FKC v Republic (Criminal Appeal 132 of 2011)
[2022] KEHC 16371 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16371 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 132 OF 2011

RN NYAKUNDI, J

DECEMBER 16, 2022

BETWEEN

FKC ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Eldoret Criminal Case No 2331 of 2011 delivered by Hon R Koech (SRM) on 11/7/2011)

JUDGMENT

Introduction

1. This is an appeal by the appellant against conviction and sentence from the decision of the Chief Magistrate's Court at Eldoret before Hon R Koech (SRM) in which the Appellant was convicted and sentenced to life imprisonment for the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act*.

2. Being aggrieved with the entire Judgment of the trial Court, the appellant preferred an appeal based on the following grounds:

    1. That the learned trial Magistrate erred in law when she entered a plea of guilty that was not unequivocal.

    2. That the learned trial Magistrate erred in law when she misdirected herself on the procedure of plea taking.

    3. That the learned trial Magistrate erred in law when she rendered a sentence but failed to take into consideration the Appellant's mitigation.

4. That the learned trial Magistrate erred in law and fact when she imposed a sentence which was manifestly excessive and severe considering the circumstances of the case, the age of the offender and the fact that he had no previous criminal records.

5. That the learned trial Magistrate erred in law and fact by handing down an excessive sentence.

Background

3. The Appellant was charged with three counts of incest by male person contrary to section 20 (1) of the *Sexual Offences Act* No 3 of 2006. The Appellant was in addition charged with two alternative charges of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act 2006*.

4. The particulars of Count I were that on the 10th day of June, 2011 at [particulars withheld] Location in Nandi County, intentionally and unlawfully the Appellant caused his penis to penetrate the vagina of NC a girl aged 14 years, who he knew to be his daughter.

5. The particulars of Count II were that on the 20th day of June, 2011 at [particulars withheld] Location in Nandi County, intentionally and unlawfully the Appellant caused his penis to penetrate the vagina of PJ a girl aged 10 years, who he knew to be his daughter.

6. The particulars of Count III were that on the 30th day of June, 2011 at [particulars withheld] Location in Nandi County, intentionally and unlawfully the Appellant caused his penis to penetrate the vagina of CC a girl aged 6 years, who he knew to be his daughter.

7. The particulars of the alternative charges were that the Appellant on diverse dates between 10th day of June, 2011, 20th day of June, 2011 and the 30th day of June, 2011 at [particulars withheld] Location in Nandi County, intentionally and unlawfully caused his penis to penetrate the vagina of NC a girl aged 14 years, PJ a girl aged 10 years and CC a girl aged 6 years, who he knew to be his daughters.

8. At the trial Court the Appellant was charged and sentence to life imprisonment on Count I and Count II. The charges on Count III were withdraw pursuant to Section 87(a) as read with Section 90 of the *Sexual Offences Act* of 2006.

9. On July 11, 2011 when the charges were read out to the Appellant for the first time, the Appellant pleaded guilty to Count I and pleaded not guilty to Count II and Count III and the alternative charges. The Appellant then changed his plea on Count II and fresh plea was taken on Count II and a plea of guilty was entered on Count I and Count II. When the facts were read to the accused. He told the Court that he wishes to be told in Nandi language. The proceedings were then interpreted for the Appellant in Nandi language and he confirmed the plea and stated that the facts were true except for CC. The Appellant stated that he did not have sex with CC. The Appellant was then convicted on Count I and Count II on his own plea of guilty.

The Appellant's Submissions

10. The Appellant also filed written submission on October 22, 2021. In his submissions the Appellant argued that where the plea of guilty is not unequivocal the ensuing conviction and sentence cannot be allowed to stand. The Appellant contends that the trial Court did not record the language which he understood. The further argued that it is not on record whether he understood the charges and the ramifications of the plea of guilty. The Appellant's case is that in the instant case the plea was never unequivocal.

11. The Appellant further submitted that the trial Magistrate imposed a severe sentence without considering that he was a first-time offender and that he had no previous records by the time of conviction and sentence.

Determination

12. Section 348 of the *Criminal Procedure Code* bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence by providing that: -

> " 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 and legality of the sentence."

13. In the case of *Olel v Republic* [1989] KLR 444, it was held that: -

> " Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

14. It worth noting that the bar only operates where the plea is unequivocal.

15. The procedure and guideline for plea taking is well articulated in Section 207 of the *Criminal Procedure Code* and the same was affirmed by the Court in the case of *Adan vs Republic* [1973] EA 445 where it was held:

> " 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.
>
> The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
>
> 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.
>
> 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.
>
> 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."

16. Similarly, in the case of *K N vs Republic* [2016] eKLR, where it was held that:

> " The procedure for taking plea follows a well-beaten path. The leading case, Adan v R (1973) EA 445 emphasises that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in Adan (supra) in Hando S/o Akunaay v Rex (1951) 18 EACA 307 as follows;
>
> '...before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent.'

> Where an accused person who has been called upon to plead under section 207 of the Criminal Procedure Code in the subordinate court admits the charge, the proviso to subsection (2) requires the prosecution to outline the facts upon which the charge is founded. The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information, as the case may be, as well as the facts outlined where the accused pleads guilty. The facts therefore are as important part of a plea as the charge itself. The nature and elements of the offence in totality must be understood by the accused and the trial court must be satisfied about this before accepting them as true. We think the court should also explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence. In outlining the facts the prosecution's role is to present the evidence that could have been proven if the case had gone to trial. Therefore for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond any reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibits that they would have relied on at the trial."

17. The record shows that the charges were first read to the Appellant on July 11, 2011 the Appellant pleaded guilty to Count I and pleaded not guilty to Count II and Count III and the alternative charges. The Appellant then changed his plea on Count II and fresh plea was taken on Count II and a plea of guilty was entered on Count I and Count II. When the facts were read to the accused. He told the Court that he wishes to be told in Nandi language. The proceedings were then interpreted for the Appellant in Nandi language and he confirmed the plea and stated that the facts were true except for CC. The Appellant stated that he did not have sex with CC. The Appellant was then convicted on Count I and Count II on his own plea of guilty.

18. In the present case, it is evident that trial Court's record does not indicate the language that the Appellant understands before taking his plea. This is in both the typed proceedings and the handwritten proceedings. It is therefore in doubt as to whether the Appellant understood the charges which were read to him and the ingredients thereof. This is further demonstrated when the facts of the case are read to the Appellant and he seeks to have them translated to him in Nandi language.

19. For a guilty plea to be unequivocal, the steps set out in *Adan vs Republic* (*supra*) must be followed. Further, the record must be such that it leaves no doubt as to whether the accused understood the charges and confirmed the charges as true. I find that the plea in this case was not unequivocal.

20. I also note that the trial Court did not warn the Appellant as to the consequences of pleading guilty. The importance of warning the accused person as to the consequences of pleading guilty was considered in the case of *Elijah Njihia Wakianda –vs- Republic* [2016] eKLR where the Court of Appeal 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……"

often- intimidating judicial process....."

21. This duty exists not only to capital offences but other serious offences whose sentences may be indefinite or long. The Court must ensure that not only does the accused understand the ingredients of the offence with which he is charged at all the stages of the plea taking, but that he also understand the sentence he faces where he opts to plead guilty as failure to do so is a violation of his right to a fair trial and that the plea of guilty was in those circumstances not unequivocal.

22. Having quashed the conviction, should I order a retrial? I think not. I consider, in the circumstances of this appeal, that a retrial is likely to cause an injustice to the Appellant. As stated by the Court Appeal in *Fatehali Manji vs Republic* 1964 EA 481

> " even where a conviction is vitiated by a mistake of the trial Court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

23. Similarly, In *Muiruri –vs- R* [2003] KLR 552, the Court held that: -

> " It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the Court's."

24. I will therefore allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF DECEMBER, 2022.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr Mugun for the state

Coram: Hon. Justice R. Nyakundi

Mr Mugun for the state