



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 96 OF 2019

(Appeal arising out of conviction and sentence of Hon. Moranga M.I.G. (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 23 of 2019 delivered on 19th September 2019)

OLIVER MUKAYA LICHOMA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Oliver Mukaya Lichoma, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (3)** of the. The particulars of the offence were that on diverse dates between 6th January 2019 and 22nd January 2019 at [particulars withheld] Village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of VDA, a child aged fifteen (15) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars were that on diverse dates between 6th January 2019 and 22nd January 2019 at [particulars withheld] Village within Trans-Nzoia County, the Appellant intentionally caused the contact between his genital organ namely his penis and the genital organ namely the vagina of BCN, a child aged fifteen (15) years. The trial court sentenced the Appellant to **fifteen (15) years imprisonment** after an initial plea of **“not guilty”** to the charge and changed his plea to **“guilty”**. This was after four of the prosecution witnesses had testified.

The Appellant is aggrieved by the respective conviction and sentence hence this Petition of Appeal. The grounds in support of the Petition are that the evidence in support of the charge was marred with discrepancies and contradictions, the charge was defective, the medical evidence was insufficient, the age of minor was not proved, and finally his defence was not considered. The Appellant urged this Court to allow the Appeal, quash the conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, parties relied on their written submissions. It is important to note at this juncture that the Appellant challenged the evidence on record yet the conviction was on the basis on his own plea of “guilty”. He regrettably failed to raise any ground on the basis of his agreement to change of plea. This court observes that the same ought to be the crux of the Appeal insofar as the determinate question being whether the conviction on a plea of “guilty” was sustainable. Put differently, did the court err in convicting the Appellant on the strength of his plea of “guilty”? Notably however, the Appellant challenged the particulars of the charge in terms of the complainant’s initials. He faulted the prosecution for indicating that a minor initialed VDA and not TNW was defiled.

Mr. Omooria for the State opposed the appeal. He asserted that the ingredients of the charge of defilement was proved. He however departed from the trial court’s conviction faulting it for not having meet the rudimentary threshold when entering plea of “guilty” and subsequently convicting the Appellant. The Learned Prosecutor cited the case of **Elijah Njihia Wakianda –vs- Republic [2016] eKLR** for the proposition that the trial court must specify the language used to explain the charge and every element of a charge where an accused person elects to enter a plea of “guilty”. He stated that the failure by the trial court to record such information went to the root of the trial and the absence thereof rendered the conviction a nullity. The plea, he added, was equivocal. Consequently, he prays that the conviction be quashed and an order for retrial be made.

It is the duty of this court as the first appellate court to re-evaluate and to reconsider the evidence adduced before the trial magistrate’s court before reaching its own independent determination whether or not to uphold the conviction. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**Njoroge Vs Republic [1986] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established the charge brought against the Appellant to the required standards of proof.

This court has perused at the proceedings at trial. The Appellant was arraigned in court on 28th January 2019. On 29th January 2019, the Appellant entered a plea of “not guilty”. The court recorded:

“The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language he/she understands, who being asked whether s/he admits or denies the truth of the charges(s) ...”

The court granted the Appellant bond. The case then proceeded for hearing. PW1 and PW2 testified. During cross examination of PW1 it was noted that the Appellant was unable to ask relevant questions. He mumbled incoherently despite several warnings by court. Upon cross examination of PW3, the court noted that the Appellant had been disoriented throughout the trial. It directed that he be mentally assessed to ascertain if he is fit to stand trial. It was established that the Appellant was mentally fit. The trial thus proceeded accordingly. After the testimony of PW4 was taken on 16th August 2019, the Appellant told the court that he was sorry and would like to change his plea. The proceedings are recorded as follows:

“the substance of the charge and every element thereof has been stated to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies:

Accused: *Ni kweli.*

Court: Plea of guilty is entered.”

