



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 95 OF 2017

DANIEL MAITHA SAMMY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgement of Hon. C. Kisiangani , RM delivered on 19/07/2016 in Machakos Chief Magistrate's Court Criminal Case No. S.O. 3 of 2016)

JUDGEMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act. In the alternative he was charged with the offence of Indecent Act with a child contrary to Section 11 of the Sexual Offences Act. He pleaded guilty to the charge and was sentenced to life imprisonment. He was aggrieved by the said conviction and sentence and lodged the following grounds of appeal namely:-

a. The learned trial magistrate erred in law and fact when he convicted and sentenced the appellant to life imprisonment on a plea of guilty and failing to find that the plea is unequivocal

b. The learned trial magistrate erred both in law and fact when he convicted the appellant on a plea of guilty yet failed to comply with the provisions of Article 27 (1), 50(2) (b) (g) (h) of the Constitution of Kenya .

2. The appeal was canvassed by way of written submissions.

3. The appellant questions as to which count the plea of guilty was entered since he was charged with two counts. The appellant further contended that the trial court did not caution on the dangers of pleading guilty to the charge. He referred to the case of **B.M. Patel v R (1955) KLR**. Further that there was no examination by a mental expert to declare the appellant fit to stand trial. Further he submitted that Section 207 (1) of the Criminal Procedure Act required the court to explain each and every element of the charge to the accused in a language of his choice and this was not done and he submits that the conviction of guilty cannot be sustained. Therefore it should be quashed and sentence set aside.

4. Mr. Cliff Machogu, prosecution Counsel, has conceded to the appeal. Counsel submits that Section 348 of the Criminal Procedure Code provides that no appeal shall be allowed in the case of the accused person who has pleaded guilty and has been convicted on that plea except as to the legality of the sentence. He cited the case of **Olel v R (1989) KLR 444**.

5. Counsel submitted that the appellant is challenging the fact that the plea was not unequivocal. He submitted that the case of **Adan v Republic(1973) EA 445** sets out the steps to be taken in recording a plea and argued that after taking plea, the next step should be conviction, wherefore the trial magistrate did not indicate which language was used to read the facts to the accused. He argues that failure to follow the procedure means the plea was not unequivocal and must be set aside. Counsel further submitted that a retrial is appropriate. He relied on the case of **Makupe v R, Criminal Appeal 98 of 1983**. In conclusion, he invited the court to find that the plea was not unequivocal and the trial court failed to follow the required procedure and thus the conviction be set aside and that this court make an order for retrial.

6. The issues for determination are whether the conviction was unsafe due to failure to conduct a mental assessment test; whether the plea was unequivocal; whether the procedure that the trial court followed was proper.

7. The appellant has argued in his submissions that it was wrong for the Trial Court to have proceeded with the trial without first calling for a mental assessment report on him. However this is not in the Grounds of Appeal. In response, I would state that the Trial Court record does not have any indication that there was an attempt to bring to its attention the suspicion that the Appellant was mentally ill. It also does not have any indication that the Appellant behaved in any way that would have alerted the Trial Court that the Appellant was anything than mentally sound. Indeed, his mitigation would seem to suggest an ability to logically communicate in a way which would not raise any concern in the mind of the Trial Court as to his mental status.

8. Section 11 of the Penal Code provides as follows:

Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

9. On the other hand, section 162 reads as follows:

162. (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

10. The law is that every accused person is presumed to be of sound mind under section 11 of the Penal Code. The burden is on the Accused Person to rebut this presumption. However, the Court is obligated under section 162 to take action – for example by ordering a mental assessment – where it comes to the attention of the Court that the Accused Person may be of unsound mind. In this case, the Trial Court cannot be faulted for proceeding as it did in the circumstances. There was simply no material brought to the attention of the Trial Court to suggest that the Appellant was of unsound mind to warrant further inquiry by the Court. In the circumstances, I find this argument to be unsustainable.

