



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 121 OF 2019

JULIA KAUME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged jointly with another namely Nancy Kathure with the offence of ‘Trafficking in Person Contrary to Section 3 (1) (g) as read with Section 3 (3) of the Counter Trafficking in Persons Act. The Appellant is the mother to the other Accused person, who is however not the subject of the instant Appeal. She is also the grandmother to the ‘child’ who is the subject of the matter.

2. The charge had 2 counts. The particulars of offence for Count I were as follows: -

‘On the 15th day of April 2019, at Maua Location, Igembe South Subcounty within Meru County being a person being in control of a child namely P.M, attempted to receive payment for the sale of the child.’

The particulars of offence for Count II were as follows: -

‘Willfully abandoning, exposing the child in a manner likely to cause harm, unnecessary suffering or injury to health contrary to Section 127 (1) of the Children’s Act, 2001.’

3. The Appellant pleaded guilty to both counts, was convicted based on her own plea of guilty and was sentenced to serve 30 years imprisonment for Count I and 2 years imprisonment for Count II. The Appellant, despite having pleaded guilty is dissatisfied with the outcome, and has proffered the instant Appeal which touches on both the conviction and the sentence.

4. The appeal is premised on the 7 grounds of appeal as per the Appellant’s Petition of Appeal dated 25th July 2019. The said grounds are as follows: -

i) THAT the Learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced by the Prosecution witnesses was not watertight to warrant a conviction.

ii) THAT the Learned trial magistrate erred by matters of law and fact by failing to note that this is a frame up case.

iii) THAT the Learned trial magistrate erred in matters of law and fact by convicting the Appellant herein to serve 32 years imprisonment without analyzing the evidence adduced before court.

iv) THAT the Learned trial magistrate erred in matters of law and fact by failing to note that the Prosecution did not prove its case beyond reasonable doubt.

v) THAT the Learned trial magistrate erred by matters of law and fact by failing to note that the Prosecution evidence was contradicting, uncollaborating and inconsistent.

vi) THAT the Learned trial magistrate erred in law by dismissing the Appellant’s defence without giving cogent reasons.

vii) THAT I wish to be present during the hearing of the Appeal.

5. This Court observes that the above grounds are all inarguable as they presuppose that the matter had gone for trial and that evidence had

been adduced which is not the case. The Appellant pleaded guilty and the Prosecution did not therefore have an opportunity to adduce evidence and neither did she defend herself. This anomaly explains why in her written submissions filed on 28th August 2020, the Appellant sought leave of the Court to be allowed to submit on her other supplementary grounds as follows: -

- i) THAT the Learned trial magistrate erroneously sentenced the Appellant herein relying on a plea of guilty which was equivocal.***
- ii) THAT the Learned trial magistrate erred in matters of law and fact by sentencing the Appellant without inquiring whether she understood her constitutional rights.***
- iii) THAT the trial magistrate faulted in matters of law and fact by failing to cite the section of the law applied to prefer the sentence to the Appellant.***
- iv) THAT the sentence preferred to the Appellant was unconstitutional to the extent that it is mandatory.***
- v) THAT the Court failed to supply the Appellant with all relevant materials for relying on during her Appeal.***

6. The Appellant submits that her plea of guilty ought to be analyzed and evaluated and she refers to the proceedings of 12th April 2019 when she entered a plea of not guilty on both counts and thereafter the Prosecution sought to amend the charges. That on 16th May 2019, the Court noted that the charge sheet had been amended and was read to the Appellant in Kimeru language which is her mother tongue. She submits that the law in Kenya is captured in the English language which the Appellant could not understand and she couldn't understand Swahili as well, leaving the Court with the option of Kimeru language. She submits that this is proof that she did not know and neither did she possess the intelligence to answer to the charges which were facing her. She further submits that poverty and illiteracy is what pushed her to opt to pose and traffic her grandson. That she is undoubtedly an illiterate and it is not on record whether the trial Court sensitized her on her constitutional rights before admitting the conduct made punishable by law. She submits that where the plea of guilty is entered, the trial Court is under a duty to make sure that the Accused person understands her rights, consequences of the plea as it stands and the possible sentences that could be given, and to understand the right that he or she is waiving by pleading guilty, including the right to defence counsel. She submits that the trial Court overlooked these imperative factors, which is tantamount to unfair trial and is against the spirit of the Constitution. She submits that the rights not to incriminate herself, the right to confront and cross-examine her accusers should also be communicated to an Accused person for the Court to satisfactorily settle on an unequivocal plea of guilty. She submits that the Court failed to explain these rights to her and instead shifted the burden to the Appellant and she quotes the proceedings at page 4 line 27-28 of the same where it was recorded, '2nd Accused may be given time to think about her plea since the charges raise a hefty sentence.' And she further quotes page 5 line 2 of the proceedings where it was recorded that '2nd Accused to think of her plea.' She submits that even a genius cannot think and familiarize with neither her rights nor the tenets of the law. She submits that the trial Court should have read over to her her constitutional rights connected to the matter and leave her to think about it. That because this never happened, her plea was equivocal and that she wasn't informed of what she was pleading. She further submits that after being supplied with the court proceedings and perusing the same, she notes that the records were lacking the vital information of which section of the law was violated by the Appellant, the elements and facts of the case on the amended charge sheet, and the initial charge sheet are all missing from the proceedings. She submits further that a procedural error was occasioned when the facts with respect to Accused I were read over to her and the 2nd Accused referred here as the Appellant answered to the facts. Initially, the Court had called for the attention of the 1st Accused reflecting that she was not aware of what was transpiring and unknowingly admitted the facts in respect to 1st Accused vide page 5 line 25. She submits that this contradiction was misleading because the 2 accused persons were both present in Court. She submits that this situation also misguided her to plead to the charges based on facts meant for her daughter who was an adult of 19 years and the mother of the child alleged to be trafficked. She submits that she was not eligible to plead on behalf of the 1st accused because the Court is a procedural institution.

7. She submits further that unless one is conversant with the law, she cannot know which section of law the Court relied upon to sentence her and for this reason, she faults the trial Court for passing the sentence without stating the provisions of law for which it was anchored on. She submits that the mandatory nature of the sentence as per Section 3 (5) (g) of the Counter Trafficking of Person's Act tied the hands of the magistrate and was therefore a premeditated sentence and against the tenets of the law to the extent that it is mandatory. She argues that in the Muruatetu case, the apex Court ruled that a sentence that has been laid down by the legislator is premeditated and contravenes the doctrines of separation of power by depriving the judiciary discretionary powers enshrined under Section 215 of the Criminal Procedure Code. She submits that due to the mandatory nature of the sentence as captured by law, the extenuating factors of the Appellant couldn't affect the sentence and that when such extenuating factors are absolutely cogitated, it is prejudicial to say that the accused person should spend the rest of his life in prison. She submits that a good and working prison system should be able to rehabilitate and reform convicts and categorically no legal research has been directed that offenders cannot be reformed. She prays for this Court to invoke the Supreme Court decision in Constitutional Petition No. 15 and 16 of 2015 referred to as the Muruatetu case and resentence the Appellant by taking into consideration the following mitigating factors: -

- i) That she is 51 years old.*
- ii) That she is a widow with 6 children.*
- iii) That she is a grandmother of 6 children.*
- iv) That she has rehabilitated and will not indulge in any criminal activities again.*
- v) That she has learnt the mistake she made, committed due to foolishness but she has known God.*
- vi) That she prays for forgiveness before God, her family members and the society at large.*

She prays that her appeal be allowed and for this Court to consider an appropriate individualized sentence to impose, proportionate to the offence as the sentence meted out to the Appellant is excessive and not ideal to her.

