



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 162 OF 2013**

**Appeal from the original conviction and sentence by the Mwingi Principal**

**Magistrate's Court (H.M. Nyaberi Ag. SPM) in Criminal Case No. 509 of 2013**

**JOHN MUSILI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Background**

John Musili, the appellant, was charged, tried and convicted by the Mwingi Principal Magistrate's Court for the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act (the Act). He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the offence state that on 16<sup>th</sup> September 2013 at (particulars withheld) of Mwingi East District in Kitui County intentionally caused penetration of his male genital organ namely penis into the female genital organ namely vagina of **J.M.S** a girl aged 4 years.

The trial court convicted the appellant after he changed the plea of not guilty to guilty. This was after the testimony of one witness. The appellant was sentenced to life imprisonment. He is aggrieved by the conviction and sentence and has come to this court on appeal.

**Petition of appeal**

In his amended petition of appeal filed with leave of this court on 23<sup>rd</sup> June 2014, the appellant has raised seven grounds of appeal which I have understood and have summarized as follows:

- i. The trial was unfair.
- ii. The trial court failed to protect the appellant's rights considering that he was not represented by a lawyer.
- iii. That he had been threatened and coerced by police and prosecution witnesses to admit the offence.

- iv. That there was no medical evidence supporting defilement.
- v. That he was not positively identified as the assailant.

In support of the petition of appeal, the appellant has filed written submissions. He has submitted that he was not accorded a fair trial given that the trial magistrate failed to caution him of the consequences of pleading guilty on such a serious offence like this one; that he was not advised on getting legal representative nor was one assigned to him given that he is not familiar with the law; that the trial magistrate did not find out why the appellant changed his plea; that he was coerced by the prosecution to admit the offence without understanding the consequences; that he was not identified as the assailant because the *Akala* shoe prints that are alleged to have led to his arrest could have been made by anyone as the shoe is common; that the evidence of PW1 and the facts read out to the appellant differ and that the P3 form does not contain evidence of penetration.

### **Respondent's submissions**

The appeal was opposed by the respondent. Learned state counsel submitted that the appellant misdirected himself on Article 50 (2) of the Constitution and that it is only in capital offences that accused persons are assigned advocates; that it is a matter of choice if one wants to be represented by an advocate and that there was no miscarriage of justice towards the appellant.

Learned state counsel further submitted that the appellant has confessed to committing this offence several times and this is recorded in the proceedings; that he alluded to settling the matter out of court which is an indication that he had committed the offence.

Learned counsel submitted that the appellant was aged between 24 and 25 years and not a minor as claimed by him; that the plea was unequivocal; that the appellant was positively identified by the complainant's sister; that the ingredients of defilement were proved; that the law is clear where one pleads guilty and that the trial magistrate followed the law. Learned state counsel asked the court to dismiss the appeal for lack of merit and uphold the conviction and sentence.

### **Determination**

I have carefully perused the record of the lower court. The appellant was presented to the court on 23<sup>rd</sup> September 2013 for plea taking. The charges were read to him and interpreted in Kikamba language. He pleaded not guilty and the case was set down for hearing on 3<sup>rd</sup> October 2013. On that day, the proceedings were conducted in chambers. The prosecution called PW1, one **J.S.M.** the father of the complainant. The witness gave evidence and the appellant cross-examined him. The record shows that immediately after the cross-examination of PW1 by the appellant, the appellant told the court:

**“I confess I committed the act against the complainant.”**

The record shows that the charges were read again to the appellant who admitted the same. The prosecutor presented facts to the court to which the appellant stated that **“All facts are correct”**. He was convicted on own plea of guilty.

In mitigation the appellant stated as follows:

**“I don't know what made me to commit the act. My father is at Mombasa. I plead for forgiveness from the complainant father. I will compensate her daughter. Am now 18 years”**  
(sic).

The trial court convicted the appellant on his own admission after he changed the plea to guilty.

