REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 13 OF 2020

SIMON VUNDI MWANIKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was convicted of his own plea of guilty for the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the Sexual Offences Act in Siakago Principal Magistrate's Court Criminal Case No. 10 of 2020 and subsequently sentenced to thirty (30) years imprisonment.

2. Aggrieved by the conviction and sentence, he appealed to this court vide a petition of appeal filed in court on 19/08/2020 wherein he raised six (6) grounds of appeal but which grounds can be summarized to only one ground that; the learned trial magistrate erred both in fact and law in recording a plea of guilt.

B. Submission by the parties

3. The appeal was canvassed orally wherein the appellant in his submissions pleaded with the court to order for retrial as he was misled into pleading guilty and only got shocked when he was sentenced. That he was mis-advised that he would be released if he pleaded guilty. The appellant further filed written submissions wherein he reiterated his grounds of appeal to the effect that he was tricked by the police to plead guilty; that the charges were not read to him in the language he understood; that he was not afforded an advocate under article 50(2)(h) of the Constitution; that the trial court ought to have observed that he was not in the right state of mind at the time of taking plea.

4. Ms. Mati for the respondent was not opposed to the case being taken for retrial as the trial court did not take into account the age of the appellant. She relied on section 348 of the Criminal Procedure Code and the exception thereto.

C. Issues for determination

5. It is trite the duty of this court as a first appellate court is to re-examine the evidence (facts and exhibits) presented before the trial court and re-evaluate the same in order to determine whether the trial court erred in law and fact in the extent raised in the petition of appeal. (See **Okeno vs Republic [1972] EA 32)**, **Kiilu & Another v Republic [2005]1 KLR 174)** and **David Njuguna Wairimu V – Republic [2010] eKLR).** Even where no evidence was adduced by the prosecution witnesses (for instance where a plea of guilty is recorded), the appellate court is still obligated to scrutinize the proceedings in their entirety so as to ascertain whether or not the sentence was lawful and legal.

6. I have definitely considered the evidence tendered in the trial court and it is my view that the main issue for determination is whether the appeal herein is merited.

D. Applicable law and determination

7. As Ms. Mati rightfully submitted, though section 348 bars an appeal from a conviction and sentence on a plea of guilty save for the extent and legality of the sentence, there are exceptions to this rule. The Court of Appeal in the case of **Alexander Lukoye Malika –vs-Republic [2015] eKLR** identified the situations in which a conviction based on a plea of guilty can be interfered with as follows: -

> **"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 guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also**

where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

8. As such, it is clear that if the plea is equivocal, the court has a duty to step in. **The appellant in his ground number 4 raised an issue to the effect that the trial court erred in law and fact by failing to consider that the particulars of the charge and its consequences were not read to the appellant in the language he understood and thus he unconsciously pleaded guilty and as such he challenges the plea as being equivocal. It is on this ground that the appellant approached this court on appeal.**

9. The procedure to be followed in taking pleas in criminal trials in the subordinate courts is provided for under section 207 of the Criminal Procedure Code. The said section provides as thus: -

> ***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 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 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 an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.***

10. In **Adan –vs- Republic (1973) EA 445** the court held as follows (in relation to the process of taking plea): -

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts…….. If the accused does not deny the facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."***
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> (See also **Ombena –vs- Republic [1981] eKLR** and **John Muendo Musau –vs- Republic [2013] eKLR).**

11. The question then is whether this procedure was followed? More so, were the charges read in the language he understood? The trial court record indicates that after the charges were read, the appellant responded as follows; -

> *"Main count*
>
> *Accused: It is true."*

12. However, a clear look at the template stamp where it is always indicated as to the language the charges were read in, the same is blank. It is common that court proceedings in Kenya are mostly conducted in English or Kiswahili and where another language is used, an interpreter is always there to interpret the same to English. In the instant case, it is not possible to tell which language was used. Was it Swahili or English? Or was it Kiembu translated into English?

13. In **Elijah Njihia Wakianda –vs- Republic [2016] eKLR** the Court of Appeal considered the issue as to failure of the trial court's record to indicate the language used to read and explain the charge to the appellant. The Court held as thus: -

> ***"The beginning point of ensuring that the accused person has entered into a free and conscious plea of guilty is being satisfied that he understands the proceedings and that he in particular understands the charge that is facing him. Indeed, the court taking the plea is required to read and explain to the accused the charge and all the ingredients in the accused person's language or a language he understands. In the instant case, the record reads thus;***
>
> ***"Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili:- "It is true."***
>
> ***With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and the rather odd "in a language he understands", when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction.***
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> ***We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language……"***

14. Appreciating the importance of adhering to the right procedure in entering a plea of guilt, the court in **Elijah Njihia Wakianda –vs- Republic (supra)** held as thus; -

> ***"..... Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt.***
>
> ***Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms. ....."***

15. As I have pointed above, there was nothing on record as to whether the substance of the charge the appellant was facing was explained to him in a language that he understands as the language in which the charges were read to the appellant herein was not indicated. There is no way it can thus be said that the charges were read in the language which he understood. As such, for this reason, the plea of guilty cannot be said to have been unequivocal.

