REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO 27 OF 2018

JULIUS MULANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the conviction and sentence on 22nd September, 2017 by Hon. Julie Oseko, CM in Malindi CM Court Sexual Offence Case No. 36 of 2016, Republic v Julius Mulanda]

JUDGEMENT

1. On 11th September, 2017 the Appellant, Julius Mlanda, was charged before the Chief Magistrate's Court at Malindi with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006 (SOA). The particulars of the charge stated that on 26th June, 2017 at [Particulars Withheld] Sub-Location, Magarini Sub-County within Kilifi County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of BJ, a girl aged 16 years.

2. The Appellant was faced with an alternative charge namely committing an indecent act with a child contrary to Section 11(1) of the SOA. The particulars being that on the date and place mentioned in the main count the Appellant intentionally and unlawful touched the vagina of BJ using his penis.

3. The Appellant pleaded guilty to the main count and was sentenced to 15 years imprisonment.

4. The Appellant appeals against conviction and sentence through grounds of appeal amended on 24th October, 2018 as follows:-

> **" 1. That the learned trial magistrate erred in law in convicting me on my own plea of guilty without considering that I was not cautioned on the dangers of pleading guilty on such offence.**
>
> **2. That the learned trial magistrate erred in not considering that the plea was invalid as the language used by the appellant was not captured in record to establish he understand the same.**
>
> **3. That the learned trial magistrate did not consider that the plea was incomplete as the P3 form being an exhibit was not produced during the plea.**
>
> **4. That the learned trial magistrate did not see that I was not represented by an advocate thus the same led me to plea of guilty."**

5. The Respondent opposed the appeal.

6. This being a first appeal the Appellant is entitled to a fresh review of the evidence adduced at the trial. This will enable this court to reach its independent decision on the evidence. In doing so, this court must give allowance to the fact that, unlike the trial Court, it did not have the opportunity of observing the demeanor of the witnesses as they testified.

7. In support of his case, the Appellant submitted that the trial Court ought to have warned him of the consequences of pleading guilty considering the seriousness of the charge facing him. He stated that he was never warned as was advised by Ngugi J, in **Simon Gitau Kinene v Republic [2016] eKLR.**

8. The Appellant also submitted that he was not represented by an advocate and the trial Court ought to have ensured that he understood every element of the charge and the facts read to him. Further, that the trial magistrate ought to have placed on record that he had been cautioned that the offence he was pleading guilty to, attracted a prison sentence of not less than 15 years.

9. The Appellant pointed out that although the Court record shows that the charge was read to him in Kiswahili, his plea is captured in English. According to him, his plea was not captured in the language he used thereby invalidating the same. He stressed that his plea was invalid due to the fact that the language used to read the charge to him was Kiswahili and his response was in English. He cited the decision in **Anthony Njeru Kathiani & Another v Republic [2007] eKLR** in support of the proposition that failure to at least record the name of the interpreter and the nature of the interpretation is a serious defect which would render the conviction unsafe and unsustainable.

10. The Appellant also submitted that the P3 form filled for the complainant was not produced on the date his plea was taken but on a later date.

11. The Appellant pointed out, that although, he was aware of Section 348 of the Criminal Procedure Code (CPC) which bars an accused person who has pleaded guilty from appealing against conviction, his appeal is about an imperfect and ambiguous plea taking process.

12. He cited the decisions of **Lukoye Malika v Republic [2015] eKLR** and **Abdalla Mohamed v Republic [2018] eKLR** as demonstrating that a plea that does not accord with the law should not be allowed to stand.

13. Opposing the appeal, counsel for the Respondent submitted that owing to the fact that the Appellant was convicted on his own plea of guilty, the appeal, in accordance with Section 348 of the CPC can only be on the **"extent or legality of the sentence."**

14. It is the Respondent's position that the Appellant's plea was taken in conformity with the template set in the case of **Adan v Republic [1973] EA 445.**

15. On the sentence imposed, it was submitted for the Respondent that the sentence imposed is the minimum sentence, as stipulated by Section 8(4) of the SOA, for the offence for which the Appellant was convicted. Counsel for the Respondent concluded by urging this court to find that both the conviction and sentence were safe and dismiss the appeal.

