REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

HIGH COURT CRIMINAL APPEAL NO. E007 0F 2021

ALKANO GALGALO DIDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence by Hon. Mbayaki Wafula, SRM, in Marsabit SRM`s Court

sexual offence case No.19 of 2020 delivered on 5/6/2020)

JUDGMENT

1.The appellant was convicted on his own plea of guilty of the offence of attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 10 years imprisonment. The particulars of the offence were that on the 11th May 2020 at [Particulars Withheld] area in Marsabit North sub-county within Marsabit county intentionally attempted to penetrate the vagina of AT, a girl aged 12 years.

2. The grounds of appeal are in summary that the trial court failed to infer that the offencethat was disclosed in the case was that of assault and not attempted defilement; that the trial court erred in relying on uncorroborated and contradictory evidence tendered by the prosecution witnesses; that the trial court failed to note that the case was not investigated to the required standard and that the trial court erred in failing to consider the appellant`s mitigation thus giving him a harsh and excessive sentence.

3. The record of the lower court indicates that the appellant was arraigned on the 25th May 2020.The charge was read to him and he admitted it but said that the victim`s family had forgiven him. The prosecution then at that stage asked the court to look at the matter in its entirety and apply the *ratio decidendi*in the *Muruatetu case* in the matter and use its discretion in sentencing the accused as the accused and the victim had reconciled. The prosecution then gave the facts of the case. The appellant was then asked whether the facts were true and he admitted them. The trial court entered a plea of guilty and convicted the appellant. The appellant was given a chance to mitigate. He prayed for leniency on the reason that he had sought for the victim`s forgiveness and she had forgiven him. Further that he was 19 years old.

4. The court then adjourned the case and called for a pre-sentencing report. The case was mentioned on the 4th June 2020 when it was noted that the pre-sentencing report was not ready. The prosecution once again pleaded with the court to sentence the appellant to non-custodial sentence as he was a youngman. The court put the case for mention on 5th June 2020. On that day the magistrate noted that the pre-sentencing report had still not been filed. He proceeded to sentence the appellant. He noted that the offence that the appellant was facing carried a minimum sentence of 10 years imprisonment. He thereupon sentenced the appellant to the minimum sentence provided by the law of 10 years imprisonment.

5. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced before the trial court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify- see **Okeno v Republic** (1972) EA 32.

6. I have looked at the grounds of appeal presented by the appellant. The grounds are not precise as they were self-prepared by the appellant.Among the grounds is that the prosecution relied on uncorroborated and contradictory evidence of the prosecution witnesses. I have taken note of the fact that the appellant was convicted on his own plea of guilty. The issue of corroboration or adduction of contradictory evidence does not arise as there was no hearing of witnesses. There is thereby no merit in this ground of appeal.

7. The appellant complains that the trial court did not determine whether the offence disclosed was attempted defilement or assault. I understandthe appellant to be challenging the manner in which the plea was taken. He faults the trial magistrate for failing to satisfy himself that the charge and the facts presented in court disclosed an offence of defilement.

8. It is the duty of a plea court to ensure that an accused person understands the charge brought against him/her. The court should also

satisfy itself that any plea of guilty entered is unequivocal.

9. The manner in which charges are supposed to be drafted is provided in section 134 of the Criminal Procedure Code that provides that –

> **Every *charge… shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

10. In this case the appellant was facing a charge of attempted defilement which was contained in the statement of the offence. The particulars of the offence were clearly stated in the charge. There was no defect in the charge as the offence that the appellant was facing was disclosed. In **Sigilani v Republic (2004) 2 KLR, 480** it was held that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".***

The charge in this case disclosed an offence of attempted defilement.

11. The manner in which pleas should be recorded and the steps that should be followed were set out by the Court of Appeal in the case of **Adan v Republic** (1973) EA 445, which steps were paraphrased by the same court in**Ombena v Republic** (1981)eKLRto be that:

> **(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;**
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> **(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
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> **(iii) 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;**
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> **(iv) 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;**
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> **(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."**

12. The appellant stated the following upon the charge being read to him:

"It is true but the victim`s family has forgiven me".

The question is whether the appellant`s statement was an unequivocal admission of the offence.

13. It would appear from the said statement that the appellant expected the court to discharge him because he had reconciled with the victim`s family or that the family of the victim would be called to withdraw the case. He might have thought that he would be given a lenient sentence in view of the reconciliation. The learned state prosecutor gave him some hope in that respect when he asked the court to sentence the appellant to a non-custodial sentence as he was young and had reconciled with the victim`s family.

14. Rule 12 of the *Sexual Offences Rules of Court, 2014*, provides that it is only a person specifically authorised by the Director of Public Prosecutions who can apply to the court to discontinue a prosecution under the Sexual Offences Act. In the premises the family of the victim had no authority to withdraw a charge of attempted defilement. It was the duty of the court to explain to the appellant that the victim`s family had no power to withdraw the case. The trial court proceeded to convict the appellant without explaining that fact to him.

15. Besides the foregoing, section 176 of the Criminal Procedure Code allows for reconciliation in offences that do not amount to felonies and those which are not aggravated in degree. The offence of attempted defilement is a felony and is one that is aggravated in degree, in which case the court has no power to promote reconciliation between the parties. This fact was not explained to the appellant before he was convicted. It must have been utter shock to the appellant for him to be sentenced to 10 years imprisonment when he was waiting to be reconciled with the victim. It is not known whether the appellant would have pleaded guilty to the charge if the foregoing was brought to his attention. It would seem that the appellant was misled into pleading guilty under the mistaken belief that he would be forgiven or the matter withdrawn. In the premises, I do not think that the plea wasunequivocal.

