



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 29 OF 2017

GERISHON GIDARUSI GULIENYI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the conviction and sentence by Hon. E. N. Nyagah, Principal Magistrate in Migori Chief Magistrate's Court Criminal Case (S.O.) No. 17 of 2017 delivered on 11/09/2017)

JUDGMENT

1. This is an appeal against the conviction and sentence resulting from a plea of guilty which was entered upon admission of the offence by the appellant.
2. On 11/09/2017 the appellant was arraigned before the Principal Magistrate at Migori facing the charge of defilement contrary to **Section 8(1)(3) of the Sexual Offences Act**, No. 3 of 2006. The particulars of the charge were that *'on the 9th day of September 2017 in Migori County, intentionally caused his penis to penetrate the vagina of M.A.C. a child aged 14 years.'*
3. The record indicates that the charge and its particulars were read to the appellant in English and interpreted in Kiswahili which language the appellant indicated to understand. When called to respond the appellant admitted the charge.
4. The facts of the case followed immediately which briefly disclosed that on the said 09/09/2017 at around 05:00pm while at the said [particulars withheld] village the appellant saw M.A.C and signaled her to follow him to a nearby bush where the appellant had carnal knowledge with her. One witness, Pius Omondi, witnessed the incident and raised alarm; members of the public quickly gathered and caught the appellant and the complainant in the act. That, the two were arrested and led to Migori Police station where the complainant confessed to have severally had sexual intercourse with the appellant. She was issued with a P3 Form which was filled, and which also confirmed that the complainant was aged 14 years old. The appellant was then charged. The P3 Form and treatment notes were produced as Exhibits 1, 2 and 3 respectively.
5. The appellant admitted the facts. The court then convicted the appellant on his own plea of guilty and sentenced him to 20 years imprisonment.
6. It is on that background that the appellant being dissatisfied with both the conviction and sentence lodged a Petition of Appeal on 22/09/2017 through the firm of **Messrs. Mudayi Okumu & Company Advocates**. The appeal was heard by way of oral submissions where the appellant contended that the plea was not unequivocal since he did not understand the proceedings which were in *Kiswahili* language instead of *Kimaragoli* language which language he understood well. Counsel further submitted that the

court did not warn the appellant of the nature of the charge and the sentence going by the gravity of the charge and did not explain the ingredients of the charge. That, the age of the complainant was also not legally settled. It was further submitted the appellant was entitled to a Counsel under **Article 50(2)(h)** of the **Constitution** due to the gravity of the offence. The cases of **R. vs. Adan** and **Charo vs. R** were cited in support of the various submissions. Counsel prayed that the appeal be allowed, and a retrial be ordered. The prosecution did not oppose the appeal since there was no representation at the hearing.

7. As this is the Appellants' first appeal the role of this court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. In this case however since the matter did not proceed on for trial, the court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

8. Due to the centrality of the issue of plea-taking, I will first revisit the law on that subject. **Section 207** of the Criminal Procedure Code states as follows:

'207 (1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.'

13. The above provisions have previously been subjected to Court's interpretation. The procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of **Adan -vs- R (1973) EA 445** and in the Court of Appeal case of **Kariuki -vs- R (1954) KLR 809** as follows:-

(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.

(iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

14. Further in the case of **Kariuki -vs- R (supra)** the Court went on and stated that:-

"The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."

And in the case of **Atito -vs- R (1975) EA 278** the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

15. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that: -

“(2) Every accused person has the right to a fair trial, which includes the right-

(a).....

(b) to be informed of the charge, with sufficient detail to answer it.

9. I have perused the record before the subordinate court. The plea was taken in English and interpreted in Kiswahili language. The appellant did not raise any objection to the languages used and instead proceeded to respond to the charge and its particulars in Kiswahili. That was also the case when the facts were presented to him. The appellant now contends that he did not understand the Kiswahili language used but his native Kimaragoli language instead and that he did not understand and could not follow the proceedings in Kiswahili language.