8. The Respondent filed its submissions through the Learned Prosecutor on 4th May 2020. Therein, it is contended that the Appellant was arrested and charged with the offence of child trafficking under the Counter Trafficking in Persons Act. That she pleaded guilty and subsequently, charges were read out to her and she maintained them to be true. She mitigated and the Court ordered for a pre-sentence report that was negative. The Court, after considering the mitigation factors and the presentence report, it sentenced the Appellant to 30 years imprisonment. It is contended by the Respondent that the plea taking process was unequivocal and therefore the Appellant is barred from appealing on the conviction but rather on the legality of the sentence only. Section 348 of the Criminal Procedure Code has been cited to support this averment. That the requirements to recording a plea of guilty are provided for under Section 207 of the Criminal Procedure Code and they were elucidated in the case of *Adan v Republic (1973) E.C 445* as follows: -

- i) 'The charges and all the essential ingredients of the offence should be read to the accused person in his language.*
- ii) The accused own words would be recorded and if they are an admission a plea of guilty should be recorded.*
- iii) The Prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts.*
- iv) If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a 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.'*

It is submitted that where an accused person has pleaded guilty, he may set up something in mitigation that negates the offence as was held in the case of **John Muendo Musau v R (2013) eKLR**. It is submitted that the procedure of plea taking as laid out in law was indeed followed and the Appellant cannot now come before this Court to challenge that which she was party to and made her own conscious decision. On sentencing, the Respondent submits that the Magistrate relied on the pre-sentence report and the law and having had the benefit of seeing the demeanor of the Appellant he arrived at a sentence defined under the law. The Respondent cited the case of **Alexander Lunkoye Malika v R (2015) eKLR** where the Court of Appeal identified situations in which a conviction based on plea of guilty can be interfered with only when the plea is imperfect, ambiguous or unfinished such that the trial Court erred in treating it as a plea of guilty; and where an accused person pleaded guilty as a result of mistake or misrepresentation of facts; and where the charge laid out against an accused person to which he has pleaded guilty disclosed no offence known in law; and where upon admitted facts the Appellant could not in law have been convicted of the offence charged. The Respondent submits that in the instant case, none of these apply and the plea taking process was therefore unequivocal and that the learned Magistrate considered all the relevant factors and meted out an appropriate sentence that is legal. They urge that the Appeal be dismissed.

Issues for Determination

9. This Court has considered the submissions by the parties and it has perused the record and considered the events that transpired in the lower Court leading to the conviction and sentence of the Appellant which is the subject of the instant Appeal. This Court as has been mentioned above observes that the grounds raised by the Appellant in her Petition of Appeal mistakenly and/or ignorantly addressed matters on evidence whereas the trial Court had not had a chance to evaluate any such evidence as the Appellant pleaded guilty. When filing the submissions herein, having presumably identified that the previous grounds of Appeal in her Petition of Appeal were inapplicable, the Appellant sought leave to submit on other grounds which indeed relate to the proceedings as they unfolded in the lower Court. Although these grounds should have been brought in the form of an amended Petition of Appeal, this Court is cognizant of the fact the Appellant is unrepresented and it will therefore address those grounds.

10. The gravamen of the Appellant's Appeal is that her plea of guilty was equivocal and should therefore be set aside alongside with her conviction. She faults the trial Court for failing to explain to her the consequence of entering a plea of guilty including the rights that she was waiving by pleading guilty and she claims that she is an illiterate who should have been treated with extra caution. On sentencing, she argues that the mandatory nature of her sentence is prejudicial and the Court did not have a chance to consider other extenuating factors in meting out the sentence.

11. Two major issues for determination arise from the instant Appeal:-

- i) Whether or not the Appellant's plea of guilty was unequivocal and/or equivocal thereby warranting an affirmation and/or quashing of the conviction.*
- ii) Whether or not there is reason to interfere with the sentence meted out.*

Whether or not the Appellant's plea of guilty was unequivocal and/or equivocal thereby warranting an affirmation and/or quashing of the conviction.

