REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELLATE SIDE

CRIMINAL APPEAL NO. 95 OF 2017

(AS CONSOLIDATED WITH CRIMINAL APPEAL NO. 98 OF 2017)

COLLINS KIPLAGAT KOECH.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence of Hon. H.M. Nyaberi, SPM, in SOC No.29 of 2017 at Iten Senior Principal Magistrate's Court dated 19 September 2017)

JUDGMENT

[1] The Appellant was arraigned before the Senior Principal Magistrate's Court at Iten on **15 September 2017**, charged with the substantive count of defilement contrary to **Section 8(1)** of the **Sexual Offences Act, No. 3 of 2006.** The particulars thereof were that on the 3rd to 12th day of September 2017 within Elgeyo Marakwet County, he intentionally caused his penis to penetrate the vagina of **FJK**, a child aged 15 years. The Appellant was also charged with an Alternative Count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. It was alleged that on the 3rd to 12th day of September 2017 within Elgeyo Marakwet County, he intentionally touched the vagina of **FJK**, a child aged 15 years with his penis and hands.

[2] The record of the lower court shows that the Appellant admitted the Substantive Charge of defilement and was accordingly convicted thereof on his own guilty plea. He was consequently sentenced to 20 years' imprisonment on **19 September 2017**. Being aggrieved by his conviction and sentence, the Appellant filed this appeal on **27 September 2017** contending that:

[a] the Police who arrested him compelled him to plead guilty to the charges;

[b] The trial court erred in law when it sentenced him to 20 years imprisonment without observing that the Police took advantage of his tender age and compelled him to plead guilty to the charges;

[c] The trial court erred in law when it sentenced him without informing him of the consequences of the charge prior to pleading guilty contrary to **Article 50(2)(b) and (l)** of the **Constitution;**

[d] That his fundamental rights and freedoms under **Article 49(1)(d)** were grossly violated;

[e] That the appeal has high chances of success.

[3] The Appellant thereafter appointed the firm of **M/s J.K. Kiplagat & Co. Advocates** to act for him; whereupon the said firm filed **Eldoret High Court Criminal Appeal No. 98 of 2017: Collins Kiplagat Koech vs. Republic** on **4 October 2017** on behalf of the Appellant, setting out the following grounds of appeal:

[a] That the learned Senior Principal Magistrate erred in law and in fact in convicting and sentencing the Appellant for 20 years;

[b] That the learned trial magistrate erred in law and in fact in arriving at his decision whereas the Prosecution had not established their case to the required standard set by law;

[c] That the learned Senior Principal Magistrate erred in law and in fact by meting a conviction which was harsh and excessive in the circumstances;

[d] That the learned Senior Principal Magistrate erred in law and in fact by not ordering for a mental assessment report on the fitness of the Appellant to stand trial;

[e] That the learned Senior Principal Magistrate erred in law and fact by imposing a very harsh and improper sentence in the circumstances;

[f] That the learned Senior Principal Magistrate erred in law and in fact by failing to confirm the language the appellant understood.

[4] It was consequently the Appellant's prayer that his appeal be allowed, the Judgment of the lower court be set aside and the conviction and sentence quashed. The Appellant's Counsel, **Ms. Rono**, urged the appeal by way of written submissions, contending, in the main, that the Appellant's plea was not unequivocal, in that the trial magistrate failed to ascertain that the Appellant understood Kiswahili language; or even that he understood the nature of the serious charge of defilement, including the penalty therefor. Counsel further argued that, whereas it was the duty of the learned magistrate to caution the Appellant about the consequences of a guilty plea, this was not done. Reliance was placed on **Adan vs. Republic [1973] EA 445** and **Anthony Njoroge Gatoho & 5 Others vs. Republic [2016] eKLR** in support of this assertion.

[5] It was further the submission of Counsel for the Appellant that since the Appellant did not express himself appropriately before the lower court, but simply said **"It is true",** the trial magistrate ought to have made an order for his mental assessment. In support of this argument, Counsel relied on **Joseph Kieti Seet vs. Republic [2014] eKLR** for the proposition that the court is obligated to enquire into the accused person's state of mind if there is reason to believe that he is not in the right state of mind. Counsel further pointed out that, since the Appellant was not represented before the lower court, it was incumbent upon the court to explain to him his rights under **Article 50** of the **Constitution**, including his right to legal representation. The cases of **Augustino Keter Misoi, [2018] eKLR**, and **Paulo Malimi Mbusi vs. Republic, Kiambu High Court Criminal Appeal No. 8 of 2017** were cited to buttress the argument.

[6] Regarding the sentence of 20 years imprisonment that was meted by the trial court, Counsel submitted that the age of the Complainant, which is a critical component of the Charge of defilement, was not proved by the Prosecution beyond reasonable doubt; and therefore, that there was no basis for the harsh sentence. Counsel hinged this argument on **Abdallah Mohammed vs. Republic [2018] eKLR** and **Kaingu Elias Kasomo vs Republic.** Thus, Counsel urged the Court to allow this appeal, set aside the lower court's Judgment and quash the Appellant's conviction and sentence.

[7] The appeal was opposed by Learned Counsel for the State, **Ms. Mokua.** She was of the view that the appeal against conviction is misconceived from the standpoint of **Section 348** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya.** She also submitted that since the procedure set out in **Adan vs. Republic** (supra) was fully complied with by the lower court, the Appellant's plea was unequivocal. Counsel further submitted that every accused person is presumed to be of sound mind and therefore the trial court had no basis for calling for a mental assessment report; adding that it was for the Appellant to raise the issue if indeed he was of unsound mind and therefore unfit to take plea, which was not done. Likewise, it was **Ms. Mokua's** submission that since legal representation is currently not available to all accused persons, the Appellant ought to have raised the issue with the trial court; which he failed to do. She however urged that, should the court find that this omission vitiated the lower court proceedings, it be pleased to make an order for a re-trial.

[8] In response to the Appellant's submissions on the sentence imposed by the lower court, Counsel for the Respondent urged the Court to note that an Age Assessment Report was placed before the lower court showing that the minor's approximate age was 15 years. In her view, the sentence was proper and should, consequently, be upheld. She accordingly urged for the dismissal of the appeal.

[9] Needless to say that, where there is an unequivocal plea of guilty, the only option open for an aggrieved convict is an appeal against sentence. This is because **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya** is explicit that:

> **"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] In **Olel vs. Republic [1989] KLR 444**, a two-judge bench of the High Court had occasion to discuss the aforementioned provision; and came to the conclusion, which I entirely agree with, that:

> **"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."**

[11] From a consideration of the Appellant's Grounds of Appeal and the submissions made on his behalf herein, it is manifest that the appeal is against both conviction and sentence; and for this he cannot be faulted, granted his contention that his plea was not unequivocal. The State, on the other hand, took the posturing that full compliance was had with the plea-taking steps set out in ***Adan vs. Republic*** by **Spry, V.P**. As this seems to be a critical component of this appeal, it is pertinent to restate those steps thus:

> **"*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."

[12] A scrutiny of the lower court record confirms that the court complied with the aforementioned steps in having the charge read over to the Appellant in Kiswahili language, having ascertained that this was a language understood by the Appellant. There is no reason to conclude otherwise, for the record confirms that there was two-way communication between the Appellant and the plea court. The facts were then stated by the Prosecutor; and those facts clearly set out the key ingredients of the offence of defilement as set out in the Main Count, including the fact that the minor was then 15 years old. The Appellant again admitted those facts, whereupon the Appellant was convicted on his own guilty plea. The Appellant was then afforded an opportunity to make his remarks in mitigation; whereupon he opted to plead for forgiveness. The matter was then stood over to **19 September 2017** for sentencing hearing, thereby giving the Appellant an opportunity to reflect on the matter. He gave no indication on **19 September 2017** that he had been compelled to plead guilty as stated in his Petition of Appeal herein. Thus, it is manifest from the record that the trial magistrate complied with the requirements of **Section 207** and the guidelines in **Adan vs. Republic,** and I so find. Accordingly, the Appellant's plea was entirely unequivocal and valid for purposes of the lower court proceedings.

