REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT OF CRIMINAL APPEAL NO.131 OF 2015

P S ……...APPELLANT

VERSUS

REPUBLIC ……...RESPONDENT

JUDGMENT

1. The appellant herein was charged with incest contrary to ***section 20(1)*** as read with ***section 20(2)*** of the Sexual Offences Act No.3 of 2006. He pleaded guilty to the charge and was sentenced to serve 10 years imprisonment. He was aggrieved by the decision of the lower court and has appealed against both conviction and sentence.

The particulars of the charge against the appellant were that on the 31st day of May 2015 at [particulars withheld] village in [particulars withheld] Sub-location in Butere District within Kakamega County he intentionally touched the vagina of B E alias S with his penis who was to his knowledge his niece.

2. The grounds of appeal are that:-

1. The trial court did not consider his mitigation

2. The trial court did not consider the report of the probation officer.

3. The trial court did not consider the circumstances that were prevailing at the time of the commission of the said offence.

4. The trial court did not consider his mental status at the time of the commission of the said crime.

3. In his submissions in this court the appellant blamed the police for misleading him to admitting the charge. That after they arrested him they beat him up and told him that if he admitted the charges he would be released.

The appellant also stated that prior to his arrest he had been taken ill and that he had not recovered when he was taken to court. That he did not understand the charge that was facing him and that he pleaded guilty to the charge unknowingly.

4. The state opposed the appeal. The prosecution counsel submitted that before the trial court sentenced the appellant, it requested for a probation report that it used to consider the sentence to met out to the appellant. That the sentence meted out to the appellant was the minimum provided by the section the appellant was charged under.

On the issue raised in ground 3 of the appeal, that the trial court did not consider the circumstances that were prevailing at the time of the commission of the offence, the prosecution submitted that the appellant did not raise the issue during his trial. That the trial court could therefore not have considered the issue when it was not brought to its attention.

The prosecution counsel further submitted that the appellant was sentenced two weeks later after pleading guilty. That he therefore had sufficient time to change his mind towards the plea of guilty. The prosecution submitted that the appeal has no grounds and that it should be dismissed.

Determination:

5. The procedure for plea taking in subordinate courts is provided for under ***section 207*** of the Criminal Procedure Code and was re-stated in the case of ***Adan vs Repubvlic*** (1973) EA 446. The procedure as set out in that case is that the charge and the particulars should be read out to the accused person so far as possible in his own language, but if that is not possible then in a language that 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 the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter 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. That the statement of facts and the accused's reply must also be recorded.

6. The lower court's record indicates that the appellant appeared before the resident magistrate Hon Shimenga on the 2nd June 2015. That charges were read out to him in Kiswahili language to which he replied:

> "It is true."

A plea of guilty was then entered. The prosecutor then read out the facts. The accused was then asked whether he admitted the facts to which he replied that the facts were correct. The court then entered a plea of guilty and convicted the appellant accordingly. The prosecutor told the court that the appellant was a first offender. The appellant was then asked to mitigate. He said that he was praying for leniency. The court then ordered for a probation report. The report was presented to the court on 12th June, 2015. The magistrate then explained to the appellant the consequences of pleading guilty and he maintained his plea of guilty. The magistrate then sentenced the appellant to the prescribed minimum sentence of 10 years.

7. It is then clear from the above that the magistrate complied with the procedure of taking pleas as set out in ***section 207*** of the Criminal Procedure Code and as re-stated in the case of ***Adan vs R*** (supra). The charge was read out and explained to the accused in kiswahili language which he understands. He pleaded guilty to the charge. There was nearly a period of two weeks from the time that the plea was taken to the day the appellant was sentenced. Even on the day of the sentence the court enquired from the appellant whether he was still pleading guilty to the charge and he still maintained a plea of guilty.

The plea was unequivocal. There cannot be any truth that the appellant was misled by the police into pleading guilty. He was remanded in prison custody for nearly two weeks before he was sentenced. The police were not with him in prison custody that time. He had sufficient time to reconsider his plea to that of "***not guilty***".

8. The appellant did not bring to the attention of the court that he was not in his proper mind when the plea was taken. The court did not observe any abnormality on him during plea taking. That the appellant was disturbed or otherwise has not been proved.

9. The court called for a probation report before it sentenced the appellant. The court then must have considered the report before sentencing the appellant. There is no ground that the appellant's mitigation was not considered.

