JMN v Republic (Criminal Appeal 11 of 2020)
[2021] KEHC 7973 (KLR) (18 March 2021) (Judgment)

JMN v Republic [2021] eKLR

Neutral citation: [2021] KEHC 7973 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL 11 OF 2020

RN NYAKUNDI, J

MARCH 18, 2021

BETWEEN

JMN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in Lamu PMCRC No. 15 of 2020 delivered by Hon. Stati on 14th July 2020 and 15th July, 2020)

Circumstances under which a plea of guilty would not be unequivocal.

The appellant, JMN, was convicted and sentenced to 15 years' imprisonment for incest under section 20(1) of the Sexual Offences Act based on his own guilty plea. He later appealed, arguing that his plea was not unequivocal due to intimidation, coercion, and lack of proper warning about the consequences. He also challenged the degree of consanguinity under section 22 of the Act. The court found that the plea was improperly taken, lacking a clear explanation of the charge's elements. It also noted ambiguities in the legal definition of consanguinity and emphasized the need for alternative dispute resolution. The conviction and sentence were quashed.

Reported by Beryl Ikamari

Criminal Procedure *- plea taking - plea of guilty - recording of a plea of guilty - where the court record did not show that the accused person was given sufficient details about the seriousness of the charge before plea taking and the accused person alleged that he pleaded guilty on account of intimidation and false promises of a lenient sentence - whether the plea was unequivocal - Constitution of Kenya, 2010, article 50(2)(b); Criminal Procedure Code (cap 75), section 207.*

Brief facts

After pleading guilty, the appellant was convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act and sentenced to 10 years imprisonment. He was accused of having penetrated the vagina of MNM while knowing that she was his niece. The appellant filed an appeal in which he averred that the plea of

guilty was not unequivocal. He explained that the plea was taken virtually while he was frightened at a police station in the presence of fierce looking uniformed police officers. He further stated that the plea was obtained through blackmail and false promises of a short probationary sentence.

Issues

i. What was the procedure to be followed when an accused person pleaded guilty to a charge?

ii. Under what circumstances would the court find that a plea of guilty was not unequivocal?

Held

1. The appellant was convicted on his own plea of guilty and the matter did not proceed for trial. The central question in the appeal was whether the plea was unequivocal. Under article 50(2)(b) of the Constitution an accused person had the right to a fair trial including the right to be informed of the charge with sufficient detail to answer to it. Section 207 of the Criminal Procedure Code also provided for matters related to plea taking.
2. The procedure and manner in which a guilty plea ought to be recorded by the trial court was as follows: -
    a. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understood.
    b. the accused's own words should be recorded and if they were an admission, a plea of guilty should be recorded.
    c. the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.
    d. If the accused did not agree to the facts or raised any question of his guilt in his reply it had to be recorded and change of plea entered.
    e. If there was no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused's reply.
3.
    a. The proceedings at the trial court were conducted in Kiswahili. The appellant replied to the charge and to the particulars of the charge in Kiswahili language. He mitigated to the court in the same language. The appellant understood that language.
4. When the charges were read to the appellant, he responded that 'Ni Ukweli', which meant 'it is true'. However, the record did not indicate exactly what the accused person was agreeing to. It was not clear whether all the ingredients of the offence were explained to him and whether it was those ingredients that he acceded to. That raised doubts as to whether the plea was unequivocal.
5. It was pertinent that the appellant be made to understand the gravity of the charges facing him. A record that indicated that the accused was warned of the seriousness of the charge was not sufficient to show the extent to which the accused was informed of the charges facing him.
6. The plea was taken virtually with the accused person being at a police station. Under those circumstances, it was plausible that the accused was intimidated when he entered the plea of guilty. It would be unsafe to uphold the plea under the circumstances.
7. The circumstances of the case were such that the more appropriate approach would have been to engage the co-offenders in a traditional dispute resolution. The appellant was 22 years old and the co-offender was 20 yeas old - both were adults.
8. The nature of the offence was incest and the degree of consanguinity was challenged on appeal. The appellant contended that he was an uncle of the second degree to the accused, being the cousin of the co-offender's mother. That degree of consanguinity was far removed as to allow for there to be a better resolution. After all, as aforesaid, the wording of section 22 (2)(a) of the Sexual Offences Act was of an ambiguous nature and often came in conflict with traditional African and Kenyan cultures' definition of relatives.