10. I have previously stated and do hereby reiterate that a plea court must always be very cautious since the proceedings at the time a plea is taken determine the way forward in the case. The court must be satisfied that the accused person fully understands the charge(s) to be able to plead with clarity. Further, in cases where an accused person pleads guilty to an offence and facts are taken, the court is duty bound to scrutinize the facts and to ensure that the facts disclose the ingredients of the offence in issue. That is the only time when a court, in the further guidance of the law aforesaid, can proceed to convict the accused person.

11. The record does not state that the appellant raised any objection to the use of the Kiswahili language in the proceedings. I therefore find that the contention that the appellant did not understand the Kiswahili language to be unsubstantiated. The learned magistrate however did not enter a guilty plea when the appellant admitted the charge and the particulars but instead jointly entered a plea of guilty and a conviction on admission of the facts. What the court failed to do was to enter a plea of guilty upon the admission of the charge and the particulars and only convict the appellant upon admitting the facts. However, by invoking **Section 382** of the **Criminal Procedure Code** and without losing sight of **Article 50(2)(b)** of the **Constitution**, I find that the anomaly is legally curable.

12. On whether the facts disclosed the offence, Counsel submitted that the age of the complainant was not settled since neither a Birth Certificate nor an Age Assessment Report was produced. I have seen the P3 Form and the treatment notes produced and note that the record is silent on whether the appellant admitted the production of the exhibits. The record only confirms that the appellant admitted the facts. I must say that the admission of the facts is not the same as having no objection to the production of exhibits. Ideally, the appellant was to be accorded an opportunity to examine the intended exhibits and decide on whether he had any objection thereto. That is because although the exhibits tend to prove some fact(s) they must always be produced in line with the settled requisite legal provisions.

13. The production of exhibits therefore remains a clear legal issue. If an accused person raises any objection to an intended exhibit, then a change of plea or a plea of not guilty must instead be entered unless the court finds that even without relying on the intended document still a conviction can stand. The documents can only be admitted as exhibits if the accused person has no objection otherwise the makers thereof must be availed and that can only be in a trial. That was not the case herein. The record does not state that the appellant did not have any objection to the production of the exhibits. I therefore find and hold that the exhibits were irregularly produced and in their absence the age of the complainant remains unsettled. In sexual offences the age of the complainant is so central and determinative not only on the sentence, but also in giving an accused person an opportunity to raise the defence of consent in the event the complainant is not a minor. It now turns that without settling the age of the complainant, the charge

cannot be said to have been proved. The plea of guilty was hence not unequivocal.

14. I have also confirmed from the record that the appellant was not called to tender his mitigations before sentencing. Once an accused person is found guilty of an offence, he or she must be called upon to tender mitigations regardless of whether the court will render the minimum sentence or not. That is important for the completeness of the record and since either party can take up the issue of sentencing on appeal. I hereby remind the trial courts that the Judiciary has long developed very comprehensive guidelines on sentencing which are worth consideration and application.

15. The appellant also raised the issue of having not been accorded a Counsel by the State in view of the gravity of the offence he faced. On 10/05/2016 the **Legal Aid Act No. 6 of 2016** became operational. **Part VII** of the **Legal Aid Act** provides for any one who wishes to be accorded legal aid in Kenya to formally apply to the **National Legal Aid Service** established under the Act. The appellant did not indicate that he so complied with the Legal Aid Act. That ground is therefore unmerited and hereby fails.

16. The upshot is that the appeal is allowed, the conviction quashed and the sentence set-aside.

17. Having so found, I must consider if the appellant is to be retried or released. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

'...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;.....'

18. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi v. R (2012) eKLR**:

“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person’

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

‘...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.’”

19. Applying these principles to this appeal and considering the gravity of the offence, the facts as recorded, the possibility of the availability of the witnesses most of whom are from the appellant’s villagehood, the fact that the appellant was convicted barely six months ago and since that eliminates the risks of faded memory, I am of the considered finding that this is a case for retrial.

20. Consequently, the appellant shall be released into police custody and be produced before any court competent to try him within 5 days of this judgment.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of March 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Mudeyi Counsel instructed by Messrs. Mudeyi Okumu & Company Advocates for the Appellant.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant.