Misiko v Republic (Criminal Appeal E038 of 2022)
[2023] KEHC 17831 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E038 OF 2022

FR OLEL, J

MAY 18, 2023

BETWEEN

GEOFFREY JUMA MISIKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence of Hon. D.N. Sure (SRM), in engineer S.O case no. 17 of 2020 delivered on 26th May 2020)

JUDGMENT

1. The Appellant herein Geoffrey Juma Misiki as on May 26, 2020 charged with the offence the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on May 23, 2020 at around 2000hrs in Kipipiri Sub County within Nyandarua county, intentionally caused his penis to penetrate the vagina of PWK a child aged 15 years.

2. Appellant was further in the alternative charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offence Act* No.3 of 2006. The particulars were that on were that on 23rd day of May 2020 at 2000hrs in Kipipiri Sub County within Nyandarua county, intentionally touched the vagina of PWK a child aged 15 years with his penis.

3. The appellant took plea on May 26, 2020 and after the charges were read out to him, he did plead guilty to the main charge of defilement and stated, "Facts were true." When the facts were read out to him the accused stated as follows, "It was consensual sex". The trial magistrate proceeded to convict the appellant on his own admission of guilt and proceeded to sentence him to 20 year's imprisonment.

4. When this appeal came up for hearing the appellant informed court that he would rely on the submissions filed in court on January 23, 2023 together with the petition of appeal earlier filed. The main issue raised in this appeal was that the plea was unequivocal. He also challenged the conviction and alleged that penetration and age of the child was not proved. Further he also challenged the

sentence as passed. The DPP also did file their grounds of opposition and submissions dated December 14, 2022 opposing the said appeal.

Analysis and Determination

5. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by *Okeno Vs. Republic* (1927)E.A 32 & *Pandya Vs. Republic* (1975) EA 366.

6. Also in *Peter's vrs Sunday Post*(1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

7. The appellant's petition of appeal challenges both conviction and sentence. The provisions of section 348 of the *Criminal Procedure Code* expressly bars appeals from subordinate court where an accused person was convicted upon a plea of guilt except on the extent and legality of the sentence. The said section 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 and legality of the sentence."

8. It therefor follows that the appellant is by virtue of section 348 of the *Criminal Procedure Code* barred from challenging the conviction and his only recourse is to challenge the extent or legality of the sentence imposed on him by the trial court. But it has been held severally by court that this bar only operates where the plea is unequivocal. Accordingly the court is not barred from inquiring as to whether a prima facie plea of guilty was unequivocal or not. Similarly it does not bar the court form inquiring as to whether the facts as read out to the accused constituted any offence. See *Anthony Muthoga Munene Vs Republic* {2022} eKLR

9. In *Alexander lukoye Malika vrs Republic* (2015) eKLR the court of appeal did identify the situations in which a conviction based on plea of guilt can be interfered with;

    i. A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilt.

    ii. Where an accused person pleaded guilty as a result of a mistake or misapprehension of facts.

    iii. The charges laid against an accused person to which he has pleaded guilty disclosed no offence known to law.

    iv. Where the admitted facts by the appellant could not in law have been used to convict him.

10. Accordingly, if plea is unequivocal the court has a duty to step in and intervene. Further the manner of plea recording is provided for under section 207(1) and (2) of the *Criminal procedure code*. The same provides for;

    i. 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 or guilty to the plea agreement:

ii. If the accused person admits the truth of the charge otherwise than by pleas agreement his admission shall be recorded as 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 be 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.

11. The manner of recording plea of guilty was dealt with in *Ombena vrs Republic* (1981)eKLR which quoted with approval on the case of *Adan vrs Republic* (1973)EA , where the court held that:

i. The charge and all essential ingredients of the offence should be explained to the accused in his language or in a language he understands

ii. The accused 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 as and change of plea entered;

v. If there is no change of plea a conviction should be recorded and a statement of fact relevant to sentence together with the accused reply should be recorded.

12. The decision of Adan(supra) had also been explained many years before in the case of *Hando s/o Akunaay vrs Rep* (1951) EACA 307 as follows:

> " Before convicting on any such plea, it is 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."
>
> "Where an accused person who has been called upon to plead under section 207 of the criminal procedure code in the subordinate admits the charge the proviso to subsection (2) requires the prosecution to outline the facts upon which the charge is founded. The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information as the case maybe, as well as the facts outlined where the accused pleads guilty. The facts therefor are as important part of the plea as the charge itself. The nature and element of the offence in totality must be understood by the accused and the trial court must be satisfied about this accepting them as true. We think the court should to the accused person the natural consequence of pleading guilty, the conviction and likely sentence.....it is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibit's that they would have relied upon at the trial."

13. Before the trial court the charge against the accused was read out to him in a language he understood (Kiswahili) and he pleaded guilty to the same by stating that; "It is true. "The prosecution then went ahead and read out the summarized facts of the case and produced the Exhibits they relied on to prove their case. The accused at this stage when asked if the facts were corrected stated that, "Facts are true." The court then proceeded to as the appellant to mitigate and he did state that, "it was consensual sex". The court then proceeded to convict the appellant on his own admission and sentenced him to 15 years imprisonment.

14. The question before this court is simple was the plea equivocal or unequivocal given the circumstance and facts of this appeal?

15. In the opinion of this court it is clear that the appellant did not fully agree with the facts as read out and that is why in his mitigation, he stated that "It was consensual sex". To the extent that he stated as such should have raised the magistrate's attention to the possibility that the accused did not fully comprehend the consequences of his plea and thus it was not safe to proceed to convict him. As stated in the Adan case (supra), "if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded as and change of plea entered." The accused mitigation did raise doubt as to his earlier admission of the facts and definitely showed that he was questioned his guilty.

16. Secondly as stated in the case of *Hando s/o Akunaay Vrs Rep* (1951), 18 EACA 307 it is desirable for the court to explain to the accused the natural consequence of pleading guilty and the likely sentence. Though this in not provided for in the criminal procedure code it constitutes good practice and promotes fair admiration of justice and right to fair hearing as espoused under article 47 and 50(2) of the*Constitution Of Kenya* 2010. In this instance this was not done.

17. In this regard I associate myself with the opinion of the court of appeal in *Elijah Njihia Wakianda vrs Republic* (2016) eKLR that;

> " Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence they are charged with. The criminal process is designed for forensic investigations and determination of guilt with various rights and safeguards built into it to ensure that only the guilty are convicted..... Given all the safeguards that are available to an accused person through the trial process, the entry of plea of guilty presents a rear absolute capitulation, a throwing in of the towel and giving a walkover to the prosecution and often at great cost. A conviction comes with it consequences of varying gravity. Thus it is that the court, at any rate the appellate court, would not accept a plea of guilt unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms.

18. Further in the same decision the appellate court stated that, " we also think that the element's of the offence are not complete if the sentence, especially if it is a 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 his trial rights that the constitution guarantees. That did not occur here yet the appellant was unrepresented calling for 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 of the process ensuring that an unrepresented accused person I s not at sea in maze of the often intimidating judicial process.

19. Obviously for the reasons stated above I find that the manner in which the charge was read out to the appellant did not strictly comply with provisions of section 207(1) and (2) of the *Criminal Procedure Code*. The appellant's plea was not unequivocal.

20. What course of action is thus available to the court? Relying on the case of A*hmed sumar vrs Repbulic* (1964) EALT 483 & *Muiruri Vrs Republic* (2003) KLR 552 the courts have held that; " whether mistakes leading to quashing of conviction were entirely the prosecution's making or not; whether on proper consideration of admissible or potentially admissible evidence a conviction might result from a retrial, at the end of the day each case must depend on its own particular facts and circumstances and an order of retrial should be made where the interest of justice requires."

21. Accordingly I do allow this appeal, the appellant's conviction is set aside and his sentence quashed. I direct that the matter be heard de novo before a different trial Magistrate at Engineer Senior Principal Magistrate court.

22. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF MAY, 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 18th day of May, 2023

In the presence of;

Appellant

.....for ODPP

.....Court Assistant