Appeal allowed. Conviction quashed and sentence set aside.

Citations

Statutes

1. Constitution of Kenya, 2010
2. Sexual Offences Act

Advocates

Mr. Mwangi for the State

JUDGMENT

Representation:

Orina & Company Advocates for the Appellant

Mr. Mwangi for the State

1. The Appellant, JMN was convicted and sentenced on his own plea of guilty in Lamu Principal Magistrate's Case No. 15 of 2020 for the offence of Incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on diverse dates between 15th of March 2019 and 11th July 2020 at Hindi location, Lamu west sub-county within Lamu county being a male person, the Appellant caused his penis to penetrate the vagina of MNM a female person who was to his knowledge his niece.

3. The Accused was presented to court on 13th July 2020. The charge was read out to him and he plead guilty. The court warned him of the seriousness of the charge and a guilty plea was entered. On 15th July 2020, the Court sentenced the Appellant to 15 years' imprisonment.

4. Aggrieved by the conviction and sentence, the accused by a Petition of Appeal dated 28th July 2020 has approached this court on 9 grounds of appeal as outlined below:

    1. That the learned Trial Magistrate erred in law in failing to see that the plea of guilty was not unequivocal.

    2. That the Trial Magistrate erred in law in failing to appreciate that the Plea was taken virtually with the Appellant being at the Police Station frightened and intimidated by the presence of fierce looking uniformed police officers who were full-house in the proceedings room.

    3. That the Trial Magistrate erred in law and fact in accepting the plea of guilty from the Appellant who pleaded through blackmail and false promises of his liberty as the charge was said to be a minor charge punishable by a short probation sentence.

    4. That the Trial Magistrate failed in law and fact in failing to appreciate that the Appellant was not in his right state of mind when the plea was taken.

    5. That the Trial Magistrate failed in law in failing to ask the Appellant the language which he understands and prefers to be used to him.

    6. That the learned Trial Magistrate erred in law in failing to warn the Appellant on the severity of the charges and the consequences of the sentence.

7. That the learned Trial Magistrate erred in law and in fact by failing to establish that the prosecution did not satisfy the test of uncle-niece relationship beyond reasonable doubt through evidence when facts were read by the prosecutor.

8. That the trial magistrate erred in law and fact in relying on medical evidence that was fished out after the Appellant was arraigned.

9. That in any event the sentence was manifestly excessive in the circumstances.

5. The Court is urged to allow the appeal, quash the conviction and set aside the sentence of the trial court.

Submissions on Appeal

6. Counsel for the Appellant filed submissions dated 4th February 2021. The question of whether the learned Trial Magistrate erred in law and in fact by failing to establish that the prosecution did not satisfy the test of uncle-niece relationship beyond reasonable doubt through evidence when facts were read by the prosecutor was first to be addressed. Reliance was placed Section 22 of the *Sexual Offences Act* for the submission that the appellant is related to the Co-offender by virtue that the appellant is a cousin to MNM's mother hence the appellant is related to the co-offender as an uncle of the second degree and not the first degree as provided in Section 22(2)(a) of the *Sexual Offences Act*.

7. It was further submitted that the Right to Fair trial under Article 50 (2) (b) included the right to be informed of the charge with sufficient detail to answer it. It was submitted that in as much as a plea is unequivocal, it should not be coupled with any threats or coercion. Reliance was placed on Elijah Njihia Wakianda v Republic [2016] eKLR and Adan v Republic [1973] EA 445 which it was submitted laid out the manner in which guilty pleas ought to be entered. Further reliance was placed on Kinene v Republic [2016] eKLR.