[13] It is noteworthy that in addition to the Prosecutor's statement that the Complainant was 15 years old, an Age Assessment Report was produced by him and was marked as the Prosecution's Exhibit 2 and that report shows the Complainant was below 18 years but of approximate age of 15 years. It is to be borne in mind that for purposes of the Sexual Offences Act, proof of age is pertinent on two fronts, first to demonstrate that the victim was a minor; and secondly for purposes of determining appropriate sentence. This was well-explicated by the Court of Appeal in **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** thus:

> **"[16] Thus in relation to the appellant's case proof of age was relevant at two levels. First, to establish that the complainant was under the age of 18 years and therefore a child; and secondly, to establish that the complainant was between the age of 12 and 15 years such as to bring the sentence of the appellant, if convicted, within the minimum provided under section 8(3) of the Sexual offences Act.**
>
> **[17] In this regard the evidence before the trial court was that of the complainant who stated during her voir dire examination that she was 12 years old. Her evidence was corroborated by PW5 who examined the complainant and filled the P3 form, which was produced as an exhibit and which stated the complainant's age as 12 years. Although no age assessment report, nor a certificate of birth or baptism certificate was produced in proof of complainant's age, the fact that the trial court found it necessary to carry out a 'voir dire' examination to determine whether the complainant understood the nature of an oath or was of sufficient intelligence to understand the importance of speaking the truth, is a clear indicator that the trial court formed the impression that the complainant was a child of tender years, and therefore the fact of her being under eighteen years of age was apparent. Indeed section 2 of the Children Act define "age" as meaning apparent age in cases where actual age is not known. Thus, we are satisfied that there was ample evidence before the trial court, to show that the complainant was under 18 years of age and we have no hesitation in finding that for the purpose of establishing the offence of defilement the complainant was established to be a child.**
>
> **[18] As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years. This means her actual age was less or more and this was sufficient to bring the complainant within the age bracket of 12 – 15 years or the purposes of the penalty under section 8(3) of the Sexual Offences Act."**

[14] In the premises, the Prosecution presented credible evidence, by way of an Age Assessment Report to prove the Complainant's age. Thus, the facts and documents supplied by the Prosecution were sufficient to place the matter within the requirements of **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act, and therefore the sentence was also lawful.

[15] I note that provision underpinning the Charge was wrongly stated as **Section 8(1)(3)** of the **Sexual Offences Act.** However, no prejudice was occasioned to the Appellant thereby. A similar issue arose in **Thomas Aluga Ndegwa vs. Republic [2018] eKLR**, the Court of Appeal held thus:

> **"The charge refers to the offence of defilement as created under Section 8(1)(2) of the Sexual Offences Act. Section 8(1) creates the offence of defilement, while section 8(2) provides for the penalty of the offence of defilement where the victim is a child under the age of eleven years. While it is clear that the drafter of the charge erred in the framing of the charge, we do not however consider this to be sufficient reason to set aside the conviction of the appellant…We are of the opinion that the error in the charge did not occasion a failure of justice and are of the view that such error is curable under section 382 of the Criminal Procedure Code…"**

[16] On whether the Court was under obligation to call for a mental assessment, Counsel for the Appellant relied on **Section 162** of the **Criminal Procedure Code** and **Joseph Kieti Seet vs. Republic [2014] eKLR**. She hinged her argument on the fact only that the Appellant admitted the serious charge of defilement and simply answered by stating **"It is true."** What then, is the duty of the trial court? **Section 162(1)** of the **Criminal Procedure Code** provides that:

> **"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."**

[17] Likewise, in **the Judiciary Criminal Procedure Bench Book, February 2018**, it is suggested at paragraph 61 thus:

> **"From the first court appearance and throughout the trial, the court should take note of the physical state of accused persons who have been detained. Where it is evident to the court, or where accused persons inform the court that they are in need of medical attention, the court should direct officers in charge of detention facilities to provide medical treatment. If there are allegations of torture or physical assault, the court must inquire into the circumstances and make appropriate orders."**

[18] The record of the lower court does not reveal any unusual occurrence or behavior that would have been the court on inquiry on the date of plea or thereafter. It is also noteworthy that no complaint was raised by either by the Appellant, or any intermediary on his behalf, as to his mental fitness. In the premises, I find no merit in the argument that an order for a mental assessment report ought to have been made by the lower court. Indeed, **Section 11** of the Penal Code recognizes that:

> **"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."**

[19] Thus the only remaining issue for my determination is the argument that the Appellant was not accorded a fair trial from the standpoint of **Article 50(2)** of the **Constitution**. Two specific components of a fair trial were raised in the Grounds of Appeal and the submissions of Counsel, namely:

> **[a]** the right to be informed of the charge with sufficient detail to answer it;

[b] the right to legal representation at State expense,

[20] There is no gainsaying that the duty of the plea court becomes more onerous in cases where an accused person opts to plead guilty to a serious charge. The court must therefore go the extra mile to ensure that the rights of such an accused person, as protected by the Constitution and relevant legislation are honoured and protected; particularly so in cases where the accused person is unrepresented. The Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR**, aptly supplied the rationale for this need for circumspection as hereunder:

> **"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."**

[21] Accordingly, it is now trite that before admitting a plea of guilty, the plea court is obliged to first inquire from the accused person his preferred language of communication; and having ascertained that, it must explain the charge and all its elements to the accused person in that language before recording the accused's response as nearly as possible in his own words. Owing to the number of pleas that the subordinate courts have to contend with every day, it is now commonplace for plea courts to use templates to enhance efficiency. It was no different herein. However, as was observed by the Court of Appeal in **Elijah Njihia Wakianda Case** (supra), the use of such templates should be discouraged, to give the plea court the flexibility to adapt to the peculiar of each accused person. This is more particularly recommended in pleas involving serious offences such. Here is what the Court of Appeal had to say in this regard:

> **"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 to 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."

[22] A perusal of the record of the lower court shows that he was unrepresented and that no caution as to the consequences of his guilty plea was administered beforehand. Thus, while it is understandable that he could not be accorded legal representation at State expense owing to paucity of resources, it was imperative that he be cautioned as to the consequences of his guilty plea; and therefore it is a serious error on the part of the lower court for not explaining all the elements of a charge including the penalty entailed thereby. In a similar facts situation, **Hon. Sitati, J.** held thus in **Bernard Injendi vs. Republic [2017] eKLR:**

"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."

[23] Similarly, in **Anthony Njoroge Gatoho & 5 Others vs. Republic**, (supra) it was held that:

"…the failure by the trial court to explain to the Appellants the consequences of pleading guilty to the charge (taking into account that they were pleading guilty to a charge which has serious penal consequences), means that the plea of guilty that was recorded by the trial court was not unequivocal. The trial court did not explain every element of the charge to the Appellants including the punishment that they were likely to suffer in the event that they were convicted.

[24] In the premises, the failure by the lower court to adhere to the provisions of **Article 50(2)(b)** of **the Constitution** by explaining all the elements of the charge of defilement, including information about the sentence entailed thereby, is inexcusable as it vitiates the entire plea-taking process. Having so found, the final question to consider is whether to order a retrial. Hence, in **Muiruri vs. Republic [2000] KLR 552** it was held that:

"Generally, whether a retrial should be conducted or not must depend on the circumstances of the case. It will only be made where the interest of justice required it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely of the prosecution making or not..."

[25] Similarly, in **Opicho vs. Republic [2009] KLR 369** it was held that

"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 purpose of enabling the prosecution to fill up gaps in its evidence as the first trial, even where a conviction is vitiated by 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 own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

[26] In the instant matter, the vitiated proceedings were held between **15th and 19th September 2017**. It is noteworthy too that the Appellant may have anticipated a retrial for in his Grounds of Appeal filed on **27 September 2017** he stated that:

"…I pray that may the honourable court order for two new re-trial…"

Thus, no prejudiced would be occasioned by his retrial.

[27] In the premises, I would allow the Appellants appeal, quash his conviction and set aside the sentence passed by the lower court against him. The case is hereby remitted for plea at Iten Senior Principal Magistrate's Court by any magistrate of competent jurisdiction, other than **Hon. Nyaberi, SPM**. The Appellant shall remain in custody pending appearance before the lower court for plea.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JULY 2019

OLGA SEWE

JUDGE