12. According to the Black's Law Dictionary 10th Edition, the meaning of the word unequivocal is '**unambiguous; clear; free from uncertainty.**' On the converse, the term equivocal in the same dictionary is defined as '**of doubtful character; questionable; having more than one meaning or sense; ambiguous.**' An equivocal plea is defined as, '**A plea of guilty entered qualified by terms that, if true, indicate the defendant is in fact not guilty, or may not understand the effects of the plea, or is not acting voluntarily.**'

13. In the case of **Ombena v Republic, 1981 KLR 450**, it was found that whether a guilty plea is equivocal or not depends on the circumstances of the case. This Court is therefore under a duty to take into account the totality of the circumstances in determining the equivocality or otherwise of the Appellant's plea.

14. The law and practice relating to the taking and recording of pleas of guilty was stated in the case of **Adan v Republic(1973) EA 445 at 446 where it was held that: -**

“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 agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged 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.”

15. Since the equivocality of the Appellant's (2nd Accused's) plea is in issue, this Court reproduces the record of the trial Court as follows: -

12/04/2019

Before A.G Munene SRM

Pros Dianah State Counsel

CA Murithi

Accused present

English/Kiswahili/Kimeru

The substance of the charge(s) and every element thereof has been stated by the Court to the accused person in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies:-

Count 1

1st Accused – It is true.

2nd Accused – It is not true.

Count II

1st Accused – It is true.

2nd Accused – It is not true.

Court Prosecutor

I intend to amend the charge. I pray for a further mention.

CO (Mwangi)

I pray that the child be placed in a rescue centre pending the hearing. I have fears that the continued stay of the minor with the 1st accused is not in the best interests of the minor.

Accused 1

It is okay. I have no objection

Court

Comments noted. Infant to be placed at Neema House Infant Rescue Centre at Nanyuki until further orders.

Accused 1

I am 17 years old.

Court

Age assessment to be in respect of Accused 1. She is to be placed at Maua Police Station. Amendment of the charge on 18/04/2019. Prebail report for each of the accused to be availed on 18/04/2019 and age assessment.

18/04/2019

Before G. N. Wakahiu CM

Pros Kang'ethe

CA Kubai

Accused 1 & 2 present

Prosecutor

The age of assessment for Accused 1 is not ready

Court

Age assessment report for Accused 1 on 24/04/2019 for Accused 1

Pre-bail report for both Accused 1 & 2 to issue.

24/04/2019

Before O. Wanyanga SRM

CP Kang'ethe

CC Ochieng

Accused present

Report not presented. Mention on 02/05/2019

02/05/2019

Before M. Onyango RM

Pros K. Maina

CA P. Murithi

Accused 1 & 2 present.

Pros

1st accused age assessment done on 16/04/2019. She is 19 years old. Pre-bail report.

Court

Placed aside

Probation Officer- pre-bail report ready.

Court- mention on 16th May 2019.

16/05/2019

Before Hon. M. Onyango RM

Pros Maina

CA Murithi

Accused 1 & 2 absent

Trial Court at Garbatulla

Mention on 23/05/2019

Warrant of arrest to issue.

Later

Accused 1 & 2 present

The accused are in custody

Pros

Pray to amend the charge sheet which is in Court.

Court

Amended charge sheet read to the Accused persons in Kimeru

Count I

1st Accused – It is not true- Plea of not guilty entered

2nd Accused – It is true – Plea of guilty entered

Count II

1st Accused – Not true – Plea of not guilty entered

2nd Accused – It is true – Plea of guilty entered

Pros

2nd Accused may be given time to think about her plea since the charge raises hefty charges.

Court

Mention on 23rd May, 2019. 2nd Accused to think of her plea.

23/05/2019

Before Hon. A. G. Munene SRM

C Pros D. Irungu State Counsel

CA Kubai

Accused 1 & 2 present

Accused 2

I want to plead guilty.

Court

Mention on 06/06/2019 for facts.

06/06/2019

Before Hon A. G. Munene SRM

Pros Diana

CA Murithi

Accused 1 & 2 present

Interpretation English/Kimeru

Court Prosecutor

These facts in respect of Accused 1. On 11/04/2019 at Maua Location, the officer in charge of crime, Inspector Alice informed the investigating officer corporal Wachira that there was a report with information that there were 2 women near Methodist Hospital selling a 3 months old baby boy. The 2 police officers went together with PC Mbui and the reportee of the matter and purported to be the husband of the buyer. They agreed to meet at Village Hotel in Maua, they made agreement with the accused for 850,000/= which price was for the child. She handed over the clinic card to the purported buyer. Later on and upon the said accused signing the agreement police officer Wachira went and arrested the accused, the mother of the baby and the baby. Julia the accused is the grandmother of the baby. I produce the agreement as exhibit 1.

Accused 2 – the facts are true.

Court – plea of guilty entered for count I and II.

Court prosecutor – 1st offender.

Mitigation

I have children I support.

Guilty Plea taking procedure

16. In *Elijah Njihia Wakianda vs. Republic* [2016] eKLR (*Waki, Nambuye & Kiage, JJA.*) cited in *NK v Republic* [2019] eKLR (Odunga, J.) it was held that:

“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.”

See also the **Kenya Judiciary Criminal Procedure Benchbook** 2018 at pp. 39-41.

17. The record of the trial court in this case, set out above, shows the events leading to the conviction and sentence of the appellant by the trial Court. On 12th April 2019, the charges were read out to the accused persons and it is confirmed that this was done in a language that they understood. The Appellant herein, who was the 2nd Accused person pleaded not guilty on both counts. Shortly thereafter, the Prosecution applied to have the charge sheet amended. From the record, it is not clear why this amendment was necessary. This Court however observes that one of the differences between the initial charge sheet and the amended one is that the latter added the terms ‘as read with Section 3 (3)’. On 16th May 2019, it was confirmed that the charge sheet had been amended and the charges were read out to the accused persons in Kimeru, which language the Appellant confirms, in her submissions, is the language she understands. The Appellant pleaded guilty on both counts. Immediately thereafter, the Prosecution pointed out that the Appellant ought to be given time to think about

her plea as the charge raised a hefty penalty. The Court concurred and the accused was indeed given time to think about the plea she had taken. The Court ordered that the matter be mentioned on 23rd May 2019. Come 23rd May 2019, the Appellant went again on record and stated that she wanted to plead guilty. By this time, she had indeed had enough time to reflect and think of the nature of the plea she had taken. After her plea of guilty had been recorded, the Court directed that the facts would be read out to her on 6th June 2019 about a week later. Come 6th June 2019, the facts were read out to the Appellant and she confirmed that they were true. A plea of guilty was entered for both counts. During mitigation, she only said that she has children who she supports.

18. This Court observes that once the Appellant's plea of guilty had been recorded, at the instance of the Prosecution and the Court, she was given time to think about her plea and the reasons for this extension were clearly spelt out, i.e for the reason that the penalty associated with the charge was hefty. The proceedings were translated from English language to Kimeru, which is the language she confirms to understand. Despite taking time to reflect, on 23rd May 2019, she again indicated that she was maintaining her plea of guilty.

19. Turning to the facts, the record bears witness that the same were read out to the Appellant on 6th June 2016 and the same was translated from English to Kimeru, the language she understood. She has argued that when they started reading out the facts, it was stated that those were the facts with respect to Accused 1, and because both herself and Accused 1 were in court at the time, this led to confusion. This Court has perused the proceedings and it is noted that indeed, when the facts were being read out, it was indeed represented that the same related to Accused 1. This should not have happened because the facts were with respect to Accused 2, the Appellant herein. However, it is clear that Accused 1 had already entered a plea of not guilty. On the previous mention date, i.e 23rd May 2019, after confirming that the Appellant was maintaining her plea of guilty, the Court directed that the facts, with respect to her, the Appellant, would be read out on 6th June 2016. When the Court sat on 6th June 2019, the agenda had already long been spelt out i.e reading of facts with respect to the Appellant. Further, this Court observes that as the facts were read out, they were clearly directed to the Appellant as it was recorded as follows: -

'...Later on and upon the said accused signing the agreement police officer Wachira went and arrested the accused, the mother of the baby and the baby. Julia the accused is the grandmother of the baby....'

Here, the facts clearly related to the Appellant who is the grandmother of the child and this ought to have dissuaded any confusion. This would explain why the accused answered to the same, and confirmed that they were true.

20. Turning to the matter of mitigation this Court agrees with the submission by the Respondent and finds that at times, the statements of an Accused person at mitigation may be a ground of changing a plea of guilty to one of not guilty depending on what is said. In ***Bivamunda Erick v Republic Criminal Revision No. 6 of 2014 eKLR*** (Tuiyott, J.) it was held that: -

'Although the Applicant had pleaded guilty to the charge, he made the following remarks when invited to mitigate.

"I went there myself, I come to be as a refugee. I come on Saturday."

What the Applicant was saying was that he was an asylum seeker and was therefore not unlawfully present in the country. He was setting up a defence to the offence he faced. At that point, the Learned Magistrate ought to have set aside the plea of guilt and substituted it with one of not guilty.'

21. This Court has considered what the Appellant said during mitigation. She stated that she has children who she supports, a statement which this Court does not find would amount to a defence. However in her initial Petition of Appeal, at ground 2, she avers that: - ***THAT the Learned trial magistrate erred by matters of law and fact by failing to note that this is a frame up case.*** In her submissions, the Appellant has however not raised any defence. She merely states that it is poverty and illiteracy which led her to traffic her grandson and that she is a 51 year old widow who has children and grandchildren and that she is repentant. Had these matter been raised during the mitigation at the trial Court, they may perhaps have been persuasive elements on sentencing. Had the issue of frame up been raised during mitigation, it would have had the potential of altering the conviction to one of 'not guilty.' The lower Court may however not be faulted for failing to change the plea because this was not raised at the lower Court.

22. From the foregoing, this Court is satisfied that the Appellant was afforded adequate opportunity to answer to the charges as well as to respond to the statements of facts. In both cases, she confirmed their truth. The Appellant has confirmed that the charges and facts were read to her in Kimeru, the language she understands.

23. The Appellant however argues that there was an omission to explain to her the consequences of entering a plea of guilty and therefore a violation of her constitutional right to fair trial. She argues that the Court erred in shifting this burden to her by ordering that she gets time to think about her plea. It is her position that the duty to explain the nature of the penalty was upon the Court and that furthermore, the law is written in English language and as a result, her limited scope of knowledge of the English language would not allow her to know what the law provided for. Article 50 (2) (b) of the Constitution of Kenya, which this Court finds to be applicable herein provides that: -

'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.

The extent of this sufficiency has not been explained. The question that begs is whether failure to inform the Appellant of the consequences of pleading guilty, being the nature of the sentence ascribed to the offence under Section 3 (5) of the Counter Trafficking in Persons' Act and the rights she would be waiving by pleading guilty constitutes insufficiency which can be construed to be a violation of her rights.

24. In the present case, this Court observes that the Appellant was indeed given time to think of her plea. Such time was accorded deliberately and the reasons were clearly indicated being that the charges pleaded to raised a hefty penalty. The Appellant upon having this indication indeed had the requisite information to enable her realize that the charges she was facing were of a serious nature. This Court also observes that the first plea taking, the confirmation of the plea, the reading of the facts, receipt of the presentencing report and the sentencing all took place on diverse dates being 16th May 2019, 23rd May 2019, 6th June 2019, 20th June 2019 and 8th July 2019 respectively. All through, this Court finds that the Accused persons had reasonable time to consider her plea and was not ambushed.

25. However, bearing the serious nature of penalties imposed upon conviction in a criminal law process, this Court has to interrogate further whether there was a duty to explain to the Accused in the language and words of the Act, that a plea of guilty of the offence she had been charged with was likely to attract a penalty of up to 30 years imprisonment and/or a fine of Ksh 30,000,000/= or to both.

26. This Court finds that it would indeed have been prudent to explain in the precise language and wording of the Act the sentence prescribed under Section 3 (5) of the Counter Trafficking in Persons Act. It appears that the Court, as well as the Prosecution had all intentions to ensure that the Appellant understood the implications of pleading guilty and that to a reasonable extent they made efforts to ensure that the Appellant's plea was unequivocal and that she understood the seriousness of the charges. Despite these intention and efforts however, the question that begs is whether the objective was actually achieved and that the Appellant really did come to know and understand the implications of her plea of guilty. As per the Blacks Law Definition of an equivocal plea as aforementioned, it is clear that equivocality, among others, includes a lack of understanding of the effects of the plea. This issue is therefore central in the determination of this issue.

Duty to explain the sentence as an element of the offence

27. There is no express provision of law which requires a Court to explain to the accused the consequences of pleading guilty. In ***Morris Obuny Diaga v. R***, KBT HCCRA 174 of 2017, this court examined the question of unequivocality of a plea where the element of the sentence for the offence is not put to the accused intending to plead guilty to the charge, as follows:

“Plea not unequivocal

3. ***This case emphasizes the need for caution in taking and accepting a plea of guilty in serious offence. There always is the need especially in serious offences with severe punishment upon conviction that the accused is fully apprised of the elements of the offences and the punishment upon a finding of guilt so that in pleading guilty he accepts both the offences and all its elements or ingredients as well as the possible sentence that may be imposed upon conviction. When this is not done, it may be that the accused thought that the offence was one for which penalty would be minor and therefore, convenient for him to plead guilty and take the punishment. Such a plea, not being based on full knowledge of the nature of the offence and its penalty, cannot be said to be unequivocal. Had he known the full weight of the offence, he may not have pleaded guilty to the charge. ...***

4. *The court has noted with approval that the trial court did comply with basic plea-taking procedure set out in the leading case of Adan v. R (1973) EA 445, as observed in the judgment of the trial court that:*

“The accused pleaded guilty to the main count and the facts and particulars constituting the offence were equally read out in detail by the prosecution. The accused was invited to state whether the facts as read out were true and to which the accused admitted the facts as true.”

Penal consequences

5. ***Today, however, conventional judicial policy of our courts is to require an even more careful testing of unequivocality of the plea based on full knowledge of the penal consequences of a conviction on a finding of guilty. The factor of seriousness of the offence and the penal consequence of conviction was not brought to the active attention of the accused before his plea of guilty was accepted. The record only shows acceptance of the facts as set out by the Prosecution. No warning of the grave consequences of conviction on plea of guilty for the charge of defilement under section 8 (2) of the Sexual Offences Act was given to the appellant. Therefore, the conviction of the appellant, herein, purportedly on his plea of guilty was not safe as the plea was not unequivocal for want of full explanation as to the nature and consequence of conviction therefore.***

28. Indeed, the Court of Appeal decision in ***Elijah Njihia Wakianda vs. Republic*** [2016] eKLR (Waki, Nwabuye & Kiage, JJA.) confirms the essence of the sentence as an element of the offence as follows:

“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. 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.”

29. The follow-up question was whether this requirement of explaining to an Accused person who pleads guilty the nature of the sentence likely to be imposed applies only to capital offences or other offences as well. In ***NK v Republic*** Criminal Appeal No 124 of 2015 (2019) eKLR, supra., while holding the view that the requirement to explain to an Accused who pleads guilty the nature of sentence that the is likely to have imposed on him is not only restricted to capital offences but also to non-capital offences, Odunga, J. cited the case of ***Bernard***

Injendi v Republic [2017] eKLR, where Sitati, J found that: -

“Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case (above) the Court of Appeal quoted from *Boit vs- Republic* [2002] IKLR 815 and 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 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.”

