REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRMINAL APPEAL NO. 50 OF 2013

CHARLES AKOYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from conviction and sentence by Hon G.A. Mmasi, SPM) in Vihiga SPM's court Criminal Case No.126 of 2013 dated 11th March 2013)

JUDGMENT

1. The appellant herein was convicted of the charge of defilement contrary to ***section 8(1)(2)*** of the Sexual Offences Act No.3 of 2006 and sentenced to serve life imprisonment. He was dissatisfied with both the conviction and the sentence and has appealed raising the following grounds of appeal:-

(1) That the appellant did not understand the language of the court.

(2) That the trial magistrate failed to grant the appellant a fair trial as the appellant was not supplied with witness statements.

(3) That the medical report was not produced.

(4) That the evidence on record was not sufficient.

2. The particulars of the offence against the appellant were that on the 31st January 2013 in Vihiga County he intentionally and unlawfully had penetration by his genital organ namely penis into the genital organ namely vagina of ***MI*** (herein referred to as the complainant)a girl aged 7 years.

3. In the alternative the appellant was charged with committing an indecent act contrary to ***section 11(1)*** of the Sexual Offences Act No.3 of 2006.

The appellant appeared before court on the 7th February 2013 when the charges were read out to him. He denied the charges. The matter was fixed for hearing on 11th March, 2013. On 11th March 2013 the complainant and three witnesses testified. The appellant did not cross-examine any of the witnesses when given opportunity to do so. At the close of the evidence of PW4, the appellant told the court that he wished to plead guilty to the charge. The charge was then read out to the appellant in Kiswahili language. He admitted the charge. The prosecutor then stated:-

> *"The facts as stated in the evidence of the complainant PW1. He is a first offender. I wish to produce (the documents) MFI 1,2,3, and 4 as exhibits – Pex1,2,3 and 4."*

4. The appellant then mitigated and said that he was seeking for leniency. The trial court then remarked that the offence was serious. That the complainant was aged 7 years and sentenced the appellant to serve life imprisonment.

The Conviction:

5. The appellant was convicted based on facts of the evidence adduced in court by the complainant, PW1, and the documents produced in court by the prosecution upon the appellant changing plea. The documents were the treatment notes, the P3 form, the Post Rape Care form and the complainant's birth certificate – P.Ex1-4 respectively.

The complainant's evidence was that on the material day at 6 p.m. she and two other children, S, PW2 and a boy called V, were sent by the

complainant's grandmother (PW3) to fetch water. They went and fetched the water. On the way back they met with the appellant who was known to them. The appellant was holding some mandazi (bans). He gave the complainant a full mandazi and gave the other two one mandazi to share between themselves. The appellant then gave V one shilling to go and buy a sweet. The appellant then took the complainant to his house. On getting there he placed her on the floor and defiled her. After he was through he pushed her out of the house. She went home and reported to her grandmother. On the following day she was taken to hospital. She was treated. The witness identified three of the documents that were produced in court as exhibits – the treatment notes, the P3 form and the Post Rape Care form – P-Ex1-3 respectively. These are the facts upon which the appellant was convicted.

Submissions:

6. In his submissions the appellant alleges violation of his right to a fair trial. He submitted that he was held in custody for two days before being charged in court. That this was in contravention of ***article 49(1)(f)(i)*** of the Constitution of Kenya 2010 in that he was not presented to court within 24 hours as required by the said article.

He submitted that the evidence was adduced in a language that he did not understand and hence he was unable to cross-examine the witnesses. That, that prompted him to plead guilty to the charge. That the trial magistrate did not warn him of the danger of pleading guilty to such a serious offence. That the magistrate failed to assign him an advocate pursuant to ***article 50(2)(h)*** of the Constitution. That the trial court also failed to supply him with witness statements as required by ***article 50 (2)*** of the Constitution.

The appellant further submits that on changing plea the court did not read the facts to the offence.

7. The State opposed the appeal. The prosecution counsel Mr Ng'etich submitted that the trial was conducted in Kiswahili language. That the appellant understood the said language. That he changed plea in the same language. Therefore that there is no substance in the argument that the appellant did not understand Swahili language.

8. The prosecution counsel further submitted that the appellant changed plea after the evidence of 4 witnesses had been taken. That on changing plea some documents were produced that sufficiently addressed the ingredients of defilement.

9. On the question of fair trial, the State submitted that the hearing spread over a number of days. That the appellant was given an opportunity to cross-examine witnesses but he chose not to. Further that the appellant never raised with the trial court the issue that he had not been supplied with witness statements. That the appellant on being convicted was given an opportunity to mitigate. That his mitigation was considered. That if the appellant was held in custody more than the time stipulated by the Constitution, such breach of a constitutional provision can be addressed by a civil action for damages and should not affect a criminal trial.

DETERMINATION:

The questions for determination are:

10. (1) Whether the proceedings were conducted in a language not understood by the appellant.

(2) Whether the appellant was afforded a fair trial.

(3) Whether the plea was unequivocal.

11. The manner of plea-taking was stated in the case of ***Adan vs Republic*** (1973), EA 446 to be 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 normally enter a 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. The statement of facts and the accused's reply must, of course, be recorded."***

12. ***Section 198(1)*** of the Criminal Procedure Code states that:-

> ***"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."***

13. ***Sub-section (4)*** states that:-

> ***"The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili."***

14. ***Article 50(2)(m)*** of the Constitution of Kenya states that:

"An accused person has a right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."

15. The lower court's original record of 7th February 2013 does not indicate the language in which the charge was read out to the accused person though it is indicated that he replied in Kiswahili language that:-

"Si kweli"

16. When the case came up for hearing on 11th March 2013, the language in which the proceedings were being conducted is not stated. The language in which the complainant (PW1) and S, PW2, testified is not stated. Irene Ludenya, PW3, and Patrick Omoli, PW4, are indicated to have given their evidence in Kiswahili language.

17. The appellant was convicted on the basis of the evidence given by the complainant, PW1. It is not indicated the language in which the complainant gave her evidence. It is not indicated whether the appellant understood the language the complainant was communicating in. If the appellant did not understand the said language, the record does not indicate whether the language was being interpreted to him. In the premises there is nothing to show that the appellant understood the facts upon which he was convicted. I find that the appellant's argument that he did not understand the language of the court is highly probable. The constitutional requirement that court proceedings should be conducted in a language understood by an accused person were not safeguarded in this case.

18. The appellant stated that he was not supplied with copies of witness statements. However, the court record does not indicate that the appellant made such a complaint to the trial court. It is inappropriate for him to raise the complaint at this court.

19. It is the duty of a plea court to satisfy itself that a plea taken on an accused person is unequivocal. The court should explain all the ingredients of the charge to the accused. Though there is no legal requirement for a court to warn an accused person of the consequences of pleading guilty to a serious charge, the court should take all precautions to ensure that the accused understood the charge. In ***David Eyanae & 2 others vs Republic*** (2007) eKLR, the Court of Appeal stated the following:-

"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."

20. In this case the court did not to take any extra caution to ensure that the plea was unequivocal. In the case of ***Simon Gitau Kinene vs Republic*** (2016) eKLR Ngugi J held that:-

"... I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal. It shall be even more so when the accused faces a serious charge capable of attracting a custodial sentence."

I cannot say that the plea in this case was clear, unambiguous and unequivocal.

21. An accused person has a right to change plea at any stage of the proceedings. In ***John Muendo vs Republic, Nairobi Criminal Appeal No.365 of 3011*** (2013) eKLR the Court of Appeal stated that:-

"We want to add here that if the accused wishes to change plea or in mitigation says anything that negates any of the ingredients admitted and been convicted for, the court must enter a plea of not guilty. That is to say, an accused can change plea at any time before sentence."

22. The accused herein decided to change plea after 4 witnesses had testified in the case. On so intimating, the trial magistrate should have demanded that the facts of the case be read out to the appellant but she did not do so. Instead the prosecutor stated that the facts were as per the evidence given by the complainant. However that is not the procedure as laid out in the case of ***Adan vs Republic*** (supra). The procedure is that the facts should have been given and the appellant asked to plead to the facts. Failure to do so meant that the appellant was convicted on facts that he did not plead to. The appellant was not given an opportunity to dispute or explain the facts or to add any relevant facts. The plea was taken in such a manner that it appears to be a shortcut to conviction and was thereby unprocedural.

23. The appellant was facing a main charge of defilement and in the alternative committing an indecent act to a child. Failure to read the facts to the appellant means that it is not known whether the facts disclosed evidence for the main charge or for the alternative charge.

24. I have checked at the P3 form produced as exhibit 2 in the case. The findings in the P3 form were:-

"Bruises on the genitalia, hymen still intact."

One of the ingredients of a charge of defilement is penetration. Penetration under section 2 of the Sexual Offences Act No.3 of 2006 is defined as the -

"partial or complete insertion of the genital organs of a person into the genital organs of another person."

25. The evidence of the complainant tended to indicate that there was complete penetration into her vagina. This cannot have been the case

since the findings in the P3 form were that the hymen was still intact. The bruises on the genitalia did not prove penetration. The prosecution left it open as to whether the offence committed was defilement, attempted defilement or indecent assault. The evidence failed to clearly indicate the offence committed.

26. The appellant in his submissions raised other issues which were not contained in his grounds of appeal. One of these grounds that he was not provided with an advocate. However the appellant did not ask the court to provide him with services of an advocate at State expense. He further claimed that the State breached his rights to fair trial in that he was not taken to court within 24 hours as required by the Constitution. However a breach of a provision of the Constitution is a good ground for a claim for general damages from the State but does not entitle one to an acquittal against a criminal charge.

In the foregoing the plea in this case was not unequivocal. The plea taking did not comply with the set guidelines for taking pleas. The plea was taken in a language not stated in the proceedings. It is not known whether the accused understood the language the plea was taken in or whether the language was interpreted to the appellant. In addition, facts of the case were not given when the appellant changed plea. The appeal succeeds on these grounds.

The question is whether the court should order a re-trial or a complete acquittal.

27. A re-trial will only be ordered where the interests of justice so require and if it is unlikely to cause injustice to the appellant. In ***Muiruri vs Republic*** (2003) eKLR 552, the Court of Appeal stated the following:-

> ***"(1) Generally whether a re-trial should be entered or not must depend on the circumstances of the case.***
>
> ***(2) It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."***

28. In ***Opicha vs Republic*** (2016) eKLR, the Court of Appeal held that:-

> ***"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 re-trial should be ordered, each case must depend on its particular facts and circumstances and an order for re-trial should only be made where the interests of justice require it."***

29. The appellant herein has served over 4 years of the sentence for an offence he does not seem to have committed. The interests of justice in the circumstances do not call for a re-trial but a complete acquittal. In the premises the conviction against the appellant is hereby quashed and the sentence set aside. The appellant is to be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at Kakamega this 22nd day of October, 2017.

J. NJAGI

JUDGE

In the presence of:

N/A - for appellant

Ng'etich - for respondent/State

George - court assistant

Appellant - present

14 days right of appeal