The facts were read out. The P3 form and the complainant’s birth certificate were produced into evidence. The accused stated: “facts are true”. Consequently, the Court proceeded to convict the accused person on his own plea of “guilty” and admission of facts. The exhibits were admitted into evidence. The sentencing was adjourned to enable a probation officer to prepare a probation report. When the matter came up in court on 12th September 2019, the Appellant indicated that he would like to change his plea. The trial magistrate recused herself for reasons that the Appellant was taking the court round circles and that any decision that she may render would be deemed unjust or prejudicial to either the complainant or the Appellant. The case was subsequently re-allocated to another magistrate. There is no indication from the record that the Appellant formally changed his plea. Instead, the court proceeded to sentence the Appellant to serve fifteen (15) years imprisonment. This was after the trial court had taken into account his mitigation and the recommendations in the probation report. This court is of the view that the following issue will determine the Appeal:

Whether the trial court met the threshold to enter a conviction on the Appellant’s plea of guilty

The procedure adhered to when an accused person enters a plea of guilty is to be found in **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 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 an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

This was further explained by the Court of Appeal in Adan –vs- Republic (1973) E.A 445 where at page 446 the court pronounced itself thus:

“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 guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to the sentence the statement of facts and the accused’s reply must, of course, be recorded.”

From the wordings of the **Criminal Procedure Code** and the above decision, the general overview is that the charges must be read in a language or so near to a language that the accused person speaks and understands. The charge and the particulars thereof must be clear and unambiguous as a matter of necessity. Further, the response must be recorded in the manner in which the response is given or as nearly and close to what the accused said in answer to the charge.

This court holds that it is imperative to ascertain whether further considerations must be taken on charge of sexual offence where mandatory minimum sentences are provided by the Act. The trial court must ensure that in such circumstances, the accused is indeed pleading “guilty” to the charge. A warning must be given to such an accused of the consequences of pleading “guilty” to the charge. The Court of Appeal in Elijah Njihia Wakianda –vs- R Criminal Appeal No. 73 of 2016 (Nakuru) held:

“We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. This should be established by specifically asking the accused what language he understands, and recording his answer before

either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language.

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.”

The proceedings of the particular day have been reproduced above. A cursory perusal reveals that the trial court did not with specificity indicate the particular language that was used to explain the charge and the particulars thereof. The court did not further caution the Appellant on the consequences of entering a plea of “guilty” in the circumstances where he is likely to face a minimum mandatory sentence on the charge levelled against him. It is further noted that the Appellant was unrepresented. It therefore hooved the trial court to treat with greatest circumspection the Appellant’s plea of “guilty” and hold his Constitutional rights to fair trial with the highest of regard. Anything less would amount to a miscarriage of justice. To this extent, this court agrees with the submission of the Learned Prosecutor that the conviction on the strength of the Appellant’s plea was equivocal. It is for this reason that this Court holds that the Appellant’s conviction on his own plea of “guilty” must be quashed.

The issue that remains for determination is whether a retrial should be ordered as requested by the prosecution. The principles guiding this court in determining whether or not to order a retrial were set out by the court in **David Tsori Sinaraha & another –vs- Republic [2004] eKLR**. It includes whether the prosecution witnesses will be procured if a retrial is ordered and whether the broad interests of justice will be served. In the present appeal, it was clear to this court that if a retrial is ordered, the prosecution will not be able to produce the main witness (the complainant) to testify before court. During the vitiated trial, the complainant’s mother told the court that the complainant had since disappeared from home and was not therefore available to adduce evidence before court. It is therefore clear that even if this court were to order that the Appellant be retried, it will not serve the ends of justice. Furthermore, the Appellant has been in lawful custody for a period of more than two (2) years. He would be prejudiced if a retrial is ordered.

In the premises therefore, this court declines the prosecution’s request that the Appellant be retried. He is hereby ordered discharged. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.

It is so ordered.

DATED AT KITALE THIS 26TH DAY OF JULY 2021

L KIMARU

JUDGE