REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 33 OF 2016

FIDEL MALECHA WELUCHI...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in Kithimani Resident Magistrate's Court

Criminal Case No. S.O 54 of 2015, Hon. G O Shikwe, RM dated 29th October, 2015)

REPIBLIC...PROSECUTOR

VERSUS

FIDEL MALECHA WELUCHI...ACCUSED

JUDGEMENT

1. The appellant herein, **Fidel Malecha Weluchi**, was charged in the Kithimani SRM's Court in Criminal Case No. S.O 54 of 2015 with the offence of Defilement Contrary to Section 8(1)(3) of the ***Sexual Offences Act***, No. 3 of 2006.

2. On 5th October, 2015, when the appellant was arraigned in Court, the appellant denied the truth of the charges and a plea of not guilty was thereby entered. However, the appellant seems to have changed his mind because on 26th October, 2015 when he appeared in court he stated that he wished to change plea. Accordingly, the charges were read over to him in Kiswahili and he apparently admitted the same. Thereafter a plea of guilty was entered and he was sentenced to twenty years' imprisonment after his mitigation.

3. In this appeal, one of the grounds relied upon by the appellant is that his plea of guilty was not unequivocal. He contends that he ought to have been warned of the consequences of pleading guilty.

4. The appeal was opposed by the Respondent through **Miss Mogoi**, Learned Prosecution Counsel.

5. I have considered the material placed before me. The manner of recording of a plea is provided for in section 207(1) and (2) of the ***Criminal Procedure Code*** provides as hereunder:

> ***(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;***
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> ***(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 it sufficient cause to the contrary:***
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> ***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.

6. The manner of recording plea of guilty was dealt with in **Ombena vs. Republic [1981] eKLR** where the Court of Appeal held that:

> **"In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —**
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> **'Held:**
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> **(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;**
>
> **(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."**
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> **In this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said "Facts are as per charge sheets", and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the Adan case the court said, at p 447:**
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> **"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."**
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> **We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand."**

7. It is therefore clear that the charge, the particulars and the facts must be read to the accused in his language or in a language he understands. This is my understanding of the decision in **K N vs. Republic [2016] eKLR**, where it was held that:

> **"The procedure for taking plea follows a well-beaten path. The leading case, Adan v R (1973) EA 445 emphasises that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in Adan (supra) in Hando S/o Akunaay v Rex (1951) 18 EACA 307 as follows;**
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>> **'…before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent.'**
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> **Where an accused person who has been called upon to plead under section 207 of the Criminal Procedure Code in the subordinate court admits the charge, the proviso to subsection (2) requires the prosecution to outline the facts upon which the charge is founded. The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information, as the case may be, as well as the facts outlined where the accused pleads guilty. The facts therefore are as important part of a plea as the charge itself. The nature and elements of the offence in totality must be understood by the accused and the trial court must be satisfied about this before accepting them as true. We think the court should also explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence. In outlining the facts the prosecution's role is to present the evidence that could have been proven if the case had gone to trial. Therefore for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond any reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibits that they would have relied on at the trial."**

8. In this case during the plea the record is clear that the first time the appellant appeared in court, both the substantive and the alternative counts were read to him and he pleaded to both. However, on the day he purportedly pleaded guilty, there is no indication as to which count he pleaded to since the record simply indicates that ***charges*** were read over to him. While it is not a requirement that both the substantive charge and the alternative one be read to the accused, and that it suffices if a plea is taken on the former, where a plea of guilty is recorded in

circumstances such as this, it may be prudent that the record indicates clearly which count was read to the accused to which he pleaded. I therefore associate myself with the opinion of the Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR** that:

> **"Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms."**

9. The manner in which the plea was recorded in that mater had somewhat similarities to the instant case. The court noted that whereas there was only one charge, the record of the proceedings stated thus:

> ***"Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili:- "It is true."***

10. Commenting on this mode of recording pleas, the Court in **Elijah Njihia Wakianda vs. Republic** (supra) stated as follows:

> **"With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and the rather odd "in a language he understands", when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That 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."**

11. In the instant case there was only one substantive charge to which there was an alternative. However, the record indicates that ***"charges read over to the accused in Kiswahili and upon being asked whether he admits or denies he replies ni kweli.*** " It is not indicated which charges were in fact read to the appellant.

