



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.46 OF 2017

(FORMERLY NAKURU HCRA.121/15)

(Appeal Originating from Nyahururu CM's Court Cr.No.1030/15 by: Hon. A.P. Ndege – P.M.)

ZAKARIA GAKURE KARURI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant **Zacharia Gakure Karuri** was convicted by the **SRM, Hon. Ndege** for the offence of ***defilement of a girl Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006.***

The particulars of the charge are that on 26/4/2015 at [particulars withheld], within Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of J.N.W. a child aged 10 years.

In the alternative, the appellant faced the charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

The particulars are that on 26/4/2015 at [particulars withheld] within Nyandarua County, caused his penis to come into contact with the vagina of J.N.W. a child aged 10 years. No finding was made on the alternative charge.

The appellant was convicted on his own plea of guilty and sentenced to life imprisonment.

The appellant is aggrieved by both the conviction and sentence meted on him. The petition of appeal was filed by ***Achieng' Owour Advocate*** on 14/5/2015 and Supplementary grounds of appeal on 23/5/2017. The counsel did not appear at the hearing of the appeal and the appellant elected to proceed in person. The grounds are as follows:

- (1) That the age of the complainant was not established;***
- (2) That there was no proper medical evidence to support the charge;***
- (3) That the magistrate did not appreciate that the appellant did not understand the consequences of the plea of guilty;***
- (4) That the plea was not unequivocal;***

(5) That the court shifted the burden of proof on the appellant;

(6) That the appellant's mental status was not established;

(7) That the appellant did not understand the language of the court which was Kiswahili;

(8) That in court, the appellant added the ground that the sentence is harsh and that witnesses were not called by the prosecution;

The appellant prays that the court do accord him an opportunity to be heard.

The appeal was opposed by the learned counsel, Ms. Rugut, who argued that the plea was unequivocal; that the facts were read to the appellant in the Kiswahili language and he answered that they were true and he went on to say '**maelezo ni kweli**'; that the appellant went ahead to give his mitigation after conviction, which means that he understood the proceedings and fully participated in them. As for the sentence, counsel argued that the court imposed the only sentence available in law, that is, life imprisonment. She urged the court to dismiss the appeal.

Section 348 of the Criminal Procedure Code bars an appeal from a subordinate court where an accused was convicted on his plea of guilty except to the extent and legality of the sentence. The section provides as follows:

'No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.'

In the case of *Olal v Republic (1989) KLR 444*, the court held

"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the CPC does not merely limit the right of appeal in such cases but bars it completely."

The appellant is by dint of the above section, barred from challenging the conviction and his only recourse is to challenge the extent and legality of the sentence imposed on him by the trial court unless he demonstrates that the plea was unequivocal.

The appellant has challenged both conviction and sentence. Indeed the appellant faces a very serious charge that attracts life imprisonment upon conviction. It is good practice that when a person pleads guilty to such a serious offence, it behoves the trial court to warn the accused of the likely sentence one will face upon conviction. This is important so that an accused can reflect and be sure that he wants to plead guilty to the charge. This is also important because once one pleads guilty, he can only challenge the extent and legality of the sentence but not conviction. In serious offences such as the one under consideration under the Sexual Offences Act, Robbery with violence or Murder, where there are minimum sentences, the court must inform an accused of the likely sentence if he pleads guilty. In this case, the trial magistrate did not inform the appellant what the likely sentence would be, when he pleaded guilty.

The other ground that the appellant raised is that he did not understand the language of the court. The court record is clear, that there was interpretation from English to Kiswahili. During the hearing of this appeal, the appellant insisted on getting a Kikuyu interpreter. However, from a consideration of the record, it is clear that the appellant understood the Kiswahili language. Upon the charge being read to him, he replied "**ni kweli**". After the facts were read to him, he replied "**kweli. Maelezo ni kweli.**" After conviction, the appellant was asked to mitigate and it is recorded that he spoke in Kiswahili as follows:

"I do not know if I was cursed, I have 11 children, 4 are adults, all the rest are in school including the victim. Some are still in secondary school. Last born in nursery – my children will suffer. The court to help me."

From the above narration, I find that the appellant understood the Kiswahili language very well and actively participated in the proceedings in the said language. It is mere pretence for the appellant to allege at this stage that he does not understand Kiswahili.

After due consideration of the proceedings before the court, I find that the plea was properly taken in terms of the guidelines given by the court in *Adan v Republic (1973) EA 443* where the court said:

“(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 state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

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

(v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”

In the instant case, the court recorded the appellant's reply in Kiswahili, in his own words and complied with the guidelines set out in the *Adan* case. In the end, I find the plea to have been unequivocal.

Since the appellant pleaded guilty, witnesses could not have been called and the contention that evidence was not adduced is misplaced. Further, the ground that the burden of proof was shifted to the appellant does not make sense because the case did not go to full hearing.

However, since the court failed to warn the appellant of the consequences of his plea, I am of the view that the omission dealt a fatal blow to the plea.

Even without considering the other grounds which are peripheral, the next question therefore is whether this court can order a retrial. The law on when the court can order a retrial has long been settled. See *Branganza v Republic (1957) EA 152. in Fetahali Manji v Republic (1966) EA 343*, the East African Court of Appeal, as it then was gave the following guidelines:

“In general, a retrial will be ordered only when the original trial was illegal or defective: It will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.”

The above decision clearly shows that a retrial will be ordered where the trial is defective or illegal but it depends on the circumstances of each case. The courts have also held that a retrial should not be ordered if it will cause injustice to the appellant and the court has to take into account the length of time that has lapsed since the arrest and arraignment of the appellant and who made the mistakes leading to an order of retrial.

In *Muiruri v Republic (2003) KLR 552*, the court said:

“It (retrial) will only be made where the interests of justice requires it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial see *Zedekiah Ojuondo Manyala v Republic*

Cr.A.57/1980 ; the length of time which has lapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's?"

In *Mwangi v Republic (1983) KLR 522*, the court added another factor to be considered when it stated:

".....a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result." (Braganza v Republic (1957)EA 132.

In the above case, the other factor to be considered is whether there is some evidence that is likely to result in a conviction if a retrial is ordered.

In the instant case, the mistake not to warn the appellant was entirely that of the court whose duty it was to inform the appellant of the consequences of pleading guilty. The offence herein attracts life sentence. The appellant was arraigned in court on 30/4/2015 and pleaded guilty on the same day. So far he has served just over 2 years.

The case did not proceed to full hearing and so the court cannot tell what evidence is likely to be adduced but from the facts narrated by the prosecution in court, I am satisfied that on a consideration of the potentially admissible evidence, a conviction may result. I find that in the circumstances, the appellant will not suffer any injustice. Consequently, I set aside the conviction and sentence and hereby order a retrial.

The retrial to be undertaken before another magistrate other than ***Hon. Ndege SRM*** who took the plea. The case be mentioned before the Chief Magistrate, Nyahururu on 31/7/2017 for taking of the plea.

Dated and Signed at *NYAHURURU* this *25th* day of *July, 2017*.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

N/A - for appellant

Tirian/Jane - Court Assistant

Appellant - present