10. The appellant was charged under ***section 20(1)*** of the Sexual Offences Act. The section reads as follows:-

> *"Any person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, grand-daughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years."*

11. The facts for the offence that were read out by the prosecutor were that the complainant was aged 7 years. That the appellant was her uncle, the appellant being the brother to the complainant's mother. That on the material day at 7 p.m. the complainant and two other children went to sleep in the house of their grandmother. The appellant was also sleeping in the same house. That the appellant then went to the children and found them preparing to sleep. He switched off the light. That the appellant attempted to have sexual intercourse with the complainant. That as he tried to penetrate her with his penis, the complainant felt pain and screamed out. The parents of the other two children heard the screams. They went to the house and knocked. The appellant opened the door. The complainant said that she would not sleep in that house. The two parents checked on the complainant and found male sperms on her private parts. On the following day they took the child to her mother at Shirotsa. She was taken to Butere sub-county hospital. She was examined. They reported at Butere police station. A P3 form was issued. The appellant was then arrested and charged. The complainant's birth certificate was produced. It indicated that she was born on 4th July 2007. The treatment notes and the P3 form were produced to the court.

12. Incest under ***section 20(1)*** of the Sexual Offences Act comprises of two elements:

> (1) commission of an indecent act or
>
> (2) commission of an act which causes penetration with a female person who is to that person's knowledge his … niece …

The appellant herein was charged with incest by committing an indecent act with his niece by touching her vagina with his penis. The facts revealed that the appellant attempted to penetrate his niece with his penis but did not complete the act because she screamed when she felt a lot of pain. The act of the appellant in putting his penis into contact with the vagina of the complainant was an indecent act with his niece that amounted to incest. The Concise Oxford English Dictionary, Twelfth Edition, has the following meaning of the word touch:

> ***"come into or be in contact with; come or bring into mutual contact; bring one's hand or another part of one's body into contact with …"***

The appellant touched the vagina of the girl with his penis as he tried to penetrate her. The appellant admitted those facts. There was no ambiguity in the charge or in the facts. I find that the plea was unequivocal.

13. The appellant argues that he was not warned of the consequences of pleading guilty to the charge. However there is no requirement in law for a court to warn an accused person of the consequences of pleading guilty to a charge. The only requirement is for courts to take extra care when taking plea to ensure that the plea is unequivocal. This point was emphasized by the Court of Appeal in ***David Eyanae & 2 others vs Republic*** (2007) eKLR where it held that:-

> *"As regards the manner of taking plea, section 207 of the Criminal Procedure Code is the guiding principle law in plea taking in criminal cases and in as far as the trial court strictly complied with the same, that court cannot be faulted merely because the nature or the punishment resulting from*

such plea is serious."

14. However, a practice has developed where judicial officers take it upon themselves to warn an accused person of the consequences of pleading guilty in serious offences. The court in this case took extra care in adjourning the matter for nearly two weeks as it waited for a probation report. On the day the appellant was sentenced the court warned the appellant of the consequences of pleading guilty to the charge and he still maintained a plea of guilty. The appellant had amble opportunity to change plea if he had wanted to.

15. The sentence provided by ***section 20(1)*** of the Sexual Offences Act for the offence of incest is imprisonment of "***not less than 10 years***." That is therefore the minimum sentence. Where an Act of Parliament prescribes a minimum sentence, courts have no discretion to impose a lesser sentence. The Court of Appeal emphasized this point while commenting on the minimum sentences provided under the Sexual Offences Act when it said in the case of ***David Kundu Simiyu vs Republic, Criminal Appeal No.8 of 2008, Eldoret*** - as cited in ***Fredrick Nzioki Wambua vs Republic*** (2015) eKLR that:-

> "***Those are minimum sentences and Parliament appears to give no discretion to courts to impose sentences below those specified as the minimum. The provisions accord to the prime objectives of the Act which is prevention and protection from harm and from unlawful sexual act***."

The appellant was given the minimum sentence and he has no cause to complain. In my view it was a proper sentence for the offence committed.

16. On my own analysis of the procedure that was taken by the trial court to take the plea, I find that the plea was properly taken. The plea was unequivocal. The sentence imposed was in accordance with the law and is thereby upheld. The appeal has no merits and is accordingly dismissed.

Delivered, dated and signed at Kakamega 3rd day of August, 2017.

J. NJAGI

JUDGE

In the presence of:

Appellant ……. present in person

Ng'etich ……..... for respondent

Okoit ……..... court assistant

14 days Right of Appeal