REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 26 OF 2018

CALISTUS MUYUGA OMOLLO..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. P. K. Rugut, Resident Magistrate in Rongo Senior Resident Magistrate's Court Criminal Case No. 368 of 2012 on 26/07/2012)

JUDGMENT

1. This is an appeal against the conviction and sentence resulting from a plea of guilty which was entered upon admission of the offence by the appellant.

2. On 26/07/2012 the appellant was arraigned before the Resident Magistrate in Rongo facing the charge of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that '*on diverse dates between 8th January 2012 and 2nd July 2012 at [particulars withheld] intentionally caused his penis to penetrate the vagina of MAO a girl aged 14 years.'*

3. The record indicates that the charge and its particulars were read to the appellant in English/Kiswahili which language the appellant indicated to understand. When called to respond the appellant admitted the charge.

4. The facts of the case followed immediately which were briefly that *'the appellant lured the child namely MAO aged 14 years and involved her in a relationship in September, 2011 they had sexual intercourse. The child was examined on 24/7/2012, there was vaginal discharge and the hymen was broken.'*

5. The P3 Form and treatment notes were produced as exhibits.

6. When the appellant was called to respond to the facts, this is what he stated:

> ***"The facts are true."***

7. The appellant then tendered his mitigations. The prosecution presented the appellant's criminal history as a first offender. The appellant was then sentenced to 20 years' imprisonment.

8. It is on that background that the appellant being dissatisfied with the sentence challenged the same vide **Kisii High Court Criminal Appeal No. 15 of 2017** before the matter was transferred to this Court. Leave to file an appeal out of time was granted on 02/03/2017.

9. The appeal was heard by way of oral submissions. The appellant appeared in person and Learned Senior Principal Prosecution Counsel **Mr. Kimanthi** appeared for the State.

10. The appellant submitted that the plea was not unequivocal since he did not really know what happened before court. It all happened in a flash. He contended that it was his first court appearance and did not understand the procedures. He stated that he even did not know that he was able to raise a defence in law since to him he married the complainant with the blessings of the parents and there was nothing to point otherwise that the complainant was a minor. The appellant prayed for an acquittal in view of the time he had since spent in prison.

11. The appeal was opposed. It was submitted that the plea was unequivocal. The language was clear and sentence within the law. This Court was urged to dismiss the appeal since the law was adhered to accordingly.

12. As this is the Appellants' first appeal the role of this court is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** 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. In this case however since the matter did not proceed on for trial, the court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

13. Due to the centrality of the issue of plea-taking, I will first revisit the law on that subject. **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.'***

13. The above provisions have previously been subjected to Court's interpretation. The procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of **Adan -vs- R (1973) EA 445** and in the Court of Appeal case of **Kariuki –vs- R (1954) KLR 809** 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.**

14. 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.***

15. And in the case of **Atito -vs- R (1975) EA 278** the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

16. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that: -

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

17. I have perused the record before the subordinate court. The plea was taken in English/Kiswahili languages. It appears the appellant was not convicted of any offence. When the facts were presented to him, he admitted them. No *plea of guilty* was recorded. The facts followed. The appellant also admitted them. The appellant was *not convicted*. Instead, the court received mitigations and sentenced the appellant.

18. As there was no conviction on any offence, it then follows that the sentence cannot stand. Even without dealing with many other aspects of this appeal the fact that the appellant was not convicted of any offence is sufficient to allow the appeal. I will therefore hold it at that.

19. The upshot is that the appeal is allowed and the sentence set-aside.

20. Having so found, I must consider if the appellant is to be retried or released. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

....in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; .....

21. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi v. R (2012) eKLR**:

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:

> *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*

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

> ***…****the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.*

22. I must now apply these principles to this case. The appellant has been in custody since 2012. Those are 8 years. The offence is a serious one. However, considering the time which has since lapsed and the possibility of the availability of the witnesses, I do not find that a retrial will serve any ends of justice.

23. I am further aware of the Supreme Court decision in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR** and that of the Court of Appeal in **Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR** on the mandatory nature of sentences.

23. Consequently, the appellant is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of February, 2020

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Calistus Muyonga Omollo, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant