



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 43 OF 2017

ELLY OMONDI MAGANGA..... APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence by Hon. P. K. Rugut, Resident Magistrate in Rongo Principal Magistrate's Court Criminal Case No. 193 of 2012 on 13/04/2012)

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 13/04/2012 the appellant was arraigned before the Resident Magistrate in Rongo facing the charge of defilement contrary to **Section 8(1) (4)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that *on diverse dates between 19th March 2012 and 12th April 2012 in Migori County within the Republic of Kenya intentionally caused his penis to penetrate the vagina of D.O. a girl aged 16 years.*
3. The record indicates that the charge and its particulars were read to the appellant in English/Dholuo which language the appellant indicated to understand. When called to respond the appellant admitted the charge. The facts of the case followed immediately which briefly disclosed that on the said 19/03/2012 the complainant also known as D. V. O. then aged 16 years old and a student at [Particulars Withheld] School in Form 3 visited the appellant who was then her boyfriend and who had pledged to marry her. The visit was at the appellant's home where the complainant stayed with the appellant for 3 days. By then the complainant's mother had travelled and left the complainant at home and on return she learnt that the complainant had left, and she began looking for her after reporting the matter to the Chief.
4. The search led to finding the complainant at the home of the appellant. Both the complainant and the appellant were arrested and taken to Awendo Police Station. The complainant was taken to hospital where she was examined and treated, and a P3 Form filled. On completion of investigations the appellant was accordingly charged. The P3 Form and the complainant's Clinic Card were produced as exhibits.
5. When the appellant was called to respond to the facts, this is what he stated:

"The facts are correct."
6. The court then convicted the appellant on his own plea of guilty and the appellant tendered his mitigations whereas the prosecution presented the appellant's criminal history as a first offender. The appellant was then sentenced to 15 years imprisonment.

7. It is on that background that the appellant being dissatisfied with both the conviction and sentence challenged the same vide **Kisii High Court Criminal Appeal No. 99 of 2012** before the matter was transferred to the High Court at **Homa Bay** where it was registered as **Criminal Appeal No. 193 of 2012**. The matter was eventually transferred to this Court.

8. The appeal was heard by way of written submissions where the appellant appeared in person and Learned State Counsel Miss Owenga appeared for the State. The appellant submitted that the plea was not unequivocal since he had been subjected to police torture and sustained injuries. That, the police had further lured him to admit the charge without knowing the repercussions of such an admission hence by the time he was arraigned before court he was not in his right mind. That, as it was his first court arraignment he was not conversant with court procedures and did not communicate with the court on what had befallen him. That, he had a valid defence to the charge. That, the facts did not prove the ingredients of the offence since the Clinic Card belonged to another person and not the complainant. The appellant prayed for a retrial of the case

9. The appeal was opposed, and this Court urged to dismiss the same given that the law was adhered to accordingly.

10. 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.

11. 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.”

15. 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.

16. 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.

17. I have perused the record before the subordinate court. The plea was taken in English/Dholuo languages. That means the proceedings were conducted in English and in the local language Dholuo. The appellant did not raise any objection to the language used and instead proceeded to respond to the charge and its particulars. That was the case when the facts were equally presented to him. As to whether the appellant had been tortured and misled by the police into admitting the charge, I have perused the record, but it is silent on whether the appellant was tortured and injured or that he was forced to admit the charge. I therefore dismiss the appellant’s contentions as afterthoughts.

18. I also wish to state that 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. In this case the facts were clearly recorded, and the appellant readily agreed to them. Two exhibits were also produced on record.

12. On the ingredients of the charge, the age of the complainant was well settled. The prosecution produced the complainant’s Health Card in such proof. The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as **“The Sexual Offences Act (Rules of Court) 2014** which came into force on 11/07/2014 under Legal Notice No. 101. Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or **any other similar document**.

13. In this case I have no hesitation in finding that the **Child Health Card** produced as exhibit 2 falls under the category of '**any other similar document**' under Rule 4 aforesaid and that the same is in proof of the complainant's age. The document has all the details of the complainant including the date of birth and when she was variously immunized. I therefore find and hold that the complainant was born on 11/08/1996 and as such she was about **16 years old** when the offence was allegedly committed in March 2012. The complainant was hence a minor within the meaning of the law.

19. On the issue of penetration, the facts did not state that the complainant and the appellant engaged in any sexual intercourse or engaged in any act that would amount to penetration in law during the days the complainant stayed at the home of the appellant. The facts were that the appellant and the complainant

stayed together on the understanding that the appellant will marry the complainant. That alone does not prove penetration as defined in **Section 2** of the Sexual Offences Act. The P3 Form as well stated that on examination the complainant's vagina was normal, there was however a brownish P.V. discharge which was smelly, and the hymen was broken although it was not stated when the hymen was likely to have been broken. The facts as presented did not therefore establish penetration.

20. The plea court was hence under a legal obligation to find that the facts did not establish all the ingredients of the charge and that the plea was to change.

21. I have also confirmed from the record that the learned magistrate 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 when the facts were admitted. What the court failed to do was to enter a plea of guilty upon the admission of the charge and the particulars but it rightly convicted 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 and hold that the anomaly is curable since it did not go to the root of the matter as to cause an injustice to the appellant and to render the plea of guilty unequivocal.

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

19. 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;.....'

20. 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.'

21. 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 homestead, the fact that the appellant was convicted barely five years ago and since there has been no

allegation that the witness memory may have faded memory coupled with the appellant's prayer for a retrial, I am of the considered finding that this is a case for retrial.

22. 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 12th day of April 2018.

A. C. MRIMA

JUDGE

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

Elly Omondi Maganda, the Appellant in person.

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

Miss Nyauke – Court Assistant