Labasha v Republic (Criminal Appeal 12 of 2019)
[2023] KEHC 17662 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17662 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 12 OF 2019

AK NDUNG'U, J

MAY 24, 2023

BETWEEN

JULIUS LABASHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Maralal PM Sexual Offences Case No 12 of 2018– A. Gachie, SRM)

JUDGMENT

1. Julius Labasha, (The Appellant) was convicted on his own plea of guilty of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on March 24, 2018 in Nairimirimo location within Samburu East Sub-County, intentionally and unlawfully caused his penis to penetrate the anus of LL, a child aged 10 years. On June 14, 2018, he was sentenced to life imprisonment.

2. The Appellant informed this court on two occasions that is on, June 15, 2022 and on March 6, 2023 that his appeal was against the sentence only. However, a perusal of the Appellant's memorandum of appeal and his submissions shows that he was appealing against both the conviction and the sentence.

3. He filed a memorandum of appeal on February 16, 2021 and further additional grounds of appeal on August 22, 2022. In his memorandum of appeal filed on February 16, 2021, he challenged the conviction based on the fact that the prosecution failed to prove the case beyond reasonable doubt. He further raised other grounds that seems to suggest that the matter proceeded for a full trial. I will therefore ignore those grounds since the Appellant was convicted on his plea of guilt hence there was no trial. The conviction is being challenged by a document termed as 'further additional grounds of appeal' on the following grounds-

i. The learned magistrate failed to note that there was serious misinterpretation of the charge that was read to him.

ii. That as a result of that misinterpretation, he ended up pleading guilty to an offence that he did not understand.

iii. The learned magistrate failed to address that issue and proceeded to convict and sentence him immediately.

iv. The learned magistrate erred by failing to peruse any evidence as the only evidence presented was only a charge sheet.

v. The learned magistrate erred by mere listening of the case.

vi. The learned magistrate erred convicting and sentencing him without consideration of any material evidence whatsoever.

vii. That he has spent five years in custody in disregards of his constitutional rights.

4. The Appellant further filed supplementary grounds of appeal accompanying his submissions raising the following grounds-

i. The learned magistrate erred by sentencing the Appellant without warning him of his ill-informed plea of guilty.

ii. The learned magistrate erred by meting out mandatory minimum life sentence over a charge that was disputable on the age of the victim.

5. In his written submissions, the Appellant argued that the plea of guilty was not unequivocal since the trial court failed to seek clarification on the matter and also failed to warn the Appellant on the expected sentence in case of pleading guilty to the charge. He contended that he was not afforded a fair trial since he was not forewarned on the graveness of the charge, his interpreter misled him and that the court failed to read the charges again to him to affirm his plea of guilty. He further submitted that the age of the complainant was not proved since the main count indicated that the victim was 10 years old whereas the alternative count indicated the age as 12 years. He submitted that this would have affected the charge sheet. He further submitted that the age was not proved since no birth certificate or any documentary evidence was produced to prove age of the victim. The Appellant urged this court to set aside the conviction and the sentence.

6. The Learned prosecution counsel, in written submissions, supported the conviction and the sentence. The counsel submitted that the instant appeal was filed out of time without leave of the court hence, the same is a nullity and ought to be struck out. Furthermore, the Appellant pleaded guilty and was therefore bound by the provisions of section 348 of the *Criminal Procedure Code* which bar appeal against conviction where a person pleads guilty. The counsel submitted that the plea was unequivocal since the trial court followed the procedure enumerated under section 207(2) of the *Criminal Procedure Code* in that the substance of the charge and the facts were read and explained to the Appellant in Samburu, a language he understood and he pleaded guilty to the charge by stating 'it is true' and also to the facts.

7. Furthermore, the Appellant did not dispute his knowledge of Samburu language, there were no unusual circumstances such as injury on the Appellant or signs that the Appellant was confused, or that there was delay in bringing the Appellant to the court after his arrest that would have necessitated the trial court to reject the Appellant's plea. As to prove of age of the complainant, the counsel submitted

that the prosecution produced the complainant's health card as Pexhibit 2 which conclusively proved the age of the complainant. The counsel supported the sentence of life imprisonment and urged this court not to interfere with the same.

8. This Appeals turns on whether the Appeal is incompetent for having been filed out of time and if deemed regular whether the plea was unequivocal.

9. The Respondent's counsel took a preliminary point of law to oppose the appeal on the ground that the appeal was filed out of time without leave of this court hence, the same is bad in law and should be struck out.

10. The starting point is section 349 of the *Criminal Procedure Code* which states that-

> " An appeal shall be entered within fourteen days of the date of the order or sentence appealed against. Provided that the court to which the appeal is made may for good cause admit an appeal after the periods of fourteen has elapsed and shall so admit on appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against and a copy of the record within a reasonable time of applying to the court there from."

11. What the above provision stipulate is that an appeal from the trial court to the High Court must be filed within 14 days but the proviso thereof stipulates that the court appealed to, may extend the time for filing of such appeal if sufficient reasons are given for the delay or failure to file the appeal within the 14 days.

12. The Appellant took plea on June 14, 2018. He pleaded guilty and he was convicted and sentenced on the same day. I have perused the record and I have seen a petition of appeal dated June 20, 2018 by the Appellant and from the prison department. Unfortunately, the same petition was filed in this court on April 2, 2019 when the prescribed time had already lapsed.

13. On February 16, 2021, the Appellant filed in this court a chamber summons application seeking leave to file the appeal out of time. There is no indication on the record before this court on whether the application was heard or not. The record further reveals that Waweru J(RTD) admitted this appeal on June 15, 2022. There is no indication however whether the learned Judge considered the Appellant's application for leave. It is also noteworthy that the Appellant all along was acting in person.

