REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 14 OF 2018

ABDALLAH RASHID MARIJANI .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the decision of Hon. D. Mulekyo in Kwale Chief Magistrate's Court Criminal Case No. 595 of 2017 delivered on 11th September, 2017).

JUDGMENT

1. The appellant was on 24th August, 2017 charged with the offence of abducting with intent to confine contrary to Section 259 of the Penal Code. The particulars of the charge were that on 17th of August, 2017 at Mwananguvunze area in Likoni location Mombasa County within Coast Region, with intent to cause RA to be secretly and wrongly confined, abducted the said RA.

2. The appellant pleaded guilty to the charge. A plea of guilty was entered. On 11th September, 2017 the facts were read out him. He said that the facts were correct. He was convicted on his own plea of guilty and sentenced to serve 5 years imprisonment without the option of a fine as he was not a first offender. The appellant being dissatisfied with the above decision filed a petition of appeal on 9th February, 2018 raising the following grounds of appeal:-

> (i) That the Learned Hon. Magistrate erred in law and fact in proceeding to sentence and convict the appellant based on a defective charge;
>
> (ii) That the Learned Trial Magistrate erred in law and fact by proceeding to sentence and convict the appellant on an apparent plea of guilty that was unequivocal, in a language the appellant did not understand;
>
> (iii) That the Learned Trial Magistrate erred in law and in fact in proceeding to sentence and convict the appellant as an adult yet all indications including observations by the then trial Magistrate were that he was a minor at the time of trial, further compounded by two conflicting reports from Coast Province General Hospital and the Medical Superintendent - Kwale District Hospital;
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> (iv) That the Learned Trial Magistrate erred in law and fact by failing to note that the prosecution of the appellant was in derogation of his constitutional rights and accentuated by malice and improper intent;
>
> (v) That the Learned Trial and Sentencing Magistrate erred in law and in fact in subjecting the appellant to double jeopardy by factoring previous records of the appellant not related to the case at hand; and
>
> (vi) That the Learned Trial and Sentencing Magistrate erred in law and fact in proceeding to sentence the appellant to an exceedingly harsh sentence without consideration of the instigating factors.

3. The appellant's Counsel, Mr. Egunza, filed his written submissions on 4th September, 2018 and contended that the offence for which the appellant was charged, was defective, as the ingredients of forcefully compelling the complainant or using deceitful means to induce her, were not proved. He submitted that the proceedings took place in English language which the appellant did not understand thereby offending the principles for plea taking that were laid out in the case of **Adan vs Republic** EA 445 at 446.

4. The appellant's Counsel raised the issue of conflicting medical reports with regard to the appellant's age as assessed at Kwale District Hospital and Coast Province General Hospital (CPGH). He submitted that none of the Medical Officers from the two hospitals testified so as to establish the veracity of the reports. He challenged the fact the appellant's previous record of convictions was taken into consideration when sentencing the appellant thereby subjecting him to double jeopardy. He prayed for the appellant's conviction to be quashed, for the

sentence herein to be set aside and for the appellant to be set at liberty forthwith.

5. The respondent's Counsel filed her written submissions on 18th October, 2018 to oppose the appeal. She submitted that under the provisions of Section 348 of the Criminal Procedure Code, no appeal lies to an appellant who has pleaded guilty save to the extent and legality of the sentence. She also referred to the case of **Adan vs Republic** (supra) on how a plea should be taken. She submitted that the charge was read over and explained to the appellant in Kiswahili language and that at a later date the facts were read out to the appellant who said that they were correct.

6. On the issue of the defective charge, Ms Marindah submitted that the act of the appellant leading the complaint to an alley and undoing her hair is a clear manifest of the deceitful means that were employed. She submitted that the appellant then asked the complainant to accompany him and they boarded a bus to Ukunda. In her view therefore, there was no defect in the charge as framed.

7. With regard to the age of the respondent, it was submitted that the report from CPGH gave the age of the appellant as 20 years, thus he was not a minor. In conclusion, Counsel for the respondent argued that the appellant was not subjected to double jeopardy by the lower court referring to his previous records as the court had a duty to consider the previous convictions before determining the sentence to mete out against him.

ANALYSIS AND DETERMINATION

8. The issues for determination are:-

i. If the plea taken by the appellant was clear and unequivocal;

ii. If the appellant was subjected to double jeopardy; and

iii. If the age of the appellant was determined.

