REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 14 OF 2014

WILSON KIMUTAI MAGUT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal case No. 3494 of 2011

in the Principal Magistrate's Court at Kapsabet – Hon. G. Adhiambo (RM)

JUDGMENT

1. The appellant herein, WILSON KIMUTAI MAGUT, was charged with the offence of defilement contrary to section 8(1) of the sexual offences Act. The particulars of the offence were that on 13th November 2011 in Nandi County intentionally caused his penis to penetrate the vagina of MJ (particulars withheld) a child aged 13 years.

2. The appellant also faced the alternative charge of indecent act with a child contrary to section 11(1) of the sexual offences act.

3. The appellant pleaded guilty to the main count of defilement and was accordingly convicted and sentenced to 35 years imprisonment thereby triggering the filing of the instant appeal in which he faults the trial court for convicting him without considering that the consequences of the offence were not explained to him in detail before he took the plea.

4. At the hearing of the appeal, the appellant relied on his written submissions, which I have considered. Miss Mumu, learned counsel for the state, submitted that the sentence passed on the appellant is legal in view of the fact that the Sexual Offences Act provides for a mandatory minimum sentence of 20 years.

5. Since the equivocality of the plea is in question, I will reproduce, below, what appears in the Court record:

> ***15/11/11***
>
> ***CORAM:***
>
> ***BEFORE G. ADHIAMBO – RM***
>
> ***IP ODILOLO FOR THE PROSECUTION***
>
> ***COURT CLERK: NERESA***
>
> ***ACCUSED: PRESENT***
>
> ***ACCUSED: I understand Kiswahili***
>
> ***G. ADHIAMBO- RM***
>
> ***15/11/11***

<u>COURT:</u> Charges read over and explained to the accused in English

or Kiswahili who replies:

ACCUSED: I understand Swahili

G. ADHIAMBO

RM

15/11/11

ACCUSED: It is true. I defiled MJ (states in Swahili).

G. ADHIAMBO

RM

15/11/11

COURT- Plea of not guilty entered

G. ADHIAMBO

RM

5/11/11

FACTS (INTERPRETATION DONE BY MISS SERENA COURT CLERK FROM ENGLISH TO KISWAHILI

6. On 13/11/11 at about 1300 hours the accused took milk to the complaints mother to assist me to cook tea, the complainant's mother allowed the accused to assist the complainant. During the time of preparing the tea the accused got hold of the complainant's left hand and pushed her to her mother's bed and the accused then had carnal knowledge of the complainant. The accused removed the complaint's inner pant and the accused also removed his long trouser and had carnal knowledge of MJ by causing his penis to penetrate into the vagina of the complainant. When the mother of the complainant went to the house to collect some money she found the accused while defiling the complainant. The mother of the complainant raised an alarm. The accused escaped. The mother of the complainant took the complainant to Kipkqren police station where the report was made. The complainant was issued with a P3 form. The complainant took the P3 form to Cepteswa Sub-District hospital where the P3 form was filled, the P3 form was filled by the doctor. The complainant returned the P3 form to Kipkaren police post. The accused was arrested and charged. The Age of the complainant as per the P3 form is 13 years.

7. P3 form in respect of MJ aged 13 years dated 14/11/1 marked Exhibit 1.

G. ADHIAMBO

RM

15/11/11

Accused – It is true

G. ADHIAMBO

RM

15/11/11

Court - Accused convicted on his own plea of guilty.

G. ADHIAMBO

RM

15/11/11

Prosecutor- He is a first offender. I pray that the court takes serious action against the accused, the offence is prevalent and the

accused deserves a deterrent sentence.

G. ADHIAMBO

RM

15/11/11

Mitigation

Accused – On that day I was drunk. I did not know what I was doing because I was drunk. I request the court to forgive me. I will not repeat such an offence.

G. ADHIAMBO

RM

8. From the above extract of the proceedings of the trial court, I note that the plea of guilty was not recorded as the trial magistrate, upon reading the charges to the accused and after getting his response recorded:

"Plea of not guilty entered."

9. Upon recording a plea of not guilty, the trial magistrate ought to have set down the suit for hearing but she instead went ahead to allow the prosecutor to read out the facts of the case to the appellant who when asked for confirm if the facts were correct stated:

"On that day I was drunk. I did not know what I was doing because I was drunk. I request the court to forgive me. I will not repeat such an offence."

10. Looking at the totality of the circumstances under which the plea was taken, I am not satisfied that the plea was properly recorded because firstly, a plea of not guilty was entered which means that there was no reason for the court to go on with the procedure of requiring that the facts be read out to the appellant. However, even assuming that there was an error in the court record and that a plea of guilty was entered, I note that the appellant did not confirm the correctness of the facts when the same were read out to him as he attributed his actions to drunkenness. My finding is that the appellant qualified his guilty plea when he explained that he was drunk at the time that he allegedly committed the offence which means that he denied responsibility for his actions. In effect, the appellant retracted his earlier guilty plea and the proper approach that the trial magistrate should have adopted should have been to substitute the guilty plea with a plea of not guilty and thereafter fix the case of hearing.

11. The law and practice related to the taking and recording plea of guilt was stated in the oft cited case of Adan v Republic [1973] EA 445 as follows:

"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 if 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 of asserts additional facts which, if true, might raise a question as to his guilty, 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, off course, be recorded."

12. In the case of **Ombena v Republic 1981 KLR 450** the court observed that whether a guilty plea is unequivocal or not depends on the circumstance of the case. Differently put, an appellate or a revising court must take the totality of the circumstances into account in determining the equivocality or otherwise of a guilty plea.

13. In the instant case I find that the guilty plea was not clear unambiguous and unequivocal. Moreover, I note that the appellant was not represented during the trial and courts have held that extra caution need to be taken in the case of undefended defendants who plead guilty. I am guided by the decision of Ngugi J. in the case of **Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)** wherein the learned judge observed that the duty of the court that plea of guilty is unequivocal is heightened where an accused person is unrepresented. In the cited case, the judge stated;

" In those cases [where there in an unrepresented accused charged with 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 consequence of such a plea is heightened."

14. In the instant case, I find that there is no indication that any extra effort was taken to ensure that the appellant is warned of the seriousness of the offence that he faced and the consequences of a guilty plea. I therefore find that it is unsafe to uphold the guilty plea in the circumstances of this case.

15. Consequently, I hereby set aside the plea of guilty entered by the trial court, I quash the conviction and set aside the sentence.

16. I now turn to consider the possible was forward: that is if the appellant is to be set at liberty or be re-tried.

17. 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 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 of 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 circumstance 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'.*
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> **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**:
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> *"…..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. In the instant case, the appellant was on 15th November 2011 sentenced to 35 years imprisonment following the defective plea of guilty. Todate and as at the time of writing this judgment, the appellant has already served 7 years out of his 35 year jail time. My finding is that a retrial, in the circumstances of this case will greatly prejudice the appellant who has already served a substantial part of his jail term. Having allowed his appeal and quashed the conviction and sentence, I accordingly direct that he may be set at liberty forthwith unless he is otherwise lawfully held.

Dated and signed at Nairobi this 6th day of December 2018

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 19th day of December 2018.

OLGA SEWE

JUDGE

In the presence of:

Appellant in person

Ms Mumu for state