



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU**

(Coram: Chunga, C.J., Akiwumi & Owuor, JJ.A.)
CRIMINAL APPEAL NO. 67 OF 2000
BETWEEN

- 1. JOSEPH ONYANGO OTIENO.....1STAPPELLANT**
- 2. FREDRICK OUMA OMIRE.....2NDAPPELLANT**

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction and sentence of the High Court
of Kenya at Kisumu (Wambilyangah, J.) dated 31st May, 1996
in
H.C.CR. APPEAL NO. 66 OF 1996)**

JUDGMENT OF THE COURT:

Joseph Onyango Otieno and Fredrick Ouma Omire the appellants herein were charged in the subordinate court on two counts of Rape Contrary to Section 140 of Penal Code, Cap 63 Laws of Kenya. Both appellants first appeared before the Senior Resident Magistrate, Ukwala on 29th December, 1995 when they pleaded not guilty to the two charges against them. Three mentions followed and the case was subsequently set down for hearing on 28th February, 1996.

On 28th February, 1996 both appellants are recorded as having indicated their wish to change their plea. Presumably, they wanted to change their plea from not guilty to guilty. The learned magistrate proceeded to record the change of plea and the record on the day in question reads as follows: "ACC.1. I want to change my plea on both counts. CT.1. It is true I had carnal knowledge of R.A.A without her consent.

2.It is true I had carnal knowledge of E.A without her consent.

ACC.2. I want to change my plea on both counts. CT. 1.It is true I had carnal knowledge of R.A.A without her consent.

2.It is true I had carnal knowledge of E.A without her consent.

The prosecutor then outlined the facts and very briefly this is what he said. The two appellants and two other boys who were not before the court on 25th December, 1995 met the complainant in the first count, R.A.A, who was returning home from the market. They stopped her and pulled her into the first appellant's house where she was forced to undress and thereafter the appellants and the two other boys at large, raped her in turn. The appellants and their colleagues then left the complainant in the house and went out on the nearby road where they met the complainant in the second count, E.A, whom they dragged into the nearby banana plantation and there raped her in turn.

After the outline of the facts, the appellants are recorded as having, each one of them, confirmed the truthfulness of those facts. They were each then, convicted on their own plea of guilty and each sentenced to seven (7) years imprisonment plus 10 strokes of the cane on each count to run consecutively. The net result is that each appellant would get 14 years in imprisonment plus 20 strokes of the cane.

The appellants appealed basically against sentence to the High Court, Kisumu which, on 31st May, 1996, dismissed their appeals and confirmed the convictions and sentences as already stated.

The appellants now bring their second appeals to this court from the appellate decision of the High Court.

It is clear to us from their submissions before us that the appellants are seeking to appeal against the severity of sentence only. Each one of them confirmed that he pleaded guilty in the subordinate court. Each one of them asked us for leniency while emphasising their remorsefulness and promising never to repeat the offence in the future. Section 361 (1) of the Criminal Procedure Code, Cap 75 Laws of Kenya, is in our opinion relevant to this matter and provides as follows;

"A party to an appeal from a subordinate court may, subject to subsection 8 appeal against the decision of the High Court in its appellate jurisdiction on a matter of law and the Court of Appeal shall not hear an appeal under this section;

(a) on a matter of fact, and severity of sentence is matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless a subordinate court had no power under section 7 to pass that sentence."

The law is manifestly clear. On second appeal, this court lacks jurisdiction to hear an appeal on severity of sentence because that is a matter of fact. Furthermore this court, lacks jurisdiction to hear an appeal on sentence except in two situations namely;

(a) where a sentence has been enhanced by the High Court.

(b) where a subordinate court had no power to pass the sentence.

The record shows that the appellants pleaded guilty and were convicted and sentenced by a Mr. Kwengo, District Magistrate 1, at Ukwala. The schedule to the Criminal Procedure Code indicates that rape is triable by a subordinate court of the 1st class. A District Magistrate 1's court is a subordinate court of the 1st class. Section 7 of the Criminal Procedure Code empowers a subordinate court of the 1st class to pass a sentence upto 7 years imprisonment. As indicated earlier, each appellant was sentenced on each count to 7 years imprisonment plus 10 strokes. The sentences were clearly within the provisions of the law and were therefore not unlawful. The magistrate had the jurisdiction to pass the sentence of 7 years and 10 strokes on each count.

In his judgment dismissing the appellants, Wambilyangah J. observed that the sentences imposed were robust, lawful and justified. Indeed, the sentences would appear to have been on the high side having regard to the record and age of the appellants. Nevertheless, that amounts to no more than severity which, according to section 361 (1)(a) of the Criminal Procedure Code is a matter of fact which this court lacks jurisdiction to deal with. The upshot of the matter therefore is that the appeals by the two appellants being only on the severity of their sentences are outside the jurisdiction of this court. We are, accordingly, unable to disturb the sentences and we would, on this ground, dismiss the appeals.

Before leaving the matter however, we want to return to the manner in which the change of plea was recorded from the appellants on February 28th, 1996. They had earlier appeared on 29th of December, 1995 when they pleaded not guilty followed by three mentions before the change of plea. It was desirable in the circumstances, that the charges should have been read again to the appellants when they indicated their desire to change their plea on 28th February, 1996. The record does not show that this was done.

The above point was brought to the attention of Senior Principal State Counsel Mr. Gacivih who, nevertheless submitted that although the record does not show expressly that the charges were read, the manner in which the pleas were recorded on 28th February, 1996 leaves no doubt that this must have been done. This may be so, but we cannot assume. It is a sound practice that in a situation like this the charges must be read afresh and the record must expressly say so.

Having said the above however, there can never be any doubt that the pleas entered by the appellants on the 28th February, 1996 were unequivocal. They understood what was alleged against them and they clearly intended to and did admit the charges. The facts were formulated, stated by the prosecution and the appellants were given the opportunity to respond and each one of them confirmed the truthfulness of those facts. It was after the confirmation of the facts that the subordinate court formally convicted each one of the appellants.

We are satisfied, under the foregoing circumstances, that no injustice occurred to the appellants by the failure to read the charges to them afresh on 28th February, 1999 when they elected to change their pleas from not guilty to guilty. It was a minor omission which cannot affect the outcome of this appeal in the particular circumstances of this matter. The appeals by the two appellants are therefore hereby ordered dismissed.

Dated and delivered at Kisumu this 14th day of June, 2000

B. CHUNGA

.....

CHIEF JUSTICE

A.M. AKIWUMI

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL