REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 18 OF 2020

JKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kilgoris Sexual Offences Case No. 54 of 2018 delivered on the 10th December *2018 by Hon. D.K Matutu, PM)*

JUDGMENT

1. JKM, the Appellant herein, was charged with the offence of incest contrary to **section 20(1) of the Sexual Offences Act No. 3 of 2006**. The alternative charge was committing an indecent act with a child contrary to **section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on 7th December in Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AC who was to his knowledge his grandchild.

2. The substance of the charge was stated to the appellant who responded as follows;

Main Count – it is false

Alternative Count –it is true

3. The facts outlined by the prosecution were that on the material day BM, the grandmother to the complainant heard her crying. She went to the child and found her pants wet. BM then saw the appellant, who was her husband, going back to bed and asked her what had transpired, the appellant asked her not to report. BM reported the incident to the village elder SR. They informed the assistant chief and the appellant was arrested and taken to Chamamit AP post while the complainant taken to hospital. The appellant was then charged.

4. The appellant responded by stating that ***"the facts are true".***

5. The trial court entered a plea of guilty on the alternative charge based on the appellant's admission.

6. Despite being convicted on his own plea of guilty, he has appealed against both the conviction and sentence. The appellant is seeking a lesser sentence on the ground that he is remorseful. Although he admits to pleading guilty before the trial court he contends that he did not understand the seriousness of the offence he was accused of.

7. The state counsel, Mr. Otieno, opposed the appeal. He submitted that the appellant was charged with defiling his granddaughter, admitted to have committed the offence and was charged for 15 years. He argued that the charge was properly read to the appellant in a language he understood. Mr. Otieno urged the court to consider that the child was 3 years old and the sentence meted was appropriate as the law provides for life imprisonment.

8. This being the first appellate court, it is my duty to evaluate and reconsider afresh the evidence on record so as to arrive at my own conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses **(see: Okeno v Republic [1972] EA 32).**

9. The conviction having been challenged this court must determine whether the plea was unequivocal. **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."

10. The Court of Appeal in **Elijah Njihia Wakianda v Republic [2016] eKLR** where the court observed as thus: -

"…..Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt.

Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms……."

11. Joel Ngugi, J in Simon Gitau Kinene v Republic [2016] eKLR stated that:

"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."

12. I have already clearly set out above the procedure that was followed by the trial court in entering the plea of guilty. It can be observed that the statement of charge was read to the appellant in Kipsigis language and he pleaded guilty to the alternative charge.

13. In **Abdallah Mohammed v Republic [2018] eKLR** the court held that;

"As pointed out, the Appellant had no legal representation and the trial court ought to have taken steps to ensure that the Appellant understood every element of the charge and the facts read out to him. He also ought to have been warned, and that warning captured on record, that the offence he was about to plead to carried a prison sentence of not less than fifteen years. In my view, extra caution includes the question as to whether or not the facts as read out are true and whether the accused person would wish to make any comment." [Emphasis added]

14. In this case after the statement of the charge was read to the appellant, the facts were stated by the prosecution and the appellant confirmed the facts to be true. In the circumstance, I find that the trial court complied with **section 207 of the Criminal Procedure Code** in entering the appellant's plea of guilty and that the appellant understood every element of a charge and pleaded guilty to every element of it unequivocally.

15. I now turn to the issue of sentence. In **WANJEMA VS REPUBLIC (1971) E.A. 493** Trevelyan J. stated;

"An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

16. Section 11(1) of the Sexual Offences Act provides that '*any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years'*. The trial magistrate considered the appellant's mitigation and the age of the victim. The appellant's granddaughter was only 3 years at the time the appellant sexually molested her and the sentence cannot be described as excessive in the circumstance.

17. In the end, the appellant has failed to demonstrate that the trial magistrate took into consideration some immaterial fact, acted on wrong principle or that the sentence is manifestly excessive. The appeal is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF MARCH, 2021.

R. E. OUGO

JUDGE

In the presence of:

Appellant In person - Present

Mr. Otieno Senior State Counsel Office of the DDP

Ms. Rael Court Assistant