PLEA OF GUILTY

9. I have considered the grounds of appeal and the appellant's submissions. The arguments thereof lean more on the side of a lower court case that was heard and determined on evidence from witnesses which is not the case here. The appellant was convicted on his own plea of guilty. The position of the law is as explained by Ms Marindah in her submissions that under the provisions of Section 348 of the Criminal Procedure Code, no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.

10. The leading authority on how a plea should be taken is **Adan vs Republic** [1973] EA 445 at 446 which is to the effect 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;***
>
> ***(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 state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;***
>
> ***(iv) If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and change of plea entered;***
>
> ***(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."***

11. Section 207 of the Criminal Procedure Code gives guidance on how a plea should be taken. It provides thus:-

> ***"(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 and pass sentence upon or make an order against him, unless there appears to be 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.***
>
> ***(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.***
>
> ***(4) If the accused person refused to plead, the court shall order a plea of "not guilty" to be entered for him."***

12. Contrary to the submissions by Counsel for the appellant, the proceedings of 24th August, 2017 indicate that there was interpretation from English to Kiswahili. On that day the charge was read over to the appellant in Kiswahili language. The appellant pleaded guilty to the charge. A plea of guilty was entered. On 11th September, 2017, when the facts were read out to the appellant, he admitted that they were correct and he was convicted on his own plea of guilty. The plea was clear and unequivocal. The proceedings of that day indicate that interpretation was from English to Kiswahili. A look at the charge sheet reveals no defect as contended by the appellant.

THE PRINCIPLE OF DOUBLE JEOPARDY

13. On the issue of the appellant being subjected to double jeopardy, the lower court proceedings do not support the said ground of appeal. Article 50(2)(a) of the Constitution of Kenya provides that:-

> ***"Every accused person has the right to a fair trial which includes the right –***
>
> > ***(a) Not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."***

14. The Criminal Procedure Code in Section 207(5)(a) and (b) has provisions on principle against double jeopardy. It states as follows:-

> ***"If the accused pleads –***
>
> ***(a) that he has been previously convicted or acquitted on the same facts of the same offence, or***
>
> ***(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."*** **(emphasis added).**

15. In the lower court case, the appellant did not plead that he had been previously acquitted on the same facts and for the same offence he was charged with. The principle against double jeopardy was well articulated in **Regina vs Z [2005] 3 ALL ER 95 where** the court held thus:-

> ***"It is obvious that this principle is infringed if the accused is on trial again for the offence of which he has been acquitted. It is also infringed if any other steps are taken by the prosecutor which may result in the punishment of the accused on some other ground for the same offence. But it is not infringed if what the prosecutor seeks to do is to lead evidence which was led at the previous trial, not for the purpose of punishing the accused in any way for the offence of which he has been acquitted, but in order to prove that the defendant is guilty of a subsequent offence which was not before the court in the previous trial".*** *(emphasis added).*

16. It is apparent that Mr. Egunza misinterpreted the principle of double jeopardy. The reference to previous convictions by the Hon. Magistrate was meant to guide her in determining if the appellant was a habitual offender and if he was, the nature or extent of the sentence she was going to mete out against him.

AGE OF THE APPELLANT

17. On the issue of the age of the appellant, the prosecution asked for time to ascertain the same. An age assessment report from Kwale District Hospital was submitted to the court which gave the appellant's age as 16 years. Mr. Masila, Prosecution Counsel, expressed dissatisfaction with the said report. He prayed for orders for the appellant to undergo a second age assessment at Msambweni Hospital. On 4th September, 2017, Mr. Masila informed the court that they had received conflicting age assessment reports. He did not however indicate the age that was reflected on the report from Msambweni Hospital. The report from the said Hospital is not in the court file. The Prosecution Counsel requested for the appellant to be taken to Coast Province General Hospital for the third age assessment. The report from the said Hospital dated 8th September, 2017 put the appellant at 20 years of age.

18. The Hon. Magistrate proceeded on the basis of the latter report. There is no explanation on record as to why the Hon. Magistrate elected to go by the third age assessment report and not the first one. When reliance was made on the said report, the appellant was treated as an adult and was sent to prison. In the face of two conflicting reports, there was a possibility that the Hon. Magistrate sent the appellant to the wrong institution for rehabilitation and that goes to the root of sentencing. The best that the Hon. Magistrate could have done was to summon the Medical Officers who undertook the age assessment of the appellant to attend court so that the inconsistency could be reconciled and in order for her to gain better insight on which report was more reliable. If the appellant was 16 years old at the time he committed the offence, he would have been sentenced to 2 years at a Borstal Institution. Due to the foregoing anomaly, I resolve the conflict in favour of the appellant.

19. I therefore quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of February, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Ogweno, Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant