REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 109 OF 2017

JOSEPH NGII.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence in Kithimani Principal Magistrate's Court (Hon. M.A Opanga), in Criminal Case SOA No. 33 of 2016 delivered on 20.9.2016 and 21.9.2016 respectively)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH NGII.....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. M.A. Opanga Senior Resident Magistrate in **Criminal Case SOA No. 33 of 2016** on 20.9.2016 and 21.9.2016 respectively. The Appellant was on 6.7.2016 charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "on the 20th day of June, 2016 in Masinga Sub-county within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **NM** a girl aged 15 years old.

2. When the charge was read to him, the appellant pleaded not guilty and a hearing date was set. When the matter was scheduled for hearing on 20.9.2016 the appellant indicated that he wanted to change his plea. The charge was read to him and interpreted in Kiswahili and he responded that it was true. The facts were read out to him by the prosecutor who produced the birth certificate, P3 form and post rape care form of the victim. The appellant informed the court that the facts were correct and he was thus convicted on his own plea of guilty. The appellant in mitigation told the court that he was intoxicated. The matter was deferred for sentencing wherein the court asked the appellant again as interpreted in Kiswahili if he still admitted the charges and he indicated that he did commit the offence. The appellant was on 21.9.2016 sentenced to 20 years imprisonment.

3. The appellant is dissatisfied with the decision of the trial court and on 31.10.2016 he appealed to this court after the grant of the requisite leave. The appellant challenged the trial court for failing to scrutinize the evidence; for failing to comply with Section 169(1) of the Criminal Procedure Code. The appellant challenged the failure to call crucial witnesses, the failure to conduct a DNA test and intimated that the prosecution's case was not proven to the required standards. The appellant prayed that the appeal be allowed, the conviction be quashed, and that the sentence be set aside. On record are grounds of clemency wherein the appellant sought that the court interfere with the decision of the trial court and reduce the sentence to the time served.

4. Submitting in support of the appeal, the appellant sought to invoke the provisions of Section 362 and 364 of the Criminal Procedure Code and urged the court to review his sentence to time served. Reliance was placed on the case of **Francis Karioko Muruatetu & Another v R (2016) eKLR and Baraka Kazungu Maingi v R (2017) eKLR**.

5. In response, the learned counsel for the state opposed the appeal and argued that the plea that was recorded was in line with the procedure in the case of **Adan v R (1973) EA 446**. Reliance was also placed on section 348 of the Criminal Procedure code as well as the case of **Olel v R (1989) KLR 444**.

6. In rejoinder, the appellant submitted that the trial court failed to take steps to ensure that the appellant understood the impact of the charges

that were levelled against him. The appellant prayed that the court order a retrial and placed reliance on the case of **Fatehali Manji v R (1964) EA 481.**

7. The issues to be determined are on the propriety of the plea of guilty and the orders that the court may grant. According to section 348 of *The Criminal Procedure Code*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the legality of the plea or to the extent or legality of the sentence.

8. Having been convicted on his own plea of guilty, the appellant in his submissions by challenging inter alia the manner in which the plea was recorded, is in essence appealing the legality of the plea. However this challenge did not appear in the memorandum of appeal and instead the appellant seemed to seek for a downward review of the sentence meted on him.

9. Be that as it may, the procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in ***Adan v. Republic, [1973] EA 446*** where Spry V.P. at page 446 stated it in the following terms:

> **"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 alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."**

10. It is incumbent upon a trial court when recording a plea to be meticulous in ensuring it first that the charge is read and explained to the accused in the language he or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

11. The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence, otherwise the plea is not unequivocal. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see ***R v Peter Muiruri & Another (2014) eKLR***).