16. In **Elijah Njihia Wakianda –vs- Republic (supra), the Court was of the opinion that: -**

> ***"We also think that the elements 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 him. That did not occur here and yet the appellant was unrepresented 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 unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process."***

17. The appellant having been unrepresented and having pleaded guilty, the trial court had a duty to take **extra caution in ensuring that he understood the nature of the charges and the consequences of such a plea. 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 behoved the Court to warn the accused person of the consequences of a guilty plea. (See the persuasive decision by Joel Ngugi, J in Simon Gitau Kinene v Republic [2016] eKLR).**

18. I note that upon the appellant having been convicted he was offered an opportunity to mitigate and wherein he stated that:-

> ***"I admit the offence. It was the devil who came to me. I just found I had done it. I shall not repeat. I do not know what compelled me to do so."***

19. It is my considered view that the response by the appellant in mitigation indicates that he denied being aware of the commission of the offence (by stating external forces having compelled him). In my view, the trial court ought to have changed his plea to that of not guilty. In **John Muendo Musau –vs- Republic [2013] eKLR,** the Court of Appeal while reiterating the law on plea taking held that: -

> **"We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty. That is to say that, an accused can change his plea at any time before sentence. The procedure laid out in Adan vs Republic (supra) is also provided for under section 207 of the Criminal Procedure Code."**

20. The appellant's statement negated the ingredient of the offence of defilement to wit the *mens rea* of the accused. The trial court ought to have noted this statement and consider the same jealously more so since the appellant was unrepresented, it ought to have taken extra caution bearing in mind that what was before it was an issue which would have the effect of curtailing the rights of the appellant herein.

21. The appellant raised grounds of appeal to the effect that he was tricked by the police and the complainant to plead guilty and that he is a lay person who did not understand court terms. However, it is my view that these grounds were raised as an afterthought. The appellant did not raise the issues with the trial court. Further, it is a general rule that ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence. (See section 7 of the Penal Code). It is my view that the said grounds are just but an afterthought and the same cannot succeed.

22. Taking into consideration all the above, it is my considered view that the plea by the appellant herein was not unequivocal as the charges were never read in the language he understood. As such the plea itself, proceedings that ensued, the conviction and the sentence were all a nullity. Consequently, the appellant's conviction is hereby quashed and the sentence that was imposed on him is set aside.

23. The issue that remains for determination is whether the court should order for the retrial for the Appellant as requested by appellant. The Court of Appeal in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR** while deciding on the issue held as thus: -

"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of <u>Ahmed Sumar vs. R (1964) EALR 483</u>, 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'

24. In **<u>Muiruri –vs- Republic (2003), KLR, 552</u>** the Court of Appeal held as thus: -

"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……..

25. The court proceeded to hold that: -

"It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. *(See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980);* **the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."**

26. In <u>Mwangi –versus- Republic [1983] KLR 522,</u> the Court of Appeal held at page 538 that: -

"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

27. In the instant case, the appellant was arrested on 21.03.2020 and arraigned in court on 26.03.2020 and was sentenced on the same day. He has served about ten (10) month in prison. The P3 form which was produced before the trial court indicates that there were ***"two bilateral abrasion wounds on the outer wall of labia majora….with intact hymen and vaginal wall indicating blunt impact friction force to the labia majora".*** I would not wish to preempt the trial court's finding but in my view, on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial more so on the alternative count.

28. Further, it is trite that criminal justice is not only concerned with the rights of the accused but also the rights of the victims to see that an accused person is procedurally punished for the offence committed if he is found guilty. However, the appellant ought not to be set at liberty for the reasons of the plea being unequivocal. The criminal justice system recognizes retribution as one of the objectives of sentencing. Justice for the victims of the offence ought to be delivered to their door steps. That can only be done where a retrial is ordered and the matter heard on merit. Setting the appellant at liberty will not be in the interest of justice to the victim of the offence herein.

29. It is my considered view that considering all the above and the circumstances of this case, the same warrants a retrial. The appeal as such succeeds. The conviction by the trial court is quashed and the sentence set aside.

30. The appellant ought to be presented before the Senior Principal Magistrate's Court at Siakago for the purpose of taking a fresh plea to the charges. The said plea taking ought to be taken before a different judicial officer from the one who conducted the matter earlier.

31. Orders accordingly.

Delivered, dated and signed at Embu this 10th day of February, 2021.

L. NJUGUNA

JUDGE

……for the Respondent

……for Appellant