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EOJ v Republic (Criminal Appeal E002 of 2021) [2023] KEHC 20807 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20807 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E002 OF 2021

HM NYAGA, J

JULY 20, 2023

BETWEEN

EOJ .... APPELLANT

AND

THE REPUBLIC .... RESPONDENT

(An Appeal from Judgment, Conviction and sentence delivered on 23rd February in Molo Chief Magistrate's Criminal (SO) Case No. E027 of 2021 by Hon. E. Soita, Resident Magistrate)

JUDGMENT

1. The Appellant, EOJ, was charged with of the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the offence were: -

   "On the diverse dates between 4th January and 7th February 2021 in Kuresoi North Sub-County within Nakuru County being a male person caused his penis to penetrate the Vagina of EG a female person who is to his knowledge his daughter.

2. He faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were: -

   "On the diverse dates between 4th January and 7th February 2021 in Kuresoi North Sub-County within Nakuru County he, intentionally touched the vagina of EG a child aged 8 years with his penis."

3. He appeared before the Resident Magistrate on the 22nd February,2021. The record reads;

> The Substance of the charge(s) and every element thereof has been stated by the court to the accused person, in a language he /she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies; in Kiswahili
>
> Count 1: True
>
> Alternative Count – It is true. I did not know what I was doing
>
> Prosecutor: I seek facts tomorrow
>
> Court: Accused is warned he will be sentenced to life imprisonment
>
> Facts on 23rd February 2021.

4. On 23rd February,2021 the facts were read to the appellant to the effect that:

> " On 26th February 2021 the mother of the complainant, LK, went to police station with the victim, EG and one community facilitator by the name Sheila and reported on diverse dates of January, 2021 to 6th February 2021, her husband EO who is the biological father had been defiling her daughter. She was taken to Molo Sub County Hospital, she was treated, examined, P3 form and thereafter filed PRC form was issued. Statements were recorded. Complainant in this case said that his father during the month of January, 2021 while asleep at the sofa set, the accused person went near her, covered her mouth where she could not scream, had sex with her two times after she went to the bedroom, later after two weeks he then came while at the sitting room the father came, elder sister was sleeping on the other room, accused had sex forcefully with victim, elder sister to victim did not hear what was happening. On 6th February,2021 at 9.00am when one Jane had gone to sleep, the father came and had intercourse with victim twice, this time her elder sister heard the struggle, and when accused person noticed he had been discovered, he stood up quickly and went to the bedroom. The next day she went to tell her mother, the mother called the complainant she confirmed the same and this is when she got angry and when accused person was questioned, he denied the facts. The wife continued asking when she continued asking the accused person stated is due to drunkardness. On 16th February 2021the mother went to the chief's office and were advised to go to police station, and further to hospital. Accused person was arrested and charged before court, P3 Form Produced as PEXB 1, PRC Form as PEXB 2.
>
> Accused: That is true
>
> Court: Plea of guilty entered
>
> Mitigation: I went somewhere and drunk alcohol, beyond myself, I did what I did under the influence of alcohol.
>
> Court: Accused person is convicted on his own plea of guilty, accused was duly warned of consequences of pleading guilty and sentence of life. Mitigation is highly considered. It should be noted that the victim is 8 years old child to accused person, his daughter to which her innocence has been stolen by the accused person her father. The accused person is a total disgrace to all fathers in the world for fathers usually protect their daughters for life. The accused person to be entered in the register of sexual defilers, a P & C file to be opened for the victim, in the end, accused person is hereby sentenced to life in jail. Right of Appeal 14 days"

5. On 26th February,2021, the Appellant lodged the instant Appeal seeking that the conviction be quashed, the sentence be set aside and he be set at Liberty on grounds that: -

    1. The Learned Trial Magistrate erred in Law and in Facts by failing to appreciate that the Appellant's plea of guilty as charged was revocable and could not sustain a safe conviction.

    2. The Learned Trial Magistrate erred in Law and in Facts by failing to inform the Appellant on the dangers of maintaining his plea of guilty as charged.

    3. The Learned Trial Magistrate erred in Law and in Facts by failing to appreciate mitigation that at the time of commission of the alleged offence he was totally intoxicated.

    4. The Learned Trial Magistrate erred in Law and in Facts by imposing an excessive sentence based on the circumstances.

6. The Appeal was canvassed through Written Submissions.

Appellant's Submissions

7. On whether proper principles and procedure of taking plea were adhered to, the Appellant argued that Pursuant to Article 50 of the *Constitution* the court was supposed to explain to him his rights provided therein and to ensure that he was supplied with witness statement in advance before taking plea. He contended that that was not done and in addition the court failed to warn him of dangers of pleading guilty and therefore the trial court acted in error. The appellant therefore prayed to be given a chance to exploit the determinant of the principles of a fair trial as elucidated in the case of Juma and Others v The Attorney General (2003)2 EA 461

8. The Appellant faulted the trial court for reason that it did not inform him of his right to representation as provided for under Article 50(g)(h) of the *Constitution* and Article 14(3)(d) of the *International Covenant on Civil and Political Rights* (ICCPR).

9. Regarding the sentence meted, the Appellant submitted that the same rendered the trial unfair as his mitigation was not considered. He asserted that he was a 1st time offender, had indicated that he committed the offence while under the influence of alcohol, he was remorseful and that he had pleaded guilty. He contended that these were sufficient grounds for the court to mete out a lenient sentence.

10. He argued the mandatory sentence meted by the trial court offends Articles 25 (c) and 50(2)(p) of the *Constitution* 2010.

11. He contended that Article 20(3) of the *Constitution* 2010 provides that a court should interpret the law in a manner that favours fundamental rights. That in the instant matter the learned trial magistrate failed to interpret the law in such a manner that it was to favour a fundamental right. To buttress his submissions, he relied on the cases of *Mwangi V Republic* (Criminal Appeal 84 Of 2015) [2022] KECA [1106] where the court reduced 20 years sentence to 10 years for a similar offence and Okello v Republic (Criminal Appeal No. 189 of 2015) (2022) (judgement)KECA 1034 (KLR) (23RD September 2020(JUDGEMENT)at Para 16 to 19 where the Court of Appeal at Kisumu substituted a 20 years sentence with 10 years for the same offence.

12. He urged this court to invoke the provisions of Article 165(1)(3)(a)(b) of the *Constitution* and find that the hearing was manifestly unfair therefore contravening his right to a fair hearing which is non-derogable Right under Article 25(c) and 50 of the *Constitution* of Kenya 2010.

Respondent's Submissions

13. The Respondent submitted that Pursuant to Section 348 of the Criminal Procedure Code, the Appeal on conviction is unmerited as the Appellant unequivocally pleaded guilty twice to the offence.

14. In regards to the sentence, the Respondent argued that the same was properly meted as provided by the law under Section 20(1) of the *Sexual Offences Act*.

15. The Respondent relied on the case of Alexander Lukoya Maliku v Republic [2015] eKLR where the Court of Appeal stated that an appellate court may only interfere with a guilty plea if the plea taken is ambiguous, imperfect, unfinished or that the trial court erred in treating it as a guilty plea. The other situation the Court of Appeal observed is where the accused pleads guilty as a result of misapprehension or mistake or where the charge disclosed no offence known in law.

16. The Respondent thus submitted that this matter does not fall within the circumstances established in the above case since the facts were read to the Appellant, he was given time to deliberate on the offence and warned of the consequences of pleading guilty and thus the plea was unequivocal.

17. The Respondent urged this court not to interfere with both the conviction and sentence and to dismiss the Appeal.

Analysis & Determination

18. The issues that arise for determination in this matter are: -

    i. Whether the appellant can challenge his conviction having pleaded guilty to the charge.

    ii. Whether the guilty plea was unequivocal or not.

    iii. Whether the trial Magistrate failed to explain to the appellant of his right to legal representation before commencement of the plea-taking proceedings

    iv. Whether the sentence was harsh in the circumstances.

    v. What orders should this court issue?

    Whether the appellant can challenge his conviction having pleaded guilty to the charge

19. My answer to this issue is in the affirmative. I am well aware of several decided cases on the issue.

20. In Wandete David Munyoki v Republic [2015] eKLR the Court of Appeal stated as follows in regards to a plea of guilty;

> "It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in Ndede v R [1991] KLR 567, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed.

21. In Davies Maina v R NyeriHCCR Appeal No. 49 Of 2017 the court said the following:

> "Although the provisions of section 348 of the CPC appear to framed in mandatory terms the Court of Appeal has variously held otherwise. This is in recognition of the fact that our criminal justice system is open to abuse by those who wield power despite the rights guaranteed for an accused person. Secondly, it is not a friendly system, has not yet to be fully demystified, and attain the requisite levels of professionalism. Persons of all walks of life are intimidated by it. Some end up pleading guilty out of fear and confusion, and even ignorance of processes."