12. Similarly, the offence in question as correctly appreciated by the Learned Trial Magistrate was a very serious offence carrying twenty years' imprisonment. Whether or not the appellant was aware of this fact is not clear. Just like in **Elijah Njihia Wakianda vs. Republic** (supra) the same court in **Kennedy Ndiwa Boit vs. Republic [2002] eKLR**, expressed the following sentiments:

> **"Stopping there for the moment, it is abundantly clear to us that at no stage did the Magistrate warn the appellant of the consequences of his pleading guilty to the charge. Indeed the appellant's plea in mitigation that *"I am asking for pardon"* clearly shows that the appellant was wholly unaware that he ran the risk of being sentenced to death… Mr. Mbeche who argued the appellant's appeal before us told us that the appellant's plea was unequivocal. If that was all the complaint we had to deal with, we doubt, on the face of the record, whether it would have succeeded. The High Court rejected that complaint on first appeal to that court (Etyang & Omondi-Tunya, JJ) but in rejecting the appeal, the learned Judges of the High Court said absolutely nothing about the failure by the trial Magistrate to warn the appellant of the consequences of his pleading guilty. The High Court's failure to address that issue is a question of law which entitles us to interfere with their finding and that of the Magistrate."**

13. A similar opinion was expressed by the Court of Appeal in **Paul Matungu vs. Republic [2006] eKLR** where it was held that:

> **"In offences carrying death sentence, it is essential for the court to warn the accused of the consequences of his pleading guilty namely that he may be sentenced to death if he pleads guilty…What we find difficult to appreciate however, is that after the appellant had stated in response to the charge that "That is true", what followed was that he was warned of the consequences without specifically stating in what way he was warned and what constituted the warning and making it clear in the record that that warning made it clear to the appellant that he faced death as the mandatory sentence for the offence he was pleading guilty to. Further there is nothing to show that after the warning was administered, the appellant was asked whether he understood the waring so that when he is recorded to have stated after the warning that "That is true", one is not certain whether those words were in response to the warning given or whether he was still insisting on his plea of guilty to the charge as the court recorded. In our view, after the warning, the court should have enquired whether the appellant understood the warning and if he said he understood the warning then the charge should have been put to him afresh and that all that should have been recorded."**

14. Whereas one may argue that the said warning only applies to capital offences, in **Bernard Injendi vs. Republic [2017] eKLR**, **Sitati, J** found 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."**

15. 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*".

16. I therefore agree that the manner in which the proceedings were conducted violated the appellant's right to fair trial and that the plea of guilty was in those circumstances not unequivocal.

17. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial? 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 the conviction is set aside because of insufficiency 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;......"**

18. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. 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:**
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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'**
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> **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:**
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>> **'…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.'"**

19. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522 and Fatehali Maji –vs- Republic (1966) EA, 343** the view expressed was that: -

> **"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."**

20. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

> **"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this**

court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

21. In this case the appellant was convicted on 29th October, 2015. He has served 3½ years. However, the offence facing him was a serious offence. Just like the Court of Appeal in **Elijah Njihia Wakianda vs. Republic** (supra) I quash the conviction and set aside the sentence. I set the clock back so the process is restarted on proper footing. In consequence, I direct that the appellant shall be presented before the Senior Resident Magistrate's Court at Kithimani for the purpose of taking a fresh plea to the charge.

22. However any resulting sentence, if at all, will take into account the period the appellant spent in custody.

23. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 27th day of February, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Mogoi for the Respondent

CA Josephine