charge of defilement contrary to **Section 8(1)** and **(2)** of the Sexual Offences Act was unequivocal and formed a proper basis for his conviction and sentence by the Principal Magistrate at Chuka. The particulars of that charge were that on the 25th June 2011 in Tharaka Nithi County (sic) within Eastern Province, he defiled MK a child aged 4 years, by inserting his penis in her vagina.

When he was arraigned before the learned Principal Magistrate on 27th June 2011, the record shows as follows;

"Interpretation-Eng/Kisw/Kimeru

…

COURT: the substance(s) (sic) and every element thereof has bee (sic) stated by Court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth for he (sic) charge(s) replies in Swahili language in the main charge

GUILTY."

At that point the prosecutor informed the court that the minor was still undergoing treatment and prayed that the matter be adjourned to the next day 28th June 2011 "***for facts and have the P3 Form filled***." This request was granted and the appellant was ordered to be remanded at the Chuka Police Station until the next day.

On 28th June 2011 the prosecutor informed the court that he was ready with the facts which he proceeded to recount on the record. The next thing the learned Magistrate recorded was;

> ***"Accused - facts are correct as stated.***
>
> ***Court – Accused is guilty on own plea and is convicted on the main charge herein."***

This was followed by the prosecutor indicating that the accused was a first offender whereupon the appellant stated, which is significant to the matter under consideration;

> ***"I live alone and I have property. I ask for security."***

After stating that the offence was a serious one calling for a deterrent sentence, the learned Magistrate sentenced the appellant to serve life imprisonment.

The appellant was aggrieved by that conviction and sentence and appealed against both to the High Court in Meru. That appeal was heard by Gikonyo J. who, by a judgment dated 28th November 2013, dismissed it, provoking the current appeal.

In what he terms "***Home Made Grounds of Appeal'*** the appellant has raised some five points of grievance. Two of these implicate the propriety of the plea of guilty which, as we have stated, is the gravamen of this appeal, namely;

> ***"2. That the learned judge erred in law in not finding that the trial court used language other than Kimeru which the appellant understand (sic)in that in plea-taking, the court recorded the reply of the appellant as guilty***
>
> ***….***
>
> ***4. That the learned judge erred in law in not noting that the trial suffered some procedural irregularities"***

A plea of guilty is a serious matter. It signifies a no contest and a total capitulation on the part of an accused person. In so pleading he waives his right to trial, one of the most fundamental aspects of the criminal justice process. He waives numerous elements of a fair trial including most significantly the presumption of innocence and the right to confront and challenge his accusers and the evidence presented against him in discharge of the prosecution's burden of proof.

Moreover, by so pleading he also places on the line his right to appeal against the ensuing conviction by virtue of **Section 348** of the **Criminal Procedure Code (CPC)** which is couched in peremptory exclusionary terms:-

> ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extend or legality of that sentence."***

Whereas all the perils a guilty pleader embraces may not much matter in petty offences or in mere infractions which do not present much risk to life or liberty, much is at stake in the offences that attract

more serious penal consequences. In the case before us, the balance of the appellant's natural life stood to be spent behind bars upon conviction.

Cognizant of the ever-present dangers of misjustice in guilty pleas, the courts have been vigilant to act upon and to uphold them only when they are

clear, express, unambiguous and unequivocal. When a plea of guilty is challenged as not having been entered unequivocally, it becomes a matter of law that permits the superior courts to entertain appeals notwithstanding **Section 348** of the **CPC** aforesaid. The predecessor of this Court considered and authoritatively laid down the manner in which pleas of guilty should be recorded and the steps which should be followed, in the decades-old case of **ADAN –VS- REPUBLIC** [1973]EA 445, 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 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 raise 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."***

Looking at the five-step sequence which we think properly captures the mandatory requirements of Section 207(1) and (2) of the C.P.C set out above, it is quite clear that (i) to (iii) were not followed in the appellant's case. From what we have set out previously, there is no indication of the language in which the charge and every element was explained to the appellant, if at all it was. In fact, it would seem that what is set out in the record is some general template purporting to comply with the requirements of proper plea taking but there is little to show that these were actually honoured in the case of the appellant. It would not have taken much for the learned magistrate to indicate on the record that the charge had been explained to the appellant in whatever language it was. That not having occurred, there is nothing on the record to contradict the appellant's complaint which he stated before us through a Meru interpreter as the totality of his appeal thus;

> ***"I did not plead guilty. I do not speak Swahili. I was not allowed to speak Kimeru in court, so I kept quiet"***

Those complaints are not idle and they cast a doubt whether the first step was complied with. That doubt equivocates the appellant's plea as he may not have understood the charge sufficiently to answer it, the more because he was unrepresented by counsel and unschooled in matters jural.

