REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 203 OF 2013

C K K…..…….....……..……...……..…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An Appeal arising out of the sentence of Hon. M. Murage CM in Criminal Case No. 78 of 2013, delivered on 21st January 2013 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was charged with offence of attempted incest by a male person contrary to Section 20(2) of the Sexual Offences Act. The particulars of the offence were that on the 16th January 2013 at [particulars withheld], Mwala District, within Eastern Province, the Appellant attempted to intentionally to touch the vagina of M M K who was to his knowledge his daughter, with his penis. The Appellant was also on the same particulars charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The Appellant was arraigned in court on 21st January 2013 and after the charge was read to him he responded that "it is true", whereupon the prosecution then read out the facts which the accused confirmed as correct. The trial magistrate then recorded as follows: "Plea of guilty entered as charged", and after mitigation noted that: "this is a serious and prevalence offence. It calls for custodial sentence. Accused to serve 10 years imprisonment".

The Appellant has appealed against the sentence only, in Amended Grounds of Appeal and submissions he availed to the Court dated 7th June 2016, which appeal was opposed by the prosecution in oral submissions made in Court during the hearing of the appeal on 27th July 2016.

While I note that the Appellant's appeal is against the sentence only, there was obvious irregularity in the recording of the plea as illustrated in the foregoing, for the following reasons. The procedure to be applied on the taking of a guilty plea was explained in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held 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 a statement of facts relevant to sentence together with the accused's reply should be recorded."

In addition, in **Ombena vs Republic (1981) KLR 45** it was held by the Court of Appeal that where an accused person is charged with more than one count the Court should record a plea on each count separately to ensure that if there is a plea of guilty the same is unequivocal.

In the present appeal it was not indicated by the trial magistrate whether the plea of guilty, conviction and sentence was with respect to the main charge or alternative charge, and there was thus an error made by the trial Court in this respect. The Appeal is therefore allowed on this ground.

The only outstanding issue therefore is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were summarized the case of **Muiruri vs. Republic (2003) KLR 552**, the court considered a similar situation and held as follows, inter alia:

"Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest 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."

In this appeal the victim was a minor then aged 12 years, and a daughter of the Appellant. The offence took place in 2013, and it would therefore not be difficult to secure the witnesses. Balancing all the interests, I am of the view that justice demands that the case be re-heard in the trial court.

I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court. I direct that the Appellant shall be retried on the same charge before a Magistrate of competent jurisdiction other than Hon. M. Murage, and for that purpose he shall remain in custody and shall be taken before a Senior Resident Magistrate at Machakos Chief Magistrate's Courts on **10th November 2016** to plead to fresh charges.

Orders accordingly.

DATED AT MACHAKOS THIS 31ST OCTOBER 2016.

P. NYAMWEYA

JUDGE