12. For a charge under sections 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006, it is necessary that the facts of the offence should specify; - the existence of a victim who is a child, unlawful penetration of the sexual organs of a victim and the identity of the perpetrator. In the instant case, the facts as narrated by the prosecutor do disclose that the appellant penetrated the victim whose age was indicated in the birth certificate that was tendered in court. The record shows that the trial magistrate read the charge and facts to the appellant in Kiswahili language after the appellant willingly indicated that he sought to change his plea. He was again reminded on 21.9.2016 if he sought to admit the charges and he gave a positive response. Hence it can be said that the appellant understood the details of the charges that were facing him. In the result, it cannot be said that the plea was equivocal for the reason that the appellant was aware of the charges facing him and thus the plea can be said to have been unequivocal and as a result the same can sustain the conviction.

13. It should also be observed that in this appeal the appellant is raising objections to the same plea that he took after considering the evidence that was against him and was in a language that he understood and a fact the learned trial magistrate relied upon in making the order he did. As a matter of principle the appellant cannot be allowed to approbate and reprobate or change positions by turning around and saying the exact opposite of what he told the lower court and in the process use the appeal process as machinery to help him do so. It was the appellant himself who sought to have the charge read over to him and which request was acceded to by the trial court.

14. The doctrine of 'approbation and reprobation' has been elucidated in Halsbury's Laws of England, 4th Edn, Volume 16, at page 1012, paragraph 1507 thus:

> "*The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent*."

15. Further, such action also amounts to abuse of the court process and this court has every power to cull actions that it deems amount to abuse of the court process as well as to preserve the integrity of the judicial system.

16. Justice Mativo in the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** expressed himself in the following terms;

> "*23 situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of*

court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

17. In these premises, I find that the belated raising of the propriety of plea has no basis and the appellant is barred from appealing against the conviction in terms of Section 348 of the Criminal Procedure Code as the plea recorded was an unequivocal one. This explains why the appellant herein filed grounds of clemency alongside his submissions which left no doubt that he had no qualms with the conviction but on the sentence meted out on him. I will address the issue of sentence shortly.

18. In the same jumbled up materials presented by the appellant, he sought to invoke the revisionary powers of the court under Section 362 as read with Section 364 of the Criminal Procedure Code that empowers the High Court to revise the orders of subordinate courts. The enabling law for revision is stated in **Article 165(6) and (7) of the Constitution** and **Section 362 as read together with Section 364 of the Criminal Procedure Code**. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. Reproduced as follows:

"362. ***The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***

364. (1)In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may

…….

b. in the case of any other order than an order of acquittal, alter or reverse the order.

(***2***).***No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;***

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

……;

(***5***).***When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."***

19. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **Ogolla & S/O Owuor Vs. Republic [1954] EACA 270** where the court stated:

"The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES Vs. REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."

20. Similarly, Section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in a charge or other proceedings. It states that**:**

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice****:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings****."***

21. The conviction having been established to be sound, the appellant's next frontier is on the sentence imposed by the trial court. I see some glimmer of hope there. Upon perusal of the copy of the certificate of birth belonging to the complainant indicates her date of birth as 11.12.1999. The incident took place on 20.6.2016 and hence the complainant's age at the time must have been between 16 and 17 years old. Going by the mathematics then the appellant ought to have been charged under section 8(1) as read with section 8(4) of the Sexual Offences Act. The irregularity is curable under section 382 of the Criminal Procedure Code as noted above since the appellant suffered no prejudice as the issue of sentence herein will be addressed. The appellant ought to have been sentenced to 15 years imprisonment pursuant to section 8(4) of the Sexual Offences Act in view of the victim's age of between 16-17 years. As the appellant had remained in custody throughout the trial then the same must be taken into account pursuant to section 333(2) of the Criminal Procedure Code.

22. In the result the appeal on conviction lacks merit and is hereby dismissed. The appeal on sentence succeeds to the extent that the sentence of twenty (20) years is hereby set aside and substituted with a sentence of fifteen (15) years from the date of arrest namely **4.7.2016**.

It is so ordered.

Dated and delivered at Machakos this 28th day of April, 2020.

D. K. Kemei

Judge