The second step ought to be the recording by the court of the exact words used by the accused person and it is only if they amount to an admission of the charge that a plea of guilty should be recorded. In the instant case the record does not contain the appellant's own words. All it says is that he answered "***Guilty***" in Kiswahili. With respect, that is not a proper way to meet this requirement. When we asked Mr. Musyoka, the learned prosecution counsel for the Republic what the Swahili word translated "**Guilty"** was, he was unable to say with certainty though he offered "***Nakubali Makosa"(I admit the wrong or offence)*** or ***"Nakiri"(I confirm or confess),*** but these are clearly not the words the appellant used.

The impropriety of recording the accused person as having answered with the word "***Guilty"*** when not speaking the English language has long been acknowledged. The **ADAN** court itself referred to this

as follows, and we agree;

> ***"The word 'Guilty' is one to be treated with the greatest caution: it is a technical expression and it was said in <u>BYARUFU GRAFA –VS- REPUBLIC</u> (1950) 17 EACA 125 and <u>M'MWENDA –VS-REPUBLC</u> [957]EA 429 that there is no word exactly corresponding to it in any of the languages of Uganda and Kenya respectively"***

On that score also, the procedure adopted by the learned Magistrate fell short of what is required.

The third step per **<u>ADAN –VS- REPUBLIC</u>**, which has been accepted by this Court in many cases including **<u>KARIUKI –VS- REPUBLIC</u>** [1984] KLR 809, requires that after the accused person's admission, and the ensuing recording of the plea of guilty, the prosecutor should immediately, there and then, read out the facts of the case and the accused is given an opportunity to dispute or explain the facts or add any relevant facts. Only if there is an unqualified acceptance of these facts as correct should a conviction be entered to be followed by the usual sentencing steps.

In the case before us, the facts were not immediately read out. Rather, an adjournment was sought and granted to the next day. Come that next day, without the plea-taking process being restarted or the appellant being asked if he still maintained the correctness of the charge and the plea of guilty, the learned Magistrate permitted the reading of the facts.

This was plainly wrong.

In **<u>ADAN –VS- REPUBLIC</u>**, the East African Court of Appeal deprecated such an approach in the following words;

> ***"We would add also, with respect, that we are in full agreement with a further observation , by the Chief Justice one MULI, J, also in Criminal Appeal No. 743, that a plea should not be taken unless the prosecution are in a position to state the facts. <u>An adjournment between the plea and the statement of facts ought never to be necessary and is most undesirable."</u>***

(Our emphasis)

We endorse that position for the simple reason that an accused person may well have changed his mind about pleading guilty in between the time he pleaded and the adjourned reading of the facts. He has a right to do so. The guilty plea-taking aborts if the prosecution is without facts to support a guilty plea and must per force start afresh after any adjournment. In fact, in the record before us it would seem the appellant was so at sea on that next day that after his conviction he addressed the Court as if he was asking to be admitted to bail. He cannot be said to have unequivocally pleaded guilty.

In so far as this case was marked by a succession of procedural miss-steps, the plea of guilty was vitiated and the conviction of the appellant cannot stand. We accordingly quash it and set aside the conviction as the plea-taking was a nullity. The learned Judge erred in not so finding and we therefore allow this appeal.

The errors we have pointed out are attributable to the trial court itself and not to the prosecution. The offence charged is a serious one against a minor and the interests of justice dictate that it be ventilated fully by way of a full trial. It is also fairly recent and there is no reason why the prosecution should not avail the witnesses and mount a prosecution in timely fashion. For all these reasons, which are legitimate considerations (See, **<u>AHMED SUMAR –VS- REPUBLIC</u>** [1964]EA 481, **<u>MUIRURI –VS-REPUBLIC</u>**, [2003] KLR 552, and **<u>KARIUKI –VS- REPUBLIC</u>** (Supra)) we order that the case be remitted to the Subordinate Court at Chuka within fourteen days hereof for re-trial in accordance with the law before any magistrate other than P. NGARE (CM).

Dated and delivered at Meru this 9th day of July, 2015.

P. N. WAKI

JUDGE OF APPEAL

R. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL