REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 142 OF 2015

P O O……APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrates Court at Makadara in Cr. Case No. 1592 of 2012 delivered by by Hon. T. Mwangi dated 21st March 2012)

JUDGMENT

Paul Otieno Odipo was charged with the offence of incest contrary to **Section 20(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the night of 17th March, 2012, at Lunga Lunga slums in Industrial area within Nairobi Area Province intentionally touched the vagina of L A with his penis, who was to his knowledge his daughter. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006,** in that he intentionally touched the vagina of L A with his penis, a child aged 10.

The Appellant was convicted on his own plea of guilty for the main count and was sentenced to life imprisonment. He was aggrieved by both the conviction and sentence and has accordingly preferred this appeal. In Amended Grounds of Appeal filed on 27th April, 2016, he was dissatisfied that the plea was not unequivocal as the charge omitted the word ***"unlawful"*** thus not supporting the particulars of the offence. That is to say that the charge was defective. He faulted the learned magistrate by not warning him of the seriousness of the offence and the consequences of pleading guilty. Accordingly, he was dissatisfied that the trial court failed to avail him an advocate to represent him contrary to **Article 50(2)(h) of the Constitution**. He urged the court to prefer a retrial.

In his written submission, he further explained that the charge was defective in that it did not accord with **Section 134 of the Criminal Procedure Code** which provides that the particulars of the charge should support the statement of the offence. In furtherance to this, he submitted that the failure to state that the sexual act done was intentionally and unlawfully so committed rendered the charge defective. He further submitted that although he pleaded guilty, he was unaware that the offence carried a mandatory sentence of life imprisonment. In that case, the trial court ought to have warned him of the consequences of pleading guilty. It is his further submission that owing to the seriousness of the offence, the trial court ought to have accorded him an advocate to represent him at State expense pursuant to **Article 50(2)(h) of the Constitution**. His contention was that the offence being serious, with the serious attendant punishment, and having pleaded guilty, the trial court ought to have asked for mental assessment before the conviction. Finally, he submitted that the life imprisonment sentence was too harsh in the

circumstances. His plea is that a retrial be conducted.

The appeal was opposed. Learned State Counsel Ms. Akuja submitted that the plea was unequivocal. Further that the Appellant was warned of the seriousness of the offence and that the proceedings were conducted in a language he understood. She submitted that the omission of the word ***"unlawful"*** in the particulars of the charge was curable under Section 382 of the Criminal Procedure Code. Furthermore, the Appellant did not raise the issue of legal representation during the trial. She urged that the appeal be dismissed.

Determination.

The Appellant was convicted on his own plea of guilty and so the first question to address is whether the plea was unequivocal. I have looked at the proceedings before the court. The plea was taken in a language that the Appellant understood and this applied to the reading of the charges and the facts constituting the charge, pronouncement of the conviction, offer of mitigation and finally sentencing. The trial magistrate did not omit any of the procedures that required to be followed whilst taking a plea. The said procedure was well set out in the case of **Adan vs Republic** 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 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 statement of the facts relevant to sentence together with the accused's reply should be recorded."

That case accords with Section 207(1) and (2) of the Criminal Procedure Code which read as follows;

(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 a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded s 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."

The Appellant raised the issue that the charge sheet was defective in that the particulars of the charge omitted to include the word ***"unlawful"*** thus implying that the act that the Appellant committed was unlawful thereby rendering the trial a nullity. I have looked at the particulars of the charge which read as follows:

"On the night of 17th and 18th day of March 2012 in Industrial Area within Nairobi area province intentionally touched the vagina of L A with his penis who was to his knowledge his daughter."

Clearly, the word "unlawful" was not included in qualifying the offence of incest. However, a charge can be deemed as defective if it is not stated and explained to an accused person in clear and unambiguous

manner that would not enable him to know the charge he is facing and as to enable him to prepare for his defence. In the present case, the facts of the charge as spelt out were very clear that the Appellant inserted his penis into the vagina of the complainant who was his daughter. That is buttressed by the particulars of the charge which clearly indicated that the sexual act committed by the Appellant involved himself and his daughter. Furthermore, the omission to include the word ***"unlawful***" is curable under **Section 382 of the Criminal Procedure Code** which provides that:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complain, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during eh trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure or justice."

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

However, it is important that I point out that the particulars insinuated that the Appellant touched the vagina of the complainant as opposed to inserting his penis therein. That notwithstanding though, the facts as read disclosed the offence of incest as it was clear the offence constituted the inserting of the penis into a vagina. It is to those facts that the Appellant conceded and a plea of guilty was entered. Furthermore, it can clearly be deduced that the error was inadvertent in that there was an alternative charge of indecent act which involved the touching of the vagina. On the whole therefore, I conclude that the charge was not in any way defective.

The Appellant also raised the issue that the trial magistrate did not warn him of the seriousness of the offence which, if he had, would not have pleaded guilty. The record of proceedings unfortunately attests a different fact. After the facts were read to the Appellant and the court convicted him on his own plea of guilty, it proceeded to warn him that the charge was serious and carried a penalty of life imprisonment. For avoidance, of doubt I duplicate the proceedings as follows:

"Accused: Facts are true.

Court: Convicted on own plea of guilty.

Prosecutor: No past records.

Court: Accused warned of seriousness of charge and that it carries with it a life imprisonment"

The Appellant did not react to the warning and he proceeded to offer his mitigation. That ground of appeal cannot therefore succeed.

The Appellant alluded that the trial court failed to allocate him an advocate at the state's expense contrary to **Article 50(2)(h) of the Constitution**. This was in view of the fact that the offence he was facing was serious. The same provides that:

"(2)every accused person has the right to a fair trial, which includes the right –

(h) to have an advocate assigned to the accused person by the State at State's expense, if substantial injustice would otherwise result, and to be informed of this right."

I make two observations under this ground of appeal. First, the proceedings were taken before the Legal Aid Act came into force in which case the Appellant was not entitled to an advocate at the State's expense. Two, the present case is not one in which substantial injustice would have been occasioned to the Appellant. This is in view of the fact that the court was mindful that the offence was serious and carried a heavy penalty. It warned the Appellant of the same but he nonetheless insisted on the

proceedings coming to a conclusion. It was at the point he was warned of the seriousness of the offence that he would have requested for legal representation and the court would have made a ruling on it. Again, that ground of appeal must fail.

Having addressed myself to all the above issues, I am minded of Section 348 of the Criminal Procedure Code which provides that 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 or legality of the sentence. The Appellant was charged under Section 20(1) of the Sexual Offences Act No. 3 of 2006. The same provides that where an accused is convicted for the offence of incest with a female who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother is liable to imprisonment for a term of not less than 10 years. The proviso to the provision is that where the victim is of under the age of 18 years, the accused shall be liable to imprisonment for life and it shall be immaterial that the act which caused penetration or the indecent act was obtained with the consent of the female. In this case, the victim who was the Appellant's daughter was aged 10 years, a fact the Appellant conceded to. The sentence imposed was therefore lawful.

In the result, I find this appeal unmeritorious and I dismiss it in its entirety. It is so ordered.

DATED and **DELIVERED** this **19th day** of **MAY, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the present of:

1. Appellant in person
2. Mr. Warui for the Respondent