See also *Kennedy Ndiwa Boit vs. Republic* [2002] eKLR.

30. In the instant case, this Court finds that the sentence as provided for under Section 3 (5) of the Counter Trafficking in Persons Act being liability for an imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both for a first time offender, is indeed a severe sentence. This Court finds that the Appellant ought to have been informed of the sentence that was likely to be imposed. This was necessitated by the fact that she was unrepresented and was an illiterate. As the likely sentence for the offence of child trafficking contrary to section 3(5) of the Act, was not put to the accused herein, the accused cannot be taken to have been informed of all the elements of the offence, and it is not safe to accept the plea of guilty as unequivocal. The Respondent correctly submitted that under Section 348 of the Criminal Procedure Code, if an Accused person is convicted of his own plea of guilty, the said conviction may not be challenged. The said provision of law, however, will only be applicable in instances where the plea of guilty was unequivocal, unlike in the present case where the plea was, as this Court has found, equivocal.

Order for retrial

31. The remedy for defective trial is retrial as held by the Court of Appeal for East Africa in *Fatehali Manji v. The Republic* [1966] EA343 laying down the law on retrial as follows:

“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 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; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice requires it.”

32. See also *Opicho v. R* [2009] KLR 369, 375 where the factors to be considered in ordering a retrial were set out as follows:

“In many other decisions of this Court it has been held 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 evidence 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 retrial should only be made where the interests of justice require it. See *Muiruri v. Republic* [2003] KLR 552, *Mwangi v. Republic* [1983] KLR 522 and *Bernard Lolimo Ekimat v. Republic*, Criminal Appeal No. 151 of 20014 UR.

The Prosecution had nothing to do with the omissions made in this trial. On the contrary, it was the prosecutor who drew the attention of the court to the required procedure but the trial court was entirely to blame for what followed. The allegations made against the applicant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interests of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all the circumstances of this case to order a retrial.

33. The seriousness of the charge and the public interest in combatting trafficking in persons, and the fact that the appellant has been in custody on the sentence for only a short period and there has not been any question of availability of the witnesses persuades the court to order for a retrial.

Conclusion

34. This Court, therefore, finds that the Appellant’s plea of guilty was not unequivocal for the reason that she was not informed of the severe consequences of pleading guilty to the offence of ‘*Trafficking in Person Contrary to Section 3 (1) (g) as read with Section 3 (3) of the Counter Trafficking in Persons Act*. The conviction for the offence based on her purported plea of guilty shall therefore be quashed.

35. Guided by the Court of Appeal decision in *Opicho v. R* (supra, the court considers that the situation in this case is one that invites an order for a fresh trial. On the principles of *Fatehali v. R*, supra, and the fact the neither the Prosecution nor the Accused had given evidence, in the circumstances, no prejudice may be suffered by ordering for a retrial. The appellant faced a serious charge of trafficking in a child. It is a serious matter of public interest that such offences when proved should be appropriately punished. The appellant shall be given a fair trial on the charge and if convicted punished but if not guilty set free. The justice of the case requires a retrial.

Orders

36. Accordingly, for the reasons set out above, this Court makes the following orders: -

- 1. *The Appeal with respect to conviction is hereby allowed as the said conviction was based on an equivocal plea and it is hereby quashed and the sentence imposed by the trial court therefore is set aside.***
- 2. *The Appellant shall be retried before a court differently constituted and for that purpose shall presented before the Chief Magistrate's Court at Maua within the next seven (7) days.***

Ordered accordingly.

DATED AND DELIVERED THIS 11TH DAY OF MARCH 2021.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Julia Kaume, for the Appellant.

Mr. P. M. Namiti, Senior Prosecution Counsel and Ms B. Nandwa Prosecution Counsel for the Respondent.