



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO. 19 OF 2018**

**KATANA KAZUNGU WANJE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From Original Conviction and Sentence in Criminal Case No. 37 of 2017 of the Chief Magistrate's Court at Malindi – Dr. Julie Oseko, CM)***

**CORAM: Hon. Justice R. Nyakundi**

**Miss Sombo for the Respondent**

**Appellant present**

**JUDGEMENT**

**Background**

The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.

The prosecution set out the brief particulars of the offence that on the diverse dates of 2016 and 26<sup>th</sup> August, 2017 at around 2200 hours at [particulars withheld] Village, Gede location within Kilifi County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MKH a girl aged 16 years.

The second count was on committing an indecent act with a child contrary to Section 11(b) of the same Act. The appellant was convicted on his own plea of guilty of defilement by the learned magistrate at Malindi and sentenced to of 15 years' imprisonment.

Being aggrieved with sentence the appellant filed this appeal raising the following grounds:

- 1. That the learned trial magistrate erred in law and fact by failing to consider that the child's age was not proved beyond reasonable doubt.***
- 2. That the learned trial magistrate erred in law and fact by failing to consider that the plea was incomplete hence a mistrial.***
- 3. That the learned trial magistrate erred in law and fact by failing to consider that the sentence was harsh and untenable.***

The approach taken by the appellant as seen from the memorandum of appeal was to attack the entire proceedings on conviction and sentence. In his submissions the appellant urged this court to have a fresh look at the plea of guilty on grounds that it was unequivocal. He relied on the provisions of Section 348 of the Criminal Procedure Code and the principles stated in the case of **Alexander Lukoye v R 2015 eKLR** where the learned judge went to the extent of saying as follows:

***“A court may only interfere with a sentence where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished back there the trial court erred in treating it as a plea of guilty.***

***Another situation is where an accused pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charges laid against an accused person is 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 connected to the offence charged?"*

Further, the appellant submitted that the Swahili language used but no mention is made in the record on the proper language of interpretation in the proceedings. The appellant further concluded and argued that he was not warned of the sentence or implications of entering a plea of guilty. He also brought to the attention of this court the inability he had to defend himself due to lack of legal knowledge and representation at the trial.

**Ms. Sombo**, prosecution counsel, for the State vehemently opposed the appeal in her written submissions a rejoinder to the appellant's appeal. The substance of the prosecution counsel was to the effect that the appeal clearly shows that the conviction was against the weight of evidence, and therefore sentence passed was lawful but not excessive. The case therefore submitted prosecution counsel falls within the requirements of Section 348 of the Criminal Procedure Code and should have been rejected summarily. Learned prosecution counsel also relied on the law regarding the procedure on plea taking as set out for adherence by the courts in **Adan v R 1973 EA 445-446**.

In her summary learned prosecution counsel concluded that the appeal on both conviction and sentence lacks merit and it is for dismissal. The appeal to this court amounted to no more than the challenge of conviction against the appellant's right to a fair hearing as stipulated in Article 50 of the Constitution.

### **The Law, analysis and Decision**

The jurisdiction and power of the appellate court is trite as stated in the case of **Okeno v R 1972 EA 32**. The provisions on taking plea are laid down extensively under Section 207 of the Criminal Procedure Code. When considering whether the plea recorded is free and voluntary the first duty of the court is as stated in the case of **Adan v Republic (supra)**. What is required is for the trial court to satisfy itself that the rights of an accused person are protected as constituted in Article 50 of the Constitution on fair trial rights.

Secondly that the language of interpretation ascertained in which the accused confirms he understands and speaks. The confirmed language is to be recorded to the effect that the accused understands it as a medium of communication to answer the indictment. The rights of an accused person to legal representation should be explained promptly and given facilities and an opportunity to instruct counsel of his choice.

That in the case of a plea of guilty the initial committal information of key witnesses who complained against the appellant must be supplied in advance of the plea taking more so where the offence is punishable with mandatory, minimum or other penalties attached to the indictment. The accused has right to know the consequences of his or her plea of guilty.

The substance of the charge and every element or ingredient of the offence must be explained to the accused person. The call by the accused person to plead guilty on each count should be reflected by the record. When the prosecution presents the fact of the charge and particulars hereof, in case of a plea of guilty, the trial court should set a date for sentencing hearing.

At the hearing on sentence the trial court and to a greater extent would consider – mitigation, the state remarks and any previous records of the accused produced and admitted in evidence and the victim impact statements. All these factors would cause the court to decide the appropriate sentence.

To my mind, the accused under the constitution is guaranteed minimum basic rights to a fair hearing in accordance to the provisions of Article 50 of the Constitution. In the shaping of our criminal justice system the guilty plea besides being voluntary, must be confirmed by the trial court to be unequivocal. When disputes arise, whether a particular plea was equivocal or not, the broad wording of the record in the form of an answer to a plea to the effect that: **I do, I accept, I admit etc have been found to be held as equivocal**. See the dicta in the case of **R v Patel 1985 KLR 32 Njuki v R 1989 KLR 444**.