Section 348 of the Criminal Procedure Code provides:

**“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 extent or legality of the sentence.”**

Our courts have entertained appeals in cases where the plea has not been found to be unequivocal. The legal principles to be applied in taking pleas are laid down in 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 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.**
- v. If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”**

Looking at the record in respect to how the plea was taken, there seems to be nothing wrong with it and there seems to be no reason for this court to fault the trial magistrate in convicting on the plea of guilty. The proceedings were conducted in the language the appellant understands and after he cross examined the first witness he abruptly changed the plea. As quickly as he changed the plea and admitted the facts, he was convicted and quickly sentenced. He even continued to tell the court in mitigation that he did not know what made him commit this offence and pleaded for forgiveness. This seems all too perfect but something disturbs my mind and makes me feel unsatisfied with the manner proceedings were conducted. I harbour the view that the appellant did not understand the gravity of the charges he was facing. The proceedings were being conducted in chambers. There is no way of knowing the conditions of that chamber, how big or small it was and how many people were in it and so forth. This may seem trivial but the conditions of the chamber or place of trial may impact on an accused person.

In addition to my misgivings above, I have considered the appellant’s submissions and I am of the view that the trial court ought to have explained to him the seriousness of the offence after he indicated that he wanted to admit, especially taking into account that he had pleaded not guilty at first. The trial court ought to have sought to understand why the appellant was changing the plea. The trial court ought to have given him time to think about what he was about to do and if possible adjourn the matter for some time. This is what fair trial demands as envisaged under Article 50 (2) of the Constitution.

The appellant like any other accused person before the court must be accorded a fair trial and there must be record to demonstrate such fair trial was accorded to him. Although the record of proceedings of the lower court show that all procedure was followed in taking down the plea, my view is that the appellant was not accorded a fair trial because of failure of the trial court to caution the appellant of the seriousness of the offence and the consequences of his plea of guilty. It is my view that this case may be one of those cases where the bar to an appeal on a guilty plea is not absolute.

In John Muendo Musau vs. Republic (2013) eKLR, the Court of Appeal stated that:

**“There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute.”**

The Court of Appeal relied in the case of Ndede vs Republic [1991] KLR 567 in which the same Court held that:

**“.....the court is not bound to accept the accused person’s admission of the truth of the charge and conviction 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” (emphasis added).**

In the **Ndede case** the appellant has pleaded guilty before the lower court. He had been held in custody for over 30 days. He appealed to the High Court and his appeal was struck out for being incompetent by virtue of section 348 of the Criminal Procedure Code which bars appeals from persons who have been convicted on their own pleas of guilty. On appealing in the Court of Appeal the Court held that section 348 of the Criminal Procedure Code was not an absolute bar to appeals from persons convicted on their own admission. The appeal was allowed and the conviction quashed. It did not matter that the prosecutor had stated the facts and that the facts disclosed that an offence had been committed and that the appellant had admitted them. The nature of the case before this court is such that failure to observe the appellant’s constitutional right to a fair trial cannot be adequately compensated in a civil suit. It is not the same as, for instance, holding the appellant in custody for a long period before bringing him to court to answer to the charges as in the **Ndede case**. Further the appellant is not asking for quashing of the conviction in order to set him free but for a retrial to afford him a chance to defend himself.

In view of this, it is my finding based on my reasoning above, that this case ought to be referred back to the lower court for retrial. I have considered the submissions by the learned state counsel and with due respect to him, rights to an accused’s fair trial are all set out in Article 50 of the Constitution. In ideal situations when the trial court is alive to the legal provisions on these rights, all the accused persons despite the offences committed have a right to be informed of their constitutional right to legal representation. I especially single out Article 50 (2) (g) and (h) on the trial court’s duty to inform an accused of his right to legal representation. Courts are duty bound to inform an accused person of these rights. The requirement in my view becomes an imperative especially where an accused pleads guilty to a serious offence like the one before this court.

I have also considered the case of **Fatehali Manji vs. Republic [1966] E.A. 343** where the Court of Appeal for Eastern Africa stated as follows in respect of a retrial:

**“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it” (emphasis added).**

See also **Mwangi vs. Republic [1983] KLR 522** in which the Court of Appeal stated that:

**“... a retrial should not be ordered unless the appellant court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence, a conviction might result.”**

It is my view that the circumstances of this case demand that a retrial be held in the interest of justice. I consequently quash the conviction and set aside the life sentence imposed by the trial court. I proceed to order that the appellant shall continue being held in custody as this case is referred to the Magistrate in Charge of Mwingi Principal Magistrate’s court for mention with a view to giving further directions on the retrial. To that end the appellant shall be produced before the Mwingi Court on 11<sup>th</sup> August 2014 for that purpose. It is so ordered.

**Dated, signed and delivered this 28<sup>th</sup> July 2014.**

**S.N.MUTUKU**

**JUDGE**