16. The facts of the case as given by the prosecution were that the complainant was a girl of the age of 12 years. That on the material day she was looking for her father`s phone when the appellant accosted her and started to drag her into the bush while trying to undress her. She screamed and her sister called SD went to her rescue. The prosecution thereupon produced the P3 form for the complainant- Pexh.1.

17. The court in the case of **Adan v Republic**(supra) emphasized the importance of giving a statement of facts of a case before a conviction is entered and stated that:

> **"The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really**

unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."

18. The question is whether the facts as given by the prosecution were sufficient enough for the appellant to understand what he was accused of doing. In my consideration, the facts as presentedwere so shallow and sketchy that it was not possible to determine from them whether the plea was unequivocal or whether the appellant had any defence to the charge. It was not disclosed as to whether the victim and the appellant were known to each other before the date of the incident. It was not stated as to the place where the victim was looking for her father`s phone when the appellant is said to have accosted her. It was not stated the distance at which the appellant dragged the victim towards the bush so that the court could ascertain the real intentions of the appellant in dragging her away. It was not stated as to which clothes of the victim that the appellant was trying to removewhich is what could have manifested his intentions. Without clear facts of the case, it cannot be said that the appellant understood the charge that he was facing nor can it be said that the plea was unequivocal.

19. The appellant was facing a serious charge that carried a minimum sentence of 10 years imprisonment. It is the duty of a court taking plea in such serious offences to warn the accused of the expected sentence in case he pleaded guilty to the charge.The Court of Appeal has had the occasion to consider the issue in the case of **Elijah NjihiaWakianda –Vs- Republic, Nakuru Criminal Appeal Number No. 437 of 2010 (2016) eKLR,where it** stated 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."

20. In **Simon GitauKinene –Vs- Republic [2016] eKLR where the accused faced a charge of trafficking in narcotic drugs,** Joel Ngugi J. held the following on the issue:

"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 is 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."

21. It has been held that it is a breach of the right to fair trial for the court to fail to warn an accused person of the danger of pleading guilty to a serious charge. In **Fidel MalechaWeluchi –Vs- Republic [2019] eKLR**Odunga J. held that:

"In this case since the charge which the appellant faced carried a prima facie minimum sentence of twenty years, it is my view that in such serious offences where the sentences may either be long or indefinite, the Court must ensure not only that the accused understands the ingredients of the offence with which he is charged at all the stages of the plea taking but that he also understands the sentence he faces where he opts to plead guilty. That in my view is what is contemplated under Article 50(2) of the Constitution which provides for the right to a fair trial. Whereas the said Article prescribes certain ingredients of a fair trial, the Article employs the use of the word "includes" which means that what is prescribed thereunder is not exclusive but just inclusive since Article 19(3) of the Constitution provides that (3) The rights and fundamental freedoms in the Bill of Rights "do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter" while Article 20(3)(a) thereof enjoins the Court to "develop the law to the extent that it does not give effect to a right or fundamental freedom".

22. In **Bernard Injendi –Vs- Republic [2017] eKLR** where the appellant was charged with defilement, Sitati J.(as she then was) considered the issue and held that:

"Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case (above) the Court of Appeal quoted from Boit vs - Republic [2002] IKLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words "as nearly as possible in his own words". I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty."

23.The appellant was unrepresented when he took plea before the magistrate. It was the duty of the trial court to ensure that the appellant understood all the ingredients of the charge and the resultant sentence in case he pleaded guilty. It is clear from the above authorities that where an accused person is charged with a serious offence that carries a long-term sentence, it is the duty of the trial court to warn him/her of the consequences of pleading guilty to the charge. The trial magistrate in this case did not warn the appellant of the consequences of pleading guilty to the charge and that the offence attracted a minimum sentence of 10 years imprisonment, which is not in any way a short prison term. The failure to so warn the appellant amounted to a breach of the principle of fair trial as prescribed in Article 50(2) of the constitution.

24. The upshot is that the plea entered against the appellant was not unequivocal. There was a breach of the appellant`s right to fair trial for failure to warn him of the consequences of pleading guilty to a serious charge that carried a minimum sentence of 10 years imprisonment. For these reasons the plea should not stand. I consequently quash the conviction entered against the appellant and set aside the sentence of 10 years imprisonment.

25. Upon reaching the above decision, the question is whether I should order a re-trial.The general principle in regard to re-trials is that a re-trial should only be ordered where it is unlikely to cause injustice to the accused. In **ObediKilonzoKevevo –Vs- Republic (2015) eKLR** the Court of Appeal heldthat:

> ***"Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of Muiruri –Vs- Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:-***
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> ***"Generally, whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justicerequireit and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."***
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> ***In the criminal justice system, the law requires that the right of the appellant must be weighed against the victim's right. In this case the appellant has been in confinement for three (3) years. Balancing the two competing interests, we believe justice demands that the case be re-heard in the subordinate court."***

26. In **Samuel WahiniNgugi –Vs- Republic (2012) eKLR** the said court held that:-

> ***"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
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> ***'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.'***

27. In this case it is the trial court that was to blame for the manner in which the plea was taken. It has however to be noted that the appellant was facing a serious offence of attempted defilement on a minor. About one-and -a half years have lapsed since when the charges were brought up against him. I do not consider that period to be detrimental to a fair trial. The appellant will not suffer any prejudice if he is re-tried of the offence. I thereby order that the appellant be re-tried of the offence by a magistrate of competent jurisdiction other than Hon. Mbayaki Wafula.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 25TH DAY OF NOVEMBER 2021.

JESSE N. NJAGI

JUDGE

Present virtually:

Prosecutor Mr. Ngige - for Respondent at Marsabit Law Courts

Appellant present - at Marsabit Law Courts

Court Assistant - Kashane - at Marsabit Law Courts

30 days R/A.