8. Citing Paul Matungu v Republic [2006] eKLR and Boit v Republic [2002] eKLR it was submitted that further submit that considering the nature of the sentence, the Appellant ought to have been warned of the consequences of pleading guilty, more so given the fact that the plea was taken virtually with the appellant being at the police station. That the trial court ought to have ascertained whether the Appellant was in his right state of mind, since he had gone through trauma at the police station with all the intimidation and being ignorant of the court process, although ignorance is no defence.

9. It was further submitted that the intimidation by the police influenced the guilty plea and the appellant had been promised liberty on the basis that the charge was minor and it would only attract a probationary sentence. Reliance was placed on Olel v Republic (1989). Counsel also cited Abdallah Mohamed v Republic [2018] eKLR submitting that as the appellant was unrepresented at trial, it was paramount that the trial court takes steps to ensure that the appellant had understood every element of the charge and facts as read to him.

10. In closing, it was submitted that the sentence meted out was manifestly excessive and the Court out to step in and quash it. Counsel cited Issa Abdi Mohamed v Republic [2006] eKLR.

Analysis and Determination

11. Given that this is a first appeal the role of this court is well settled. It was held in the case of Pandya v R [1957] EA 336 that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always

bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

12. As the Appellant was convicted on his own plea of guilty, the matter did not proceed on for trial, thus the trial court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

13. Central to the appeal is the question of plea taking and whether the guilty plea was unequivocal. Article 50 (2)(b) of *the Constitution* states that: -

> (2) Every accused person has the right to a fair trial, which includes the right- (b) to be informed of the charge, with sufficient detail to answer it."

14. Section 207 of the *Criminal Procedure Code* states as follows:

'207

> (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 plea agreement;
>
> (2) If the accused person admits the truth of the charge otherwise than by 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;
>
> 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."

15. Courts have had occasion to elaborate on the procedure and the manner in which a guilty plea ought to be recorded by the trial court. In the case of Adan vs R (1973) EA 445 and in the Court of Appeal case of Kariuki vs R (1954) KLR 809 the rendition of the Court was 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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.
>
> (iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.
>
> (v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

16. Further in the case of Kariuki vs R (supra) the Court went on and stated that:-

> "The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."

17. The accused was presented in court on 13th July 2020, for completeness I will reproduce the record of the lower court:

> "13/7/2020
>
> Coram:
>
> T.A. Sitati- P.M.
>
> Kiongo - DPP
>
> Kitti- Court Assistant
>
> Accused - Present
>
> DPP: Facts are ready
>
> (Incest, Indecent charges)
>
> Charge Read Over and Explained In Kiswahili:
>
> Accused responds: Count 1: Ni ukweli: (True)
>
> T. A. Sitati - P.M.
>
> 13/7/2020
>
> Court: Accused is warned on seriousness of the charge.
>
> Court: Plea of guilty entered.
>
> T. A. Sitati - P.M.
>
> 13/7/2020
>
> DPP: Pray for facts on 14/07/2020 for the exhibits to be produced - P3.
>
> T. A. Sitati - P.M.
>
> 13/7/2020
>
> DPP: The P3 is at Hindi Police Station now.
>
> T. A. Sitati - P.M.
>
> 13/7/2020
>
> Accused: Nothing to say.
>
> T. A. Sitati - P.M.
>
> 13/7/2020
>
> Court:
>
> 1. Facts 14/7/2020.
> 2. Accused remanded in custody Hindi Police Station.
>
> T. A. Sitati - P.M.
>
> 13/7/2020
>
> 14/7/2020
>
> T.A. Sitati- P.M.

Kiongo - DPP

Kitti- Court Assistant

Accused - Present

DPP:

Facts are that in April 2020, MN aged 20 years went to her father and asked for permission to get married to her lover JMN. The father refused to grant the permission. He told the daughter that they were first Cousins - J and the father. That as a result J was M's uncle. He declined to grant the permission.

