REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei

CRIMINAL APPEAL NO. 119 OF 2019

MICHAEL OPIYO OCHIENG.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence in Kithimani Senior Principal Magistrate's Court (Hon. G.O. Shikwe (RM), in Criminal Case SOA No. 43 of 2015 delivered on 3.9.2015)

BETWEEN

REPUBLIC .....PROSECUTOR

-VERSUS-

MICHAEL OPIYO OCHIENG....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. G.O. Shikwe Resident Magistrate in **Criminal Case SOA No. 43 of 2015** delivered on 3.9.2015 at Kithimani law courts. The appellant was on 28.7.2015 charged with the offence of defilement contrary to section 8(1) as read with 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "on diverse dates between 1st June to 27th July 2015 at Matuu Township in Yatta Sub-county within Machakos county intentionally and unlawfully caused his penis to penetrate the vagina of JP a child aged 16 years".

2. When the charge was read to him, and interpreted in Kiswahili, he replied "***ni kweli***". A plea of guilty was entered by the trial court.

3. The court prosecutor read out the facts to him that were to the effect that the victim was a student at [Particulars Withheld] Primary School who had been sent home for fees on 1.6.2015 and 27.7.2015 and that she had gone to her mother's friend who handed her over to the appellant; that the appellant was living with the victim as his wife and was repeatedly defiling her until he was ambushed by members of the public. In evidence was tendered the medical report indicating that the victim was aged 16 years(Pexh1); that the victim tested positive for pregnancy (Pexh2) and that the P3 forms for the appellant and the victim were produced as exhibits (Pexh 3 and 4). The appellant did not object to the production of the same and his reply was to the effect that the facts were correct; that he did not rape her but that he slept with her and that he did not know her age at the time.

4. The appellant was convicted on his plea of guilty and in the absence of mitigation he was sentenced to Fifteen (15) years of imprisonment.

5. The Appellant is dissatisfied with those proceedings and on 15.7.2019 appealed to this court on grounds that he amended without the requisite leave. The appellant challenged the conviction on the grounds that the plea was unequivocal. He challenged the trial court for failing to comply with section 207 of the Criminal Procedure Code and urged the court to quash the conviction, to set aside the sentence and set him at liberty.

6. Submitting in support of the appeal, the appellant in placing reliance on the case of **Adan v R (1973) EA 445** submitted that the court did not adhere to the procedure for recording of the plea.

7. In response, the learned counsel for the state conceded to the appeal and argued that the plea was not recorded in line with the procedure in the case of **Adan v R (1973) EA 446**. Counsel urged the court to vacate the conviction and sentence issued by the lower court and issue a retrial.

8. The issues to be determined are on the propriety of the plea of guilty and the orders that the court may grant. According to section 348 of *The Criminal Procedure Code*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the legality of the plea or to the extent or legality of the sentence.

9. Having been convicted on his own plea of guilty, the appellant by challenging inter alia the manner in which the plea was recorded, is in essence appealing against the legality of the plea.

10. The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in ***Adan v. Republic, [1973] EA 446*** where Spry V.P. at page 446 stated it in the following terms:

> **"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."**

11. It is incumbent upon a trial court when recording a plea to be meticulous in ensuring it first that the charge is read and explained to the accused in the language he or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

12. The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence, otherwise the plea is not unequivocal. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see ***R v Peter Muiruri & Another (2014) eKLR***).

13. For a charge under sections 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006, it is necessary that the facts of the offence should specify; - the existence of a victim who is a child, unlawful penetration of the sexual organs of a victim and the identity of the perpetrator. In the instant case, the evidence that was tendered by the prosecution in the facts as read out do not indicate the language that was used and it cannot be established whether the appellant understood the details of the charges that were facing him. In the case of **John Muendo Musau v R**, **Nairobi Criminal Appeal 365 of 2011** the court observed that the trial court ought to enter a plea of not guilty when an accused makes statements in mitigation to counter the plea of guilty. In the result, it cannot be said that the plea was unequivocal, neither can it be said that the plea of guilty was correctly entered and as a result the same cannot sustain the conviction. Further it is noted that the appellant in response to the facts stated that he did not rape the complainant but only slept with her. This was a clear denial and that the learned trial magistrate ought to have entered a plea of not guilty since the appellant seemed to have qualified the charge.

14. It should also be observed that when sentencing the appellant, there is no indication that he was given a chance to mitigate. According to the Judiciary Sentencing policy Guidelines, it is indicated that the convict has a right to equal protection of the law. According to the Judiciary Criminal Procedure Bench book at Paragraph 103, it is indicated that a convict should be given the opportunity to state facts in mitigation. In the present case the appellant did not mitigate and hence I find that he was occasioned injustice. Because of the procedural infraction I find that the sentence meted on the appellant ought not to stand.

15. In these premises, I find that the appeal has merit, the conviction is quashed, sentence set aside.

16. It is trite law that in cases where the appellate court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order of a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence.

17. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522 held** as follows;

> **"…several factors have therefore to be considered. These include:**
>
> **1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.**
>
> **2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.**

3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.

4. A retrial should be ordered where the interest of justice so demand.

Each case should be decided on its own merits."

18. From the foregone analysis it is noted that the appellant has barely served a fraction of the sentence and is thus not likely to suffer any prejudice. On the part of the Respondent learned counsel has sought for a retrial. As the case did not go to trial, I am satisfied that the witnesses are likely to be procured without difficulty. This is a case that merits a retrial.

19. In the result I find merit in the appeal. The conviction is quashed and the sentence set aside and is substituted with an order for a retrial. The appellant, upon delivery of this judgement, be forthwith presented before the Principal Magistrate at Kithimani law courts on the 16.7.2020 or as soon as is practicably possible for the purposes of a retrial.

It is so ordered.

Dated and delivered at Machakos this 15th day of July, 2020.

D. K. Kemei

Judge