16. The question to be answered in this case is whether the Appellant's plea was taken in compliance with the law for taking plea. In **John Muendo Musau v Republic [2013] eKLR**; **Criminal Appeal No. 365 of 2011 (Nairobi)**, the Court of Appeal restated the law on plea taking as follows:-

> **"The legal principles to be applied in plea taking in all criminal cases were well enunciated in the *locus classicus* case of Adan vs Republic [1973] EA 445 where the Court held:-**
>
> > **"(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 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 facts relevant to sentence together with the accused's reply should be recorded."**
> >
> > > **We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty. That is to say that, an accused can change his plea at any time before sentence. The procedure laid out in Adan vs Republic (supra) is also provided for under section 207 of the Criminal Procedure Code."**

17. A plea of guilty that is offered outside the standards set by the law is defective and a conviction arising out of a defective plea cannot be allowed to stand. Where it is found that the process of taking plea did not comply with the law, Section 348 of the Criminal Procedure Code does not apply.

18. In **Alexander Lukoye Malika v Republic [2015] eKLR** the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:-

> **"A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."**

19. The submission by the Respondent that a conviction based on a plea of guilty cannot be interfered with on appeal is thus erroneous. If the plea is equivocal, the appellate court has a duty to step in and quash a conviction arising from such a plea.

20. In the appeal before me, after the charge was read and explained to the Appellant he responded as follows:-

> **"It is true. I did have sex with the girl. I wanted to marry her. I did ask my parents to speak to the girl. They paid some money. She is 15 years old and I am 26 years. After our parents agreed I sent for her. She came. She agreed. I married her. We had sex severally as husband and wife. Then the brother came and took her away from me. I was later arrested."**

21. Before the prosecutor could read the facts he noted that there was an error on the date of the offence. He applied for an amendment of the same and the charge was once again read to the Appellant. He once again pleaded guilty. Thereafter the facts were read to the Appellant after which he confirmed the facts to be true. He again repeated that he had sex with the complainant. A plea of guilty was then recorded.

22. The prosecutor indicated that the Appellant had no previous record. The Appellant then offered his mitigation upon which the trial magistrate called for a victim assessment report. The Appellant was sentenced after the trial magistrate considered the report. Looking at the proceedings it is clear that all the steps that needed to be followed when taking plea were adhered to by the trial magistrate in this case.

23. There is the question about the language used in the trial. The proceedings clearly shows that the Appellant understood the charge and responded to it. He explained at great length the nature of the relationship he had with the complainant.

24. The law as expounded by the Court of Appeal in **George Mbugua Thiongo v Republic [2013] eKLR** is applicable in this case. In that case the Court of Appeal held that:-

> **"22. For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."**

25. The Appellant has referred me to my decision in **Abdallah Mohammed v Republic [2018] eKLR** where I found the plea was equivocal. The facts of that case are different in that the Appellant therein had simply responded **"it is true"** after the charge was read to him. There was no elaboration unlike in this case where the Appellant is on record as having explained at length that he had sex with the complainant.

26. It is noted that after the Appellant pleaded guilty, the prosecution went ahead to produce a P3 form showing that the complainant had sexual intercourse. The prosecution also produced a birth certificate for the complainant which confirmed she was born on 28th August, 2000 and was almost 17 years at the time of the commission of the offence. All the ingredients of the charge of defilement were therefore proved.

27. The sentence of 15 years is the minimum sentence provided by the law and the trial magistrate cannot be faulted for imposing that particular sentence. There is therefore no merit on the appeal against sentence.

28. The outcome of this appeal is that the same is without merit. The appeal is dismissed in its entirety.

Dated and Signed at Nairobi this 5th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 30th day of May, 2019

R. Nyakundi,

Judge of the High Court