REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 19 OF 2019

ONESMUS MUSYOKI MWIKYA…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court (Hon. I.M. Kahuya), in Criminal Case SOA No. 10 of 2019 delivered on 12.2.2019)

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. I.M. Kahuya, Senior Resident Magistrate in Criminal Case SOA No. 10 of 2018 on 12.2.2019. The Appellant was on 1.2.2019 charged with the offence of rape contrary to Section 3(1)(a)(b)(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "on the 30th day of January, 2019 in Kalama Sub-county of Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **MKK** without her consent.

2. When the charge was read to him, the trial court recorded the proceedings of the day as follows;

Interpretation: Kiswahili

The substance of the charge (s) and every element thereof has been stated by the court to the accused person in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge (s) replies; **In Kiswahili**

Accused: Ni ukweli.

Court: Plea of guilty entered.

Prosecutor: On 30/1/2019 at 3 pm one M entered into her grandmother's house and was shocked to find their shamba boy (accused person) on top of her 90 years old grandmother who is also dumb.

He was in the process of raping her. At that point, M pulled the accused person off her grandmother; at a time when the grandmother was bleeding profusely from her private parts.

Similarly, the accused person had blood on his penis and wanted to fight off M in an attempt to continue raping the grandmother. A fight ensued and fortunately the accused person fled the scene as M pursued her while raising an alarm, members of the public came around and helped restrain the accused person who was then taken to the police station at Machakos. Meanwhile the grandmother (victim) was rushed to hospital at Machakos level 5 and treated. We produce the P3 form and post rape care form to confirm that indeed the victim (MKK) was raped. The same is produced as P. exh 1 and P. exh 2 respectively.

Accused: Facts are true.

Court: Convicted as own plea of guilty.

Prosecutor: 1st offender.

Mitigation: Forgive me; I didn't know what happened. It must have been the devil.

Court: Mention 12/2/2019 for pre-sentence report.

12/2/2019

Before: Hon. I. M. Kahuya - SRM

Court Prosecutor: Wambugu

Court Clerk: Patrick

Accused: Present in Person

Interpretation: English/Kiswahili

Munguti – Probation Officer: The pre-sentence report is ready.

Court: The report has been duly received and the victim's sentiments read to the accused person. Indeed the offence committed was unthinkable and against the moral fabric of the community. In order to deter others, the accused person is hereby sentenced to life imprisonment.

3. The appellant is dissatisfied with those proceedings and has appealed to this court on the following grounds, namely;

> ***a) The appellant pleaded guilty to the aforesaid charges***
>
> ***b) The learned trial magistrate failed in law and facts when he failed to follow the necessary steps in plea of guilty charges.***
>
> ***c) The learned trial magistrate erred in law and facts by not considering that his constitutional rights as stipulated in Article 50(2) and 49 of the constitution of Kenya were violated.***
>
> **d) The learned trial magistrate erred in law and facts by not considering the forms of defence as stipulated by law.**

4. Submitting in support of the appeal, the appellant submitted that the plea was not unequivocal. He placed reliance on the case of **Adan v R (1973) EA**. He submitted that it was not indicated in what language that the facts were read out to him and resulted in him pleading guilty. He told the court that he was comfortable in Kiswahili and the record does not indicate that the facts were read out in Kiswahili and in this regard reliance was placed on the case of **R v Peter Muiruri & Another (2014) eKLR** in submitting that the plea was equivocal hence the conviction and sentence be quashed and a retrial ordered.

5. The appellant submitted that he was not represented in the trial hence injustice was occasioned. He added that he was occasioned a harsh sentence and the same ought to be reviewed.

6. In response, the learned counsel for the state opposed the appeal and argued that the plea that was recorded was in line with the procedure in the case of **Adan v R (1973) EA 446**. Reliance was also placed on section 348 of the Criminal Procedure code.

7. The issues to be determined is on the propriety of the plea of guilty and the orders that the court may grant. According to section 348 of *The Criminal Procedure Code*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the legality of the plea or to the extent or legality of the sentence.

8. Having been convicted on his own plea of guilty, the appellant by challenging inter alia the manner in which the plea was recorded, is in essence appealing the legality of the plea.

9. The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in ***Adan v. Republic, [1973] EA 446*** where Spry V.P. at page 446 stated it in the following terms:

> ***"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."***

10. It is incumbent upon a trial court when recording a plea to be meticulous in ensuring first that the charge is read and explained to the accused in the language he or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as to whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

11. The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence, otherwise the plea is not unequivocal. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see ***R v Peter Muiruri & Another (2014) eKLR***).

12. For a charge under sections 3(1)(a)(b)(3) of the Sexual Offences Act No. 3 of 2006, it is necessary that the facts of the offence should specify; - the existence of a victim, unlawful penetration of the sexual organs of a victim without the consent of the victim. In the instant case, although, the facts as narrated by the prosecutor do not disclose that the appellant penetrated the victim. The facts instead disclose that the appellant was found in the process of raping the victim. With all due respect the facts as read out do not indicate the language that was used so as to ensure that the appellant understood the details of the charges that were facing him. In the result, the facts as narrated by the prosecution not being in the language the appellant understood, the plea was equivocal and cannot sustain the conviction. Further the appellant in mitigation seems to blame someone else namely the devil and this created an impression that there might have been a different perpetrator of the crime other than the appellant. Therefore the appeal must succeed. The conviction is quashed and the sentence set aside.

13. Where a conviction is quashed and sentence set aside, the question always follows as to whether there should be a re-trial. It is a basic principle of constitutional law, that no person may be placed twice in jeopardy that is, put on trial with the possibility of conviction and punishment, for the same criminal offense. In cases where the appellate court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order of a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence.

14. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522** held as follows;

> ***"…several factors have therefore to be considered. These include:***
>
> > ***1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
> >
> > ***2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
> >
> > ***3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
> >
> > ***4. A retrial should be ordered where the interest of justice so demand.***
>
> ***Each case should be decided on its own merits."***

15. Because of the infraction on the procedure of narrating the facts to the appellant had been occasioned by the trial court, the appellant ordinarily should not be made to suffer prejudice. However I note that there was no trial in the case as it was just a plea. The prosecution must be ready with their witnesses whose availability will not be hampered because they can be availed by the prosecution. Again the appellant has barely served a fraction of the sentence and there will be no prejudice suffered. The justice of the case warrants an order for a retrial in the circumstances.

16. In the result the appeal succeeds. The conviction is quashed and sentence set aside with the following orders:

> ***a) An order for a retrial do issue and the Appellant be presented before the Chief Magistrate's court Machakos on the 28.11.2019 for the purposes of a retrial.***
>
> ***b) The Appellant be placed in police custody at Machakos police station and to be presented before the Hon Chief Magistrate on the 28.11.2019 for retrial.***

It is so ordered

Dated and delivered at Machakos this 27th day of November, 2019.

D. K. Kemei

Judge