M left in a huff screaming that her father would not stop her from finding love. She disclosed that they had been in love for 4 years. The father called for an emergency family meeting attended by the said J, M and 2 brothers of J. J and M disregarded the resolution and fled the village. They went to rent a single room and began living together as a husband and wife.

The father sent an elder, Pastor Mbogua, to try and separate the 2 but both J and M refused. PC Peter Bigambo was alerted. He went to Hindi Town and confirmed that J and M were living together. Both were arrested.

Mary who was aged 20 years old was medically examined. The doctor confirmed that she had been engaging in sexual intercourse.

I produce the following:

1. Treatment notes dated 13/7/2020 confirming that M was engaging in sex- P EX 1.
2. P3 - Form dated 14/7/2020 confirming the sexual evidence on the female- P.EX. 2.
3. The Doctor also filed the Post Rape Care Form in which the female told the doctor that it was all voluntary sex.

I produce the Post Rape Care Form as PEX.3.

The 2 were booked in and brought to Court as today.

That is all

T. A. Sitati - P.M.

14/7/2020

ACCUSED: Facts are true.

COURT: Convicted on own plea of guilty.

T. A. SITATI - P.M.

14/7/2020

14/7/2020

DPP: First Offender.

No previous record

T. A. SITATI - P.M.

14/7/2020

Mitigation, Kiswahili

I ask for forgiveness. I sent her to seek permission from her father. It was my fault. I ask to be given a chance. I want to pursue education. I am still young - 22 years old.

T. A. Sitati - P.M.

14/7/2020

COURT: Sentence 15/7/2020

T. A. Sitati – P.M.

14/7/2020

15/7/2020

T.A. Sitati- P.M.

Kiongo - DPP

Kitti- Court Assistant

Accused - Present

Sentence, Kiswahili

A first Offender. His pleaded guilty. Asks for forgiveness.

The aggravating factors are his persistent rejection of the sustained efforts by his parents and relatives to bring the relationship to an end. Even a Priest's effort went naught.

To deter this relationship, the Court passes the minimum sentence of 10 years' imprisonment

Right of Appeal 14 days.

T. A. Sitati

Principal Magistrate

15/7/2020

18. The lower court record as reproduced above indicates that the proceedings in the case were conducted in Kiswahili language. The appellant replied to the charge and to the particulars of the charge in Kiswahili language. He mitigated to the court in the same language. I am thus convinced that the proceedings were conducted in Kiswahili language that the appellant understood the language. However, in Mose v R (2002) 1 EA ,163, the Court of Appeal Chunga CJ Lakha and Okubasu JJA held;

19. The procedure for calling upon an accused to plead required that the accused admit to all the ingredients of the offence charged before a plea of guilt could be entered against him. The words "it is true" standing on their own did not constitute an unequivocal plea of guilt. It was desirable that every constituent ingredient of the charge be explained to the accused so that he should be required to

admit or deny every constituent." In the same vein, in George Wambugu Thumbi v Republic Criminal Appeal 1 of 2018 [2019] eKLR the Court held:

> "It is time that when an accused person responds 'it is true' to a charge read to him or her, to be asked what exactly he is saying is true to."

20. Against the backdrop of the aforementioned authorities, it is of note that when the charges were read to the Appellant, he responded that 'Ni Ukweli', which means 'it is true'. However, the record does not indicate what exactly the accused person was agreeing to. It is not clear whether all the ingredients of the offence were explained to him and whether it is these ingredients that he acceded to. This raises doubts as to whether the plea was therefore unequivocal.

21. Going further, I associate myself with the sentiments regarding an unequivocal plea of guilty–especially where the accused person was unrepresented and the charges facing them attracted a custodial sentence as expressed by my colleague Ngugi J in Simon Gitau Kinene v Republic Criminal Appeal 9 of 2016 [2016] eKLR:

> 19. 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 v R Kiambu Crim. App. No. 8 of 2016 (unreported) this is what I said and I find it relevant here:
>
> > 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."