It is highly necessary that the accused person who opts to plead guilty understands the nature and consequences of his or her plea and the heavy statutory punishment provided for such offence. One such principle to ensure fidelity to the Constitution and the law was noted in the persuasive authority in **Huangchin Shin v Republic** where Wilson J said:

***"It is to my mind essential .to the validity of a plea of guilty that the accused should fully understand what he is pleading to in order to give full effect to the provision of Section 207 of the CPC and realization of the rights to a fair hearing guaranteed under the Constitution. The trial court is required to take administrative measure to explain the nature and distinction between the main and alternative charges in the information. The consequences of pleading to one or either of them than the other and the penalty for all of them."***

It is therefore mandatory in the criminal administration of justice the trial record do show in tangible terms salient features of unequivocal plea and safeguards to the right to a fair hearing. The core question which arises in this appeal is whether the appellant under Article 50 of the Constitution was accorded a fair trial.

The Constitution of Kenya in Article 50 provides fair trial rights directly enforceable by a court, tribunal or another independent tribunal or body(s). The accused even at plea stage is presumed innocent until the contrary is proved.

In determination of his rights, the appellant is to be informed of the charge with sufficient detail to answer which promotes right to equal protection and benefits of the law in Article 27 of the Constitution. The right to a fair trial includes a right to legal representation as provided in Article 50(G) and (H) of the Constitution.

The court in **Juma and others v A.G. 2003 eKLR** affirmed the principles of fair trial where it held as follows:

***“It is our elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favor, a right to cross-examine his adversary’s witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence.”***

The combined effect of these principles as set out is that the appellant case fails on threshold criteria. None of the principles proffered by the court were applied to the trial of the appellant. The appeal, though filed as an ordinary case of an aggrieved convicted and sentenced offender prima facie, raises issues of constitutional interpretation under Article 50.

In short, no plea should be entertained by an independent court or tribunal properly constituted in terms of Article 50(1) of the Constitution without first providing the charge sheet, and detailed information on the complainant against the accused person. On arraignment the trial court must inform the accused of his right to legal representation promptly and where there is a likelihood of substantial injustice in terms of 50(j), legal representation to be provided by the state to act for the accused before commencement of any proceedings.

The import of the consequences of substantial departure from the constitutional rights to a fair hearing in Article 50 is that it cannot be cured by the provisions of Section 348 as read with Section 382 of the Criminal Procedure Code. Further in the case of **People v MCdough 2001 3L. R 411 Keane C.J. Welce**

That:

***“Where a criminal trial, on which the defence of the accused was conducted with such a degree of casualness or disregard of the accused’s interests as to create a serious risk of a miscarriage of justice, could not be regarded as a trial in due process of law.”***

In the instant appeal, although the appellant pleaded guilty to the offence the validity of the plea is questionable on the following grounds:

- 1. That the language of interpretation used in explaining the nature of the offence as understood by the appellant is not clear from the record.***
- 2. That the nature and consequences of the plea, more specifically as to sentence was never brought to the attention of the appellant before plea admission.***
- 3. The failure to inquire fully whether the appellant had been supplied with the charge sheet and detailed information of the offence in advance to plead or answer it for the court to enter plea of guilty is not determined in the proceedings.***

I have had the privilege to serve as a trial judge and at the subordinate court. Through, my experience, the view I take is that providing equal justice in an adversarial system as applied in our country for substantive justice to be realized, accused persons must be assisted in a meaningful way to fairly, and justly represent themselves in the conduct of their defence. In my considered view witness statement should be recorded in a language accused persons understands more preferably Swahili should be a language of choice and if in English, the contents be clearly explained in advance to the accused persons. It is also important that basic civic education on criminal process and procedure be made available to the accused person to enable them prepare their respective defences to the charge. If it is in order for the accused person to represent himself at the trial the right to decide whether he requires time to hire counsel should be explained promptly by the court. The inquiry should be reflected in the court record.

From what I have said above I am of the view that the trial court disregarded the fundamental rights to a fair hearing and as a result the appellant was prejudiced occasioning a failure of justice. Whether the accused person appears ready to plead guilty to the charge that can only be guaranteed upon emphasis of the rights under Article 50 of the Constitution.

Although the cases in magistrate courts sometimes overwhelm Judicial Officers and the heavy case docket they preside over its important that minimum constitutional guarantees under Article 50 remains the safest and legal course more so where the accused persons are not represented by counsel.

The court must be satisfied that the accused has been informed of his or her rights under Article 50 and that he or she fully understands their implication to the trial at hand. It is not enough to rush during a trial and in the end deprive the accused on opportunity to a fair trial which plea will lead to a mistrial or failure of justice. Under the circumstances of this case and in accordance with the provision of Section 207(2) of the Criminal Procedure Code Article 50 of the Constitution and the principles in **Adan v Republic** the appellant did not have a right to a fair trial.

It follows from these provisions that the appeal be allowed by questioning the conviction and sentence of the trial court determined on 11<sup>th</sup> September, 2017. In reaching this decision, I am alive of the principles in **R v Vashanjee Liliander Dobhane 1946 13 EACA, Koome v Republic 2005 1KLR 575 and Scharaha v R 2004 2KLR**. On whether this Court should order for a re-trial.

Due to the exceptional nature of the case, that the plea was not voluntary or unequivocal subject to Article 50 on right to a fair trial, the decision to order for retrial is withheld. This approach strikes the proper balance between finality of guilty plea and fairness to the appellant. Ultimately the appellant is at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF JULY, 2019.

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**R. NYAKUNDI**

**JUDGE**