REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 34 OF 2016

BETWEEN

JAMES KHISA ……..…....…….APPELLANT

AND

REPUBLIC……..…..…….RESPONDENT

(An appeal from the conviction and sentence in Criminal Case No. 22 of 2015 in the Principal* Magistrate's Court at Kimilili *by Hon. D.O.Onyango (SPM) on 01.02.16)

JUDGMENT

The Trial

1. On 11th July, 2016, the Appellant herein **SAMUEL MUGANDA** pleaded guilty to a charge of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as ***the Act***) and was sentenced to serve 20 years' imprisonment.

The Appeal

2. Aggrieved by this decision, the appellant lodged the instant appeal on 10.07.18.

3. When the appeal came up for hearing on 07.08.19, the Appellant chose to wholly rely on the grounds of appeal and written submission filed on 31st July, 2019.

4. Ms. Nyakibia, Learned Counsel for the state conceded to the Appeal on the ground that the answer to the plea was not recorded in the Appellant's own words and that he was not warned of the seriousness of the offence that he was likely to be handed to him.

Analysis and determination

5. This is the first appellant court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

6. The appellant is appealing both on conviction and sentence. In the case of **Adan vs Republic [1973] EA LR 445**, the court set out the steps to be followed by a court when taking plea**.** It was adopted in **Kariuki vs Republic [1954] KLR 809**where it was held: -

> **"The manner in which a plea of guilty should be recorded is:**
>
> **(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's**

language or in a language he understands;

(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;

(c) the prosecution may 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;

(d if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v Republic [1973] EA 445".

7. Courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. In the case of **Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)**, the court held that where an Accused Person is unrepresented, the duty of the Court to ensure that the plea of guilty is unequivocal is heightened.

8. In **Simon Gitau Kinene v Republic [2016] eKLR,** the court held as follows:

> **"In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.….To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened."** (emphasis added)

9. In this case, the record shows that the charge was read in Kiswahili language that the Appellant understands. After Appellant pleaded guilty he was "***not warned of the sentence by the court***". There is therefore no evidence that the appellant was warned about the seriousness of the offence that he was pleading to. In those circumstances, given the seriousness of the charge and the fact that the Court was about to convict and sentence the Accused Person to a mandatory sentence of 20 years' imprisonment, it behooved upon the Court to unequivocally warn the Accused Person of the consequences of a guilty plea. This was clearly not done.

Orders

10. In the end, therefore, the court makes the following orders:

(a) **The guilty plea entered against the Appellant was not unequivocal and the conviction and the sentence imposed on him are consequently set aside.**

(b) **The Appellant has served over3 ½ years' imprisonment and it would not be in the interest of justice to order a retrial since complainant did not even appear to be truthful.**

(c) **It is therefore hereby ordered that Appellant shall be released and set free forthwith.**

DATED AND DELIVERED IN BUNGOMA THIS *09th* DAY *August* 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Brendah

Appellant - Present

For the State - Ms. Nyakibia