14. I have considered this issue carefully and I have noted that our courts in different instances have had different opinions on whether to allow or dismiss the appeal that is devoid of leave. For example, in the case of *Michael Onyango Owala v Republic* [2018] eKLR, RE Aburili J held that;

> Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the proviso to Section 349 of the *Criminal Procedure Code* to enlarge the time for filing of such an appeal or to have the appeal as filed out of time deemed to be duly filed, such an 'appeal' is no appeal at all. It is incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof. Such is not a procedural error. It is an error that goes to the root of the appeal as it is the leave that would accord this court the jurisdiction to hear and determine an appeal that is filed out of time.

15. In *PS v Republic* [2021] eKLR F Gikonyo (J) held that;

> " No leave has been obtained to file the appeal out of time. An appeal filed out of time without leave of the court is incompetent and the court cannot lawfully exercise jurisdiction on such appeal. Limitation of actions is a substantive matter of law. It serves a noble objective to ensure finality of litigation. Thus, failure to obtain leave to file proceedings out of time is not a mere technical omission but a substantial lapse that goes to the root of the proceeding itself."

16. However, RK Limo (J) expressed a different view in *Lucy Muthoni Macharia v Republic* [2015] eKLR. The court held that;

> " I have checked at the proceedings from the file and the record of appeal and I did not find the order granting leave. It is true that where an appeal is filed out of time it is desirable that the Appellant launches the appeal with the order granting leave and indicate so in the petition of appeal. The only savior in this appeal is the fact that the same was admitted to hearing on July 25, 2013 by this court. The law provides under Section 349 of the *Criminal Procedure Code* that this Court has a discretion to admit an appeal outside the 14 days period given if there are sufficient reasons so to do. In view of the fact that the Respondent did challenge the admission of the appeal, this Court shall notwithstanding the sentiments above determine this appeal on merit rather than striking it out for want of form."

17. Noting that the Appellant who is in person had already drawn a petition of appeal 6 days after the conviction and which petition was only filed on 2.4.19 and alive to the fact that the Appellant was convicted at Mararal Law Court, a considerable distance from the nearest High Court Station, and further noting that he subsequently filed an application seeking to lodge the appeal out of time, an application which for no explicable reasons was not dealt with by the court and this court having admitted the appeal on 15.6.22, am persuaded that sufficient ground exists to deem the appeal herein as regularly filed.

18. Moving on to the merit of the appeal, the main issue to consider is whether plea of guilty was unequivocal. The procedure for taking plea is provided under section 207 of the *Criminal Procedure Code* which states as follows;

> (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:
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> 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.

19. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in *Adan v Republic*(1973) EA 445 at 446-

> " When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

20. The record reveals that the charges were read and interpreted in Samburu language, the language that the Appellant understood. It is recorded as follows;

Main count

Accused: it is true

Court: plea of guilty entered.

21. The facts were read and it is recorded;

Accused: the facts are true

Court: accused is convicted on his own plea of guilty.

22. It is noteworthy that the charge was read in Samburu language, a language that the Appellant understood. He did not tell the court that he did not understand the said language so he was aware of what he was pleading to. However, as the Appellant submitted, the trial court failed to warn the Appellant on the consequences of pleading guilty and especially to the instant offence that attracts a life imprisonment.

23. To buttress this point, the Appellant relied on a myriad of cases to show that failure to warn the Appellant the consequences of pleading guilty to the charge would mean that the plea was not unequivocal. In *Alkano Galgalo Dida* Crim App No E007 2021 the court held that the plea was not unequivocal for failure to warn the Appellant of the consequences of pleading guilty. Other cases relied on by the Appellant included the Court of Appeal decision in *Elijah Njihia Wakianda v Republic* [2016] eKLR where the court held that;

> " We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the *Constitution* guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the

protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process."

24. The Appellant also relied on the case of *Simon Gitau Kinere vs Republic* (2016)eKLR, *Fidel Malecha Weluchi vs Republic* (2019)eKLR, and *John Ndung'u Kagiri vs Republic* (2016)eKLR. In all those cases, the convictions and the sentences were quashed.

25. I concur with J Ngugi J (as he then was) in his holding in *Simon Gitau Kinene v Republic* [2016] eKLR that there was need in the circumstances of this case for the court to take the initiative to warn the Appellant who was appearing in person on the gravity and dire consequences of the offence that he faced. The learned judge in the Kinene Case stated;

> Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi vs Republic* Kiambu Criminal Application No 8 of 2016 (Unreported) this is what I said and I find it relevant here:-
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> In those cases (where there is an unrepresented Accused charged with a serious offence), care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence... To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.
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> These sentiments apply with equal force to the present case. I therefore hold that it would be unsafe to uphold the guilty plea in the circumstances."

26. It is my finding that it would be unsafe to uphold the plea of guilt entered in the Appellant's trial. Accordingly, the plea of guilt entered in the Appellant's trial is hereby set aside and substituted thereof with an order that a fresh plea be taken before a magistrate of competent jurisdiction other than A Gachie SRM. The sentence of life imprisonment imposed on the Appellant is consequently set aside. The Appellant be released from prison to be placed at Maralal Police Station pending his presentation to court for plea within 14 days hereof. The Deputy Registrar of this court is directed to send back the trial court file in Maralal PM Sexual Offences Case No 12 of 2018 and a copy of this file and ruling to the Principal Magistrate's Court, Maralal for compliance.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 24TH DAY OF MAY, 2023.

A. K. NDUNG'U

JUDGE