22. Flowing from the above case, it was pertinent that the Appellant be made to understand the gravity of the charges facing him. The court record indicates that 'Accused is warned of the seriousness of the charge'. This alone is not sufficient in my view to show the extent to which the accused was informed of the charges facing him. Additionally, as has been stated by Counsel for the accused person, the plea was taken virtually with the accused person being at a police station at the time. It is not lost on this court that under those circumstances, it would be plausible that the accused was intimidated when he entered the plea of guilty. In totality, I am of the persuasion that it would be unsafe to uphold the guilty plea in the circumstances.

23. Having reversed the conviction on a plea of guilty, I now have to contend with the sentence of 10 years' imprisonment. The powers of the High Court in an appeal are found in section 354 of the CPC and include;

> (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
>
> (a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence."

24. In the current case, the Appellant has argued that his relation to the co-offender did not fall within the ambit described under Section 22 of the *Sexual Offences Act*. It was said that the Appellant was is related to the co-offender as an uncle of the second degree and not the first degree as provided in Section 22(2)(a) of the *Sexual Offences Act*. This court in Ismael Hassan Medza v Republic Criminal Case 111 of 2017 [2021] eKLR had the following to say on the degrees of consanguinity as regards the offence of incest as contained in Section 22 of the *Sexual Offences Act*.

25. My interpretation of the offence of incest under Section 20 (1) of the Act was meant to prohibit sexual intercourse between persons so closely related that marriage between them is forbidden by Law.

However, the common definition in Section 22 of the Act embodies the views of parliament which one may term as amorphous in both dictionary and legal definitions. Why do I say so? The scope of consanguinity varies from one race, tribe, ethnic society, community and country, for reason that various societies have stringent cultures customs and taboos which govern incestuous acts and prohibitions."

26. Article 159(2) of *the Constitution* recognizes the principles that should govern the exercise of judicial authority. These are:

a. Justice shall be done to all, irrespective of status;

b. Justice shall not be delayed;

c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

27. The Judiciary Alternative Justice Systems Baseline Policy,2020 recognizes the importance of traditional justice systems in the resolution of both civil and criminal disputes. It adopts the Agency Theory of Jurisdiction as the constitutionally permissible modality to determine the acceptability and propriety of a particular dispute, controversy or issue to be before an AJS Mechanism. This theory also challenges us to go beyond the narrow view in criminal law of taking these cases as disputes between the State and the individual, and not between two individuals.

28. This theory has been applied in Republic v Mohamed Abdow Mohamed [2013] eKLR where the Court discharged an accused who had been charged with murder in keeping with the agency theory, since the Court established that there was consent in the withdrawal of the matter. A similarly situation prevailed in Republic v Musili Ivia & another Criminal Case No. 2 of 2016 [2017] eKLR.

29. I have set out the above rendition as it is my feeling that given the circumstances of this case, a more appropriate approach would have been to engage the co-offenders in traditional dispute resolution. I say so emboldened by the fact that the appellant is a young man of 22 years at the time the offence was committed. The co-offender was 20 years old. Both are adults. While the nature of the offence is that

of incest, the degree of consanguinity was challenged on appeal. The Appellant contended that he was an uncle of the second degree to the accused, being the cousin of the co-offender's mother. This degree of consanguinity is far removed as to allow for there to be a better resolution. After all, as aforesaid, the wording of Section 22 (2)(a) of the *Sexual Offences Act* is of an ambiguous nature and often comes in conflict with traditional African and Kenyan cultures definition of relatives.

30. In the premises, I am inclined to allow the appeal. The conviction of the appellant of 14th July 2020 is quashed and the sentence of 15th July 2020 set aside. The Appellant shall be set free unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH 2021.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mwangi for the State – present virtually

Appellant – present virtually