REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 24 OF 2015

(Being an Appeal from the original conviction and sentence in Criminal Case No. 174 of 2015 at the

Principal Magistrate's Court at Runyenjes)

LIVIO MUTUGI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of the Principal Magistrate Runyenjes in Criminal Case No. 174 of 2015. The appellant was convicted of the offence of defilement contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006 on his own plea of guilty and sentenced to thirty (30) years imprisonment. Being dissatisfied with the conviction and sentence, he lodged this appeal.

2. The appeal revolves around the grounds that may be summarized as follows: -

i. That the learned trial magistrate erred in law and facts when he convicted on an equivocal plea of guilty.

ii. That the learned trial magistrate erred in law and facts sentencing the appellant to 30 years which was harsh and excessive.

3. The appeal was argued by way of written submissions.

B. Appellant's Submission

4. The appellant submitted that he was convicted and sentenced of the offence whereas the complainant had been married to him for a period of two years and that there was no complaint by any person as to the relationship until the chief of the area interfered out of ill-will against the appellant due to a land dispute between him and the appellant. Further that the appellant stated that he was intimidated and threatened at the police station and as a result of which he became confused even when arraigned in court and thus ended up pleading guilty not knowing the consequences.

5. It was his submissions further that the victim was not brought to court for the court to see her posture and physical body structure which was such that no one could tell if she was a minor. He further submitted that the complainant was not opposed to the union and she willingly consented to it and her parents never complained. It was his submissions further that the sentence was excessive bearing in mind that the he unconsciously pleaded guilty and that he was young and a first offender.

6. The respondents on their part submitted that the plea was properly taken in compliance with Section 207(1) of the Criminal Procedure Code and the case of **Adan –vs- R (1973) EA 443** and further that the appeal was misconceived given the provisions of Section 348 of the Criminal Procedure Code which bars appeals from convictions on a plea of guilty other than on legality of the sentence. The respondent however conceded to the ground on the harshness and excessiveness of the sentence imposed on the appellant (30 years) in as far as it was pegged on the mandatory nature of the sentences that sets a limit to judicial discretion. Reliance was made to **S- -vs- Toms 1990(2) (SA 802(A).** However, the respondent submitted that the circumstances under which the offence was committed be taken into account.

C. Issues for determination

7. This is a first appeal and this court's duty is to re-analyse and re-evaluate the evidence and arrive at its own conclusion. (See **Okeno –vs- R (1972) E.A.32, Kiilu & Another –vs- R (2005) 1 KLR 174).** After due consideration of the evidence on record, the grounds of appeal,

submissions and authorities, it's my opinion that the issues for determination are: -

a) Whether the plea by the appellant was unequivocal?

b) Whether the instant appeal ought to succeed/what orders should the court make in the circumstances?

D. Applicable law and determination of the issues

8. Before I determine on the foregoing issues in this appeal, I note that the respondent raised the issue that the appeal was misconceived by virtue of Section 348 of the Criminal Procedure Code. It is my view that the issue requires to be determined at this preliminary stage.

9. Section 348 provides: -

> ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.***

10. However, the Court of Appeal in Alexander Lukoye Malika v Republic [2015] eKLR held as follow: -

> ***"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."***

11. It is my opinion that from the above authority, this court has jurisdiction to entertain the instant appeal notwithstanding the fact that the appellant pleaded guilty since the appellant has raised the issue of the plea having not been unequivocal.

i. Whether the plea by the appellant was unequivocal?

12. A perusal of the grounds on the petition of appeal clearly indicates that the instant appeal was premised mainly on plea taking. It was the appellant's contention that he was psychologically intimidated and threatened by the police officers that led him to plead guilty and that he was unconscious of what was happening around him; that he was not given a chance to address the court after he regained his composure; that his mental stability was not examined before taking plea; and he was mentally disturbed so as not to understand the nature and indeed the seriousness of the charge he faced and he could not plead to the charges. All these grounds points out to the fact that the appellant was attacking the plea taking and recording process. As such the question which needs to be answered is whether the plea by the appellant was unequivocal?

13. Section 207 of the Criminal Procedure Code provides for the procedure to be followed in taking pleas in criminal trials in the subordinate courts. It 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 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***.

14. In **Adan versus Republic (1973) E.A.445** the court held as hereunder 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."***

15. From the trial court's records, it is noted that after the charges were read to the appellant he responded as follows: - *It is true.* The court then proceeded to enter a plea of guilty and called for the reading of the facts by the prosecutor.

16. The dangers/or effects of entering a plea of guilt was appreciated by the Court of Appeal in **Elijah Njihia Wakianda v Republic [2016] eKLR** where the court observed 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……..."

17. The trial court's records indicates as follows as to the plea taking;-

"Interpretation-English/Kiswahili/Kiembu

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

(the typed proceedings indicates Kiswahili but the handwritten ones seems to indicate Kiembu. Judge to advise on the one to pick. But it does not change the argument herein)

18. It is clear that the record does not indicate the language used to read and explain the charge to the appellant. The indication of English/Kiswahili/ Kiembu is ambiguous and does not show which of the two languages between Kiswahili and English the court used. Was it English translated to Swahili or Kiembu or was it either of the two languages translated to English? It is simply not possible to tell which of the three languages the appellant is alleged to have 'understood'.

19. There is no indication in the record of whether the court inquired from the appellant what language he understood or whether an enquiry was made to assist the court determine the language the accused understood so as to use it in reading and explaining the charge. It is indicated on record that the answer to the charge and to the facts was in Kiembu. But does not always follow that going by the language the appellant used in his answers and to the facts that one language was used. This is in view of the court having indicated that it used Kiswahili and kiembu at the same time.

20. In **Elijah Njihia Wakianda v Republic (supra)** the court considered the issue as to failure of the trial court 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.

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……."

21. The circumstances in ***Elijah Njihia Wakianda case*** **(supra)** are similar to those in this case. The 'template' which the learned judges noted content thereof appears to be the same one employed here for the charge and every element thereof are said to have been *'stated to the accused in the language that he/she understands'* without specifying which language it was and suggesting that the accused person could be of either gender when it is clear that the appellant was a male person. The appellant here is said to have *'replied in Kiembu' but the question is what language did the court use to communicate to him.*

22. There is nothing on record to show that the charge was explained to the appellant in the language which he understood as to the substance of the charge facing him and the elements thereof. This ought to have been done more so since the appellant did not speak or understand English or Swahili. The record must bear it out in clear and unambiguous terms the language that the appellant understood or the translation thereof more so when he pleads guilty to the charge against him. Failure to do so makes the plea equivocal.

23. The appellant further raised a ground to the effect that the learned trial magistrate erred in law and facts when he failed to warn him of the seriousness and magnitude of the charges he was facing and the accompanied sentence if he entered a plea of guilty.

24. The duty of the trial magistrate to warn an accused person of the seriousness and magnitude of the charges an accused person is facing/the severity of the sentence therefrom if he entered a plea of guilt was considered by the court in ***Elijah Njihia Wakianda case*** **(supra)** where the court held as thus: -

> ***"……..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…"***

25. It is my considered view that failure by the trial court to explain to the appellant herein as to the nature and magnitude of the charge he was facing and the severity of the sentence goes to the root of the unequivocallity of the plea by the appellant. The offence facing the appellant was a serious one and the court ought to have made sure that the appellant was aware of the gravity of the offence facing him.

26. It is my considered view that the plea in this appeal was not unequivocal due to the foregoing reasons.

ii. Whether the instant appeal ought to succeed/what orders should the court make in the circumstances?

27. Having found that plea was not unequivocal, the same was not an efficacious the issue arises as to the basis for the conviction and sentence that followed. I am alive to the fact 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 tried and sentenced for the offence committed if found guilty. Where a plea of guilty is not unequivocal, the conviction resulting therefrom cannot stand but ought to be quashed and sentence set aside. The victim of the offence will benefit from a fair trial for he will be accorded justice. It is therefore my considered opinion that the appellant ought to be charged and tried afresh.

28. The appellant raised other grounds in the amended grounds of appeal which includes the harshness and excessiveness of the sentence. However, having found that the plea was not plain and unequivocal, it is my considered opinion that the said grounds ought not to be considered in this appeal whose foundation has been destroyed.

29. I find this appeal has merit and it is hereby allowed.

30. The conviction is hereby quashed and sentence set aside.

31. It is hereby ordered that retrial be done at Runyenjes Principal Magistrate's Court by a different magistrate and to be concluded within four (4) months.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Appellant through Video Link