11. I shall now address the issue of whether the plea was unequivocal. The learned state counsel and the appellant have attacked the procedure undertaken by the trial court. The record of the trial Court show that the appellant stated that he understood English and Kiswahili. The original record of the trial Court indicate that the charge was read over to the appellant in Kiswahili by the Court assistant, and the said appellant pleaded not guilty on 25.1.2016, but after Pw3 testified on 5/7/2016, the appellant sought that the charge be read to him. On the said 5.7.16 the substance of the charge was duly read over to the appellant in Kiswahili. The prosecution read out the facts to the appellant, however no language was indicated and responded by stating that the facts were true. The appellant was subsequently convicted on his own guilty plea and a plea of guilty entered. The appellant was then sentenced to life imprisonment.

12. Counsel for the prosecution in his submissions relied on the case of **ADAN V REPUBLIC [1973] E.A. 445** In that case, the Court of Appeal for East Africa laid down the steps to be taken where there is a guilty plea 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 in 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 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.

The Court in that case at **pages 446-447** observed as follows:

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 reply must, of course be recorded.

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.

13. Section 207 of the Criminal Procedure Code (Cap 75) states as follows:

(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 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 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.

(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.

(5) 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.

14. Article 50 (2) of the Constitution provides for the right of every accused person to a fair trial.

15. The circumstances of this case are that the appellant pleaded guilty to the charge. It is not clear if the appellant appears to have understood the allegations against him despite having opted to admit having committed the offence. From the record, it is not indicated what language was used to read out the facts to the appellant and the Respondent’s counsel has submitted that the court make an order for retrial.

16. However, a re-trial is not ordered as a matter of course rather, it is intended to ensure that a fair trial is accorded to a party without causing prejudice to the party against whom such an order is sought to be made.

17. As was stated in the case of Ahmed Ali Dharmasi Sumar vs Republic 1964 E.A 481 and restated in Fatehali Manji vs The Republic 1966 E.A. 343:-

“In general a re-trial 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 purpose 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. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

18. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of Joseph Ndungu Kagiri v Republic [2016] eKLR, Mativo J had the following to say:-

“As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial, and therefore the entire proceedings in criminal case number Nyeri Criminal Case Number 254 of 2011, Republic vs. Simon Murage Mutahi & Another are hereby declared to be a nullity and are hereby quashed. I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings and set aside the orders made in the said case.”

19. Notably as was stated in the case of Ahmed Ali Dharmasi Sumar vs Republic (Supra) and restated in Fatehali Manji v The Republic (Supra), in deciding whether a case is suitable for re-trial, each case depends on the particular circumstances. In the present case, the Appellant herein has been incarcerated since 23.1.2016 and has hardly served a fraction of the sentence. The complainant is known to him, hence there is a high chance that witnesses can be traced and or are readily available which could speed up the process of trial if a fresh trial is ordered and in addition, the prosecution has conceded to a retrial being conducted.

20. **Section 169** of the Criminal Procedure Code deals with the contents of a Judgment and from the record the appellant was sentenced on his own guilty plea. No Judgment was written by the trial court.

21. The next issue relates to the fact that there was no finding on the alternative charge. In Robinson Mwangi Maina vs. Republic [2006] eKLR, the Court of Appeal restated the correct position thus:

"The trial court found that the alternative charge was part of the robbery and therefore acquitted them of the same charge of handling stolen property. That was not really correct. Where an accused person is convicted on the main charge, the usual practice is to make no findings on the alternative charge so that if on appeal the court thinks that the main charge was not proved but the alternative one was, the court can substitute a conviction on the alternative charge which would still be available on the record..."

22. From my above analysis, there are defects in the original trial. It is not clear on which offence the appellant is convicted of and there is no finding on the alternative charge.

23. It is therefore the considered opinion of this court that a re-trial would be the best to afford justice to the parties.

24. The appellant was sentenced to life imprisonment, however, given the above scenario, I do find that there is no need to address the issue of sentence.

25. In the result the Appellant's appeal has merit. The conviction is quashed and sentence set aside. The Appellant is ordered to be released from prison custody and to be placed in police custody at Masii police station who shall thereafter produce the Appellant before the Chief Magistrate's Court Machakos for the purpose of a retrial on the 28/03/2019.

It is so ordered.

Dated, Signed and Delivered at Machakos this 27th day of March, 2019.

D. K. KEMEI

JUDGE