REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 18 OF 2020

JOHN MUTUNE MUTUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court

Criminal Case No. 11 of 2018, Hon. A Lorot, SPM dated 10th August, 2018)

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MUTUNE MUTUNGA.....ACCUSED

JUDGEMENT

1. The appellant herein, **John Mutune Mutunga**, was charged in the Machakos Chief Magistrate's Court Criminal Case No. 11 of 2018 with the offence of offence of Rape Contrary to Section 3(1)(a) and (c) and (3) of the ***Sexual Offences Act*** no.3 of 2006. The particulars were that on 30th day of January 2017 in Mwala sub-county within Machakos County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of WTW a female adult aged 19yrs by force who is a mentally challenged woman.

2. He also faced an alternative count of committing an indecent act with an adult Contrary to Section 11(A) of the Sexual Offences Act. The particulars were that on 30th day of January 2017 in Mwala sub-county within Machakos county intentionally touched the vagina of WTW with his penis against her will a mentally challenged woman aged 19 years old.

3. The appellant pleaded guilty to the main count where he was sentenced to serve twenty (20) years imprisonment.

4. I have considered the material placed before me. In this case, the offence with which the appellant was charged was a very serious offence carrying a long imprisonment. Whereas the proceedings indicate that the Appellant informed the court that he understood the impact of changing his plea, there is no evidence that the consequences of changing a plea in a case such as the one facing him was explained to him. In **Kennedy Ndiwa Boit vs. Republic [2002] eKLR**, expressed the following sentiments:

> **"Stopping there for the moment, it is abundantly clear to us that at no stage did the Magistrate warn the appellant of the consequences of his pleading guilty to the charge. Indeed the appellant's plea in mitigation that *"I am asking for pardon"* clearly shows that the appellant was wholly unaware that he ran the risk of being sentenced to death… Mr. Mbeche who argued the appellant's appeal before us told us that the appellant's plea was unequivocal. If that was all the complaint we had to deal with, we doubt, on the face of the record, whether it would have succeeded. The High Court rejected that complaint on first appeal to that court (Etyang & Omondi-Tunya, JJ) but in rejecting the appeal, the learned Judges of the High Court said absolutely nothing about the failure by the trial Magistrate to warn the appellant of the consequences of his pleading guilty. The High Court's failure to address that issue is a question of law which entitles us to interfere with their**

finding and that of the Magistrate."

5. A similar opinion was expressed by the Court of Appeal in **Paul Matungu vs. Republic [2006] eKLR** where it was held that:

> **"In offences carrying death sentence, it is essential for the court to warn the accused of the consequences of his pleading guilty namely that he may be sentenced to death if he pleads guilty…What we find difficult to appreciate however, is that after the appellant had stated in response to the charge that "That is true", what followed was that he was warned of the consequences without specifically stating in what way he was warned and what constituted the warning and making it clear in the record that that warning made it clear to the appellant that he faced death as the mandatory sentence for the offence he was pleading guilty to. Further there is nothing to show that after the warning was administered, the appellant was asked whether he understood the waring so that when he is recorded to have stated after the warning that "That is true", one is not certain whether those words were in response to the warning given or whether he was still insisting on his plea of guilty to the charge as the court recorded. In our view, after the warning, the court should have enquired whether the appellant understood the warning and if he said he understood the warning then the charge should have been put to him afresh and that all that should have been recorded."**

6. Whereas one may argue that the said warning only applies to capital offences, in **Bernard Injendi vs. Republic [2017] eKLR**, **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."**

7. In this case since the charge which the appellant faced carried a long sentence, it is my view that in such serious offences where the sentences may either be long or indefinite, the Court must ensure not only that the accused understands the ingredients of the offence with which he is charged at all the stages of the plea taking but that he also understands the sentence he faces where he opts to plead guilty. That in my view is what is contemplated under Article 50(2) of the Constitution which provides for the right to a fair trial. Whereas the said Article prescribes certain ingredients of a fair trial, the Article employs the use of the word "includes" which means that what is prescribed thereunder is not exclusive but just inclusive since Article 19(3) of the Constitution provides that (3) The rights and fundamental freedoms in the Bill of Rights "*do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter*" while Article 20(3)(a) thereof enjoins the Court to "*develop the law to the extent that it does not give effect to a right or fundamental freedom*".

8. Apart from that there is no evidence that the applicant was informed of his right to have legal representation. Article 50 (2) (g)(h) of the Constitution of Kenya 2010 on fair hearing, states that:

> ***(2) Every accused person has the right to a fair trial, which includes the right--***
>
> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
> ***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***

9. The Constitution makes it mandatory for an accused to be promptly informed of this right before the trial commences.

10. In addition, the ***Legal Aid Act 2016***, section 43 on duties of the court when interacting with an unrepresented person states that:

> ***"A Court before which an unrepresented accused person is presented shall:***
>
> ***a) Promptly inform the accused of his or her right to legal representation;***
>
> ***b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and***
>
> ***c) Inform the service to provide legal aid to the accused person"***

11. In this case the said provisions were not complied with. In **Joseph Kiema Philip –vs- Republic [2019] eKLR** the court with regards to the said requirement stated that:

> **"The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010…it**

is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation…In this instance the appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the trial court, the appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice."

12. Similarly, in *the case of* **Jared Onguti Nyantika vs. Republic [2019] eKLR**, it was stated that it is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing. In the present case, the Appellant faced a long sentence in prison if convicted. In ***David Njoroge Macharia vs. Republic*** **[2011] eKLR** and ***Karisa Chengo & 2 others vs. Republic*** **[2015] eKLR**, it was emphasized that;

"one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years imprisonment. The charge was a very serious one, upon being found guilty the appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trail should have informed him of his right to legal representation and directed that he be provided with an advocate at state expense."

13. I therefore, have no hesitation in finding, which I hereby do, that the Appellant's rights under the foregoing provisions were violated and contravened. I therefore agree that the manner in which the proceedings were conducted violated the appellant's right to fair trial and that the plea of guilty was in those circumstances not unequivocal. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** 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;....."

14. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. 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 vs. 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 vs. 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.'"

15. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966) EA, 343** the view expressed 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."

16. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** 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."

17. In this case the appellant was convicted on 10th August, 2018. He has served 2½ years. However, the offence facing him was a serious offence whose sentence is also heavy. Just like the Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR** I quash the conviction and set aside the sentence. I set the clock back so the process is restarted on proper footing. In consequence, I direct that the appellant shall be presented before the Chief Magistrate's Court at Machakos for the purpose of taking a fresh plea to the charge.

18. However, any resulting sentence, if at all, will where appropriate, take into account the period the appellant spent in custody.

19. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 4th day of March, 2021.

G V ODUNGA

JUDGE

In the presence of:

Appellant online

Mr Ngetich for the Respondent

CA Geoffrey