



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
(CORAM: CHERERE-J)
CRIMINAL APPEAL NO.14 OF 2013

TWWAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 88 of 2013 in Chief Magistrate's Court at Bungoma by Hon. P.O.Ooko (PM) on 07th February, 2013)

JUDGMENT

The Trial

1. **TWW (hereinafter referred to as the Appellant)** has filed this appeal against conviction and sentence on a charge of incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

On 27th December in Bungoma Central District within Bungoma County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of NJW a girl aged 8 years who to your knowledge was your niece

2. The charge was read out and explained to the accused person in Kiswahili language which the Appellant indicated he understands and he replied:-

Accused – “Ni kweli” translated to mean “It is true.”

3. The prosecution proceeded to give facts of the case at length to which the Appellant replied; -

“The above facts are correct”.

4. The learned trial magistrate proceeded to enter a plea of guilty against the Appellant.

5. The prosecution indicated that the appellant was a 1st offender. In mitigation, accused state as follows: -

“I normally take alcohol and it is the one that misled him to commit the offence”.

6. In sentencing the Appellant, the trial magistrate had this to say:-

“I have considered the mitigation of the accused person and the fact that he is a first offender. I am afraid that the hands of the court are tied as this offence has only one sentence of life imprisonment. He is accordingly sentenced to life imprisonment.

7. Aggrieved by this decision, the appellant lodged the instant appeal. In his amended grounds of appeal filed on 02.08.19, the Appellant raised 8 grounds which I have consolidated to 6 grounds as follows:

- i. That the mandatory life sentence is unconstitutional
- ii. That the charge sheet was defective since the Ob number thereon differed with the one on the P3 form
- iii. The Appellants rights under Articles 25, 27, 35 and 49 of the Constitution were breached
- iv. That appellant beaten and coerced to plead guilty
- v. That Applicant was no informed of his right to representation by counsel, was not supplied with statements nor released on bail
- vi. That Appellant was not warned of the dangers of pleading guilty
- vii. No DNA was conducted to prove incest

8. 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”.

9. 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.

10. 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)

11. In this case, the record shows that 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 life imprisonment, it behooved upon the Court to unequivocally warn the Accused Person of the consequences of a guilty plea. This was clearly not done.

12. Having said that, I shall not delve into the other issues raised on appeal. The Appellant has served 6 ½ years from date of conviction and in the circumstances, I find that the interest of justice would not be served if a retrial is ordered.

13. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

DATED AND DELIVERED THIS 09th DAY August 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Brenda**

Appellant - **In Person**

