PNM v Republic (Criminal Appeal E068 of 2023)
[2024] KEHC 8573 (KLR) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8573 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E068 OF 2023

AK NDUNG'U, J

JULY 15, 2024

BETWEEN

PNM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM's Sexual Offences Case No.E041 of 2023– Hon. B. Mararo, SPM)

JUDGMENT

1. The Appellant, PNM was charged with Defilement contrary to Section 8 (3) of the *Sexual Offences Act*. In the alternative, he was charged with Committing an indecent Act with a child contrary to Section 11 (1) of the same Act. The particulars were that on the 3rd day of September 2023 in Kieni East Sub-County within Nyeri County unlawfully and intentionally caused his penis to penetrate the Anus of M.K.N a male child aged 13 years.

   He admitted the offence and was sentenced to serve 50 (fifty) years imprisonment.

2. The Appellant was arraigned before Court (Hon. Kithinji, CM) for plea on the 6/9/2023. The record of the court was as follows:

   " Magistrate: Hon. Kithinji – CM

   Prosecutor/State Counsel: Mrs. Awino

   Court Clerk: Roba

   Accused: Present

   Interpretation: Kiswahili

The substance of the charge and every element thereof has been stated by the court to eh accused person in the language that he/she understands, who being asked whether he admits or denies the truth of replies;

Count 1: It is true.

Plea of not guilty entered.

Prosecution: On 3/9/2023 at noon the complaint was going back from school. He stood on the road. He knew the accused. The accused took him to his house and penetrated the anus of the complainant. He went and told the mother and the accused was arrested.

Complainant/accused taken to hospital for treatment, examination.

P3 form – P exhibit 1

PRC form – P exhibit II

Treatment notes P exhibit III

Accused – facts are correct

Prosecution – Nil

Accused in mitigation

It was the first time to do something like that. I will not do it again.

Court: Convicted on his own plead. Mitigation considered as well as the fact that he is a first offender however the offence is an extremely serious as the accused penetrated a young child of 13 years both and orally and in the anus. A deterrent sentence is appropriate. The accused is sentenced to serve 50 (fifty) years imprisonment.

14 days Right of Appeal.

B. Mararo

SPM

6/9/2023

3. Section 348 of the Criminal Procedure Code provides that;

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

4. A scrutiny of the proceedings of 6/9/23 before the trial court shows that the Appellant was arraigned before Hon. Kithinji CM for plea taking. Inexplicably, the same record shows that the plea was taken by B. Mararo SPM on the same date. This anomaly goes to the root of the propriety of the plea. It is a clear manifestation of a despicable casual attitude in the conduct of very serious court business affecting the life and liberty of an accused person.

5. In effect, no proper plea was taken as there is no certainty from the court record of the Magistrate who took the plea.

6. On that reason alone the plea is vitiated and is amenable to a review by this court even without the necessity of an appeal.

7. I find it necessary to comment on apparent brevity in the taking of the proceedings during the plea which blurs clarity in the whole process. Whereas the exhibits in a trial are to be produced during the reading of the facts, such production must be clear from the record and the person moving the court be clearly shown to be doing so. In the present case, the P3 form, the PRC form and treatment notes are marked as exhibits without an indication that the prosecution moved the court in that direction.

8. While its appreciated that our courts are often times swamped with heavy workloads, brevity that obfuscates issues and renders a plea of guilty equivocal must be avoided.

9. The legal procedure to be adopted by a court taking a plea in a criminal trial was set down in *Adan v Republic* 1973 EA 445 where the Court of Appeal for East Africa considered the manner in which pleas of guilty should be recorded and the steps which should be followed. It laid down the following guidelines:

   i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language which 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 the facts or raises any question of his guilt his reply must be recorded and change of plea entered; and

   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.

10. I have perused the record of the plea taking court. There was no discernible departure from the above principle save for one glaring omission which, despite the summary allowing of the appeal herein for an incurable irregularity of uncertainty of before whom plea was taken, merits mention.

11. The accused faced a serious charge. It is now an established legal requirement that where an accused faces a serious charge that attracts a severe sentence, the court has the obligation to warn such an accused person of the consequences of pleading guilty.

    This requirement was emphasized in *Hando s/o Akunaay v Rex* (1951)18 EACA 307 where the court stated:

    > ''Before on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent....we think the court should also explain to the accused person the natural consequence of a pleading guilty, the conviction and the likely sentence. therefore, for eh court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn, be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond reasonable doubt. It is therefore incumbent upon he prosecution, in proof of the charge, to present the exhibits that they would have relied on the trial."

12. Sitati J in in the case of *Benard Injendi v R*[2017]eKLR, held as follows;

    > ''Finally, the learned magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence facing him. In the Paul

> Matungu case (above) the Court of Appeal quoted from Boit v Republic (2002)Eklr 815 stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused person must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words ''as nearly as possible in his own words''. I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty. (emphasis added)

13. To buttress the point further the court in *Elijah Njihia Wakaianda v Republic*, Nakuru Criminal Appeal No. 437 of 2010 (2016) eKLR where the court stated that''. ...

> We also think that the elements of the offence are not complete if the sentence, especially if it is severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of trafficking a charge of his trial rights that he constitution guarantees him. That did not occur here and yet the appellant was unpresented calling upon the trial court to be particularly solicitous of his welfare.''....The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unpresented accused person is not lost at sea in the maze of the often intimidating judicial process.'' (emphasis ours).

14. In *Simon Gitau Kinene v Republic* (2016) eKLR where the accused faced a charge of Trafficking in Narcotic drugs, Joel Ngugi (J) held the following on the same issue involving an undefended accused person;

> ''Finally, counts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an accused person is unpresented, the duty of the court is to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v Republic*, Kiambu Criminal App. No. 8 of 2016 (unreported) this is what I said and find it relevant here;
>
> > ''In those cases [where there is an unrepresented accused charged with a serious offence] care should always be taken to see that the accused understands the element of the offence, especially if the evidence suggest that he has a defence....to put it plainly, then, one may add that where an unrepresented accused person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the accused person understands the consequences of such a plea is heightened. Here the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the court was about to convict and sentence the accused person for, it behooved the court to warn the accused person of the consequences of a guilty plea.''
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> (See also the sentiments of Odunga J in of *Suleman Musa Kimbiriwa v Republic* [2018] eKLR)

15. The cumulative effect of the above is that it is a legal requirement for a court taking plea to inform the accused person, especially where unrepresented, of the severity of consequences (read sentence) upon an own plea of guilt. In our instant case, this requirement did not find even the slightest of mention.

16. The result would be that this appeal would also succeed on this ground.

17. The appeal herein therefore has merits. The proceedings and sentence passed on the appellant are set aside. The dictates of justice would demand that the matter be referred for re trial before any other magistrate of competent jurisdiction other than Hon. Kithinji or Hon B. Mararo. It so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF JULY, 2024

A.K. NDUNG'U

JUDGE