I don't think that I need to state anything more on the issue and I will now proceed to consider the next one.

Whether the guilty plea was unequivocal or not

22. Article 50 (2)(b) of the *Constitution* states that: -

> "(2) Every accused person has the right to a fair trial, which includes the right- (b) to be informed of the charge, with sufficient detail to answer it."

23. Section 207 of the Criminal Procedure Code states as follows:

'207 (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 plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by plea 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 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."

24. The superior Courts have had occasion to elaborate on the procedure and the manner in which a guilty plea ought to be recorded by the trial court. In the well-known case of Adan v R [1973] EA 445 the Court of Appeal famously reiterated the proper way to take a plea. It 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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.
>
> (iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered."
>
> (v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

25. In the earlier case of Kariuki v R [1954] KLR 809 the same Court had stated that: -

> “ The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading.”

26. The lower court record as reproduced above indicates that the proceedings in the case were conducted in Kiswahili language. The appellant replied to the charge and to the particulars of the charge in Kiswahili language. He mitigated to the court in the same language. I am thus convinced that the proceedings were conducted in Kiswahili language that the appellant understood the same.

27. A keen look at the proceedings show that when the charges of defilement were read to the accused he merely stated “True”. The exact words he used in Kiswahili were not stated but it is assumed that the word “true” was an interpretation of the word(s) he spoke in Kiswahili.

28. In Mose v R [2002] 1 EA ,163, the Court of Appeal Chunga CJ Lakha and Okubasu JJA held;

> “ The procedure for calling upon an accused to plead required that the accused admit to all the ingredients of the offence charged before a plea of guilt could be entered against him. The words “it is true” standing on their own did not constitute an unequivocal plea of guilt. It was desirable that every constituent ingredient of the charge be explained to the accused so that he should be required to admit or deny every constituent.”

29. In the same vein, in George Wambugu Thumbi v Republic Criminal Appeal 1 of 2018 [2019] eKLR the Court held:

> “ It is time that when an accused person responds ‘it is true’ to a charge read to him or her, to be asked what exactly he is saying is true to.”

30. Guided by the aforementioned authorities, it is thus clear that the plea as recorded did not meet the requisite threshold. It is not certain whether all the ingredients of the offence were explained to him and whether it is these ingredients that he acceded to. From the foregoing I am persuaded that the plea of guilty was not unequivocal.

31. It is also part of the record that even after pleading to the principal charge of defilement, the court still went ahead to read the alternative charge of indecent act with a child. The appellant also pleaded guilty to this charge.

32. It is well settled law that when an accused pleads guilty to the main charge, then he should not be called upon to plead to the alternative charge. He is only required to plead to the alternative charge if he pleads not guilty to the principal/main count.

33. On this issue I will refer too the decision in James Mwangi Kimangu v Republic[2020] eKLR where the court held as follows;

> “ ....I find the learned magistrate’s action to have been a gross misapprehension of the law; this is so because, irrespective of the principal count which this secondary count was alternative to, it was not open to him to convict the appellant on both the principal count and the count alternative to it. The reason is simply that both the principal and the alternative count would ordinarily be founded on the same act or omission and an offence, as known in law, would constitute the impugned act or omission by the accused (see section 4 of the Penal

Code on the definition of 'offence'). Convicting an accused on the principal and alternative count would effectively amount to punishing him twice for the same offence.

Speaking of this question in Seifu s/o Bakari v Republic [1960] E.A. 338 at page 339 the Court of Appeal for East Africa held that:

"Where charges against an accused are in the alternative, the proper course, upon conviction of the appellant on one count, is for the court to refrain from entering a verdict or finding on the other count."

34. Therefore, this was an error by the trial magistrate. He then proceeded to convict the accused, but did not specify which count he was convicting the appellant. The appellant could not be convicted on both the principal and alternative count.

35. Even though in giving the warning to the accused the trial magistrate seemed to be referring to the principal count, these are not matters to be left for assumption. The court record must be clear on which count he was convicting the appellant. For these reasons I find that the conviction was unsafe.

36. The lower court record shows that after the charges were read to the appellant he not only said true to the principal count and it is true to the alternative count. His exact words were as follows;

" It is true. I did not know what I was doing"

37. Even after the facts were read out to him and he was convicted, he stated as follows in mitigation;

" I went somewhere and drunk alcohol, beyond myself, I did what I did under the influence of alcohol."

38. To me, this was an attempt by the accused to explain why he did the alleged act, citing drunkenness. Once an accused utters additional words that seem to be an attempt to explain himself out, then the plea cannot be said to be unequivocal and the trial court ought to record /enter a plea of not guilty. For these reasons also I find that the plea of guilty was not unequivocal and is unsafe to stand.

Whether the trial Magistrate failed to explain to the appellant of his right to legal representation before commencement of the plea-taking proceedings

39. The Appellant contended that he was not informed of his right to legal representation. Article 50(2) g and h provides that –

" Every person has a right to choose and be represented by an advocate and to be informed of this right properly.

(h) To have an advocate assigned to the accused person by the state and at the state expense, if substantial injustices would otherwise result, and to be informed of this right properly"

40. The Appellant was unrepresented before the Lower court and there is no evidence that the trial magistrate informed the Appellant of his rights to representation before taking Plea.

41. I concur with the holding in the case of Republic v Radebe Sr. Mborani 1988 1 SA 191 at 195B where the following passage succinctly places emphasis on the issue of legal representation under Article 50 2(G), (H).

> " A general duty on the part of judicial officers to ensure that the unrepresented accused fully understands their rights and the recognition that in the absence of such understanding a fair and just trial may not take place. If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one to merit a sentence which could materially prejudice to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction.
>
> Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of his right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in unfair trial in which there may well be a complete failure of justice"

42. The importance of legal representation was also emphasized by Lord Denning in his decision in the case of Pett v Grey Hound Racing Association 1968 2 ALL ER 545 at 549 where held as follows:

> " It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: You can use any questions you like: Where upon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him, and who better than a lawyer who has been trained for the task"

43. Going by the above, it was necessary that the fundamental rights on a fair trial enacted pursuant to Article 50 of the *Constitution* be secured to protect the accused person. The trial magistrate failed to inform the appellant of his right to representation and that occasioned prejudice and a miscarriage of justice.

Whether the sentence was harsh in the circumstances

44. The appellant submitted that the sentence imposed on him was unlawful since it was meted out under mandatory minimum provisions under the *sexual offences Act*.

45. Having found that the conviction cannot stand I don't think that it is right to delve into the issue of the sentence. Flowing from the orders I am about to make shortly, that may unduly prejudice the appellant, the state or the trial court when it is called upon to determine the matter afresh. I will therefore not state anything more on this issue.

46. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial? I have already let the cat out of the bag in the preceding paragraph, but I will now give the reasons.

47. The Court of Appeal in the case of Ahmed Sumar v R [1964] EALR offered the following guidance:

> " ...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; 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 retrial should be ordered;......"

48. The same court also had the following to say in the case of Samuel Wahini Ngugi v R [2012] eKLR: -

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar v R [1964] EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
>
> 'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'
>
> That decision was echoed in the case of Lolimo Ekimat v. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:
>
> '...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.'"

49. In Muiruri v Republic [2003], KLR, 552 and Mwangi v Republic [1983] KLR 522 and Fatehali Maji v Republic [1966] EA, 343 the view expressed by the court was that: -

> " Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the 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 for a retrial should only be made where the interests of justice requires it."

50. In the case of Issa Abdi Mohammed v Republic [2006] eKLR the court opined that: -

> " An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

51. In the present case it is evident that the error was on the part of the trial court. Therefore the state will be greatly prejudiced if any other orders are given. Further, the court notes the nature of the offence(s) which were allegedly committed against a child. The court also notes that the alleged offence took place in 2021 which is quite recent and witnesses may still be available. The accused has only been in prison for two(2) years which is relatively a short period when juxtaposed against the maximum sentence that can be meted out in case of a conviction. All these factors point to a decision to order a retrial.

52. In conclusion I make the following orders;

    i. The conviction and sentence entered in Molo Chief Magistrate's Criminal (SO) Case No. E027 of 2021 are hereby set aside.

    ii. The appellant to be presented before the Chief Magistrate's Court, Molo for fresh plea taking/retrial.

    iii. The Appellant shall be released from prison forthwith and shall, instead, be placed in the remand section pending his presentation before the Magistrates' Court for a retrial.

    iv. The Deputy Registrar is directed to send back the trial court file and a copy of this ruling to the Chief Magistrate's Court, Molo for compliance.

Dated, Signed and Delivered at NAKURU this 20th day of July, 2023.

HESTON M. NYAGA

JUDGE

<u>In the presence of;</u>

C/A Jeniffer

Ms Murunga for state

Appellant present