REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL 7 OF 2020

WILLY KUVIKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal arising from the conviction and sentence

by Hon. M.K. Mwangi (Principal Magistrate) at Machakos Chief

Magistrate's Court in Criminal Case No. 57 of 2015 delivered on 15.1.2015)

BETWEEN

REPUBLIC.....PROSECUTOR

-VERSUS-

WILLY KUVIKA.....ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. M.K. Mwangi Principal Magistrate in Criminal Case No. 57 of 2015 15.1.2015. The Appellant was on 12.1.2015 charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "on the 9th day of January, 2015 at [particulars withheld] sub-location, Muthetheni Location in Mwala sub-county within Machakos County intentionally and unlawfully touched the breasts of MN, a girl child aged 13 years using his hands."

2. The appellant faced a 2nd count of house breaking contrary to Section 279(b) of the Penal Code. The particulars of the charge were that the appellant on the 9th day of January, 2015 at [particulars withheld] sub-location, Muthetheni Location in Mwala sub-county within Machakos County, did break into the house of Catherine Wambua and did steal therein 20 kgs of maize, 4 Kgs of maize flour and one litre of cooking oil all valued at Kshs 1,050/- the property of Catherine Wambua.

3. The record indicated that the charge was read to him and interpreted in Kiswahili he responded that it was true. The facts were read out to him on 15.1.2015 in English interpreted into Kiswahili by the prosecutor who produced the birth certificate of the complainant that was marked Pexh 1. She also told the court that the police found and arrested the appellant as he was escaping with 20 kg of maize flour and one litre of cooking fat The Appellant told court that the facts were correct; that he fondled the girl's breasts and he was sorry. The appellant was convicted on his own plea of guilty. The appellant in mitigation told court that he prayed for leniency and he would never touch a girl again. The appellant was on 15.1.2015 sentenced to 10 years imprisonment in respect of count 1 and 2 months in respect of count 2.

4. The appellant is dissatisfied with the decision of the trial court and on 10.12.2019 he appealed to this court against sentence only. The appellant sought for leniency and sought that his sentence be reduced to the time served. Vide amended grounds of appeal filed on 8.9.2020 the appellant challenged the trial court for failing comply with the provisions of Section 207 of the CPC, failing to consider that the plea that was entered was equivocal and for not considering possible lacuna in the weight of evidence. The appellant prayed the sentences meted on him be interfered with.

5. Submitting in support of the appeal, the appellant sought to invoke the provisions of Section 207 of the Criminal Procedure Code and submitted that there was non-compliance with the same. It was submitted that the innocence of the appellant ought to have been established through a trial process. The court was urged to find that the conviction was not safe. Attached were copies of training certificates issued to the appellant.

6. In response, the learned counsel for the state opposed the appeal and argued that the plea that unequivocal and that the accused person was arrested when fleeing from the scene; that the age of the victim was proven vide a birth certificate. It was the submission of counsel that the sentence meted on the appellant was mandatory in the case of indecent act with a child. The court was urged to uphold the sentence issued by the trial court.

7. The issues to be determined are that of propriety of the plea of guilty; the legality of the sentence 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.

8. Having been convicted on his own plea of guilty, the appellant in his amended grounds of appeal by challenging inter alia the manner in which the plea was recorded, is in essence appealing the legality of the plea. The appellant also sought for a downward review of the sentence meted on him.

9. The procedure of recording a plea of guilty and the steps to be followed by the court is unchallenged 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*."

10. From the record of the trial Court, before recording the plea was meticulous in ensuring that the charge was read and explained to the accused in English and translated to Kiswahili, a language that the appellant appears to have understood and was familiar with and as a result the appellant in his own words stated that he fondled the breasts of the complainant plead to the same properly and in unequivocal manner. After the appellant on 12.1.2015 stated that the charge was true, the court went ahead to give a date for reading the facts and I see nothing to suggest that the court did not record the answer the appellant gave as clearly as possible in the exact words used by the appellant. There is no doubt in my mind that the appellant understood the charges facing him as well as the substance and every element of the charge.

11. I am satisfied that the plea of guilty was really unequivocal and the response that he gave indicated that he had no defence but that he was sorry.

12. For the avoidance of doubt with regard to a charge under sections 11(1) 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, indecent act on the victim and the identity of the perpetrator. In the instant case, the facts as narrated by the prosecutor do disclose that the appellant fondled the breasts of the victim whose age was indicated in the birth certificate that was tendered in court. In the result, it cannot be said that the plea was equivocal; the fact that the appellant was aware of the charges facing him, the plea can be said to have been unequivocal and as a result the same was sufficient to sustain the conviction.

13. It should also be observed that in this appeal the appellant is raising objections to the same plea that he took after considering the evidence that was against him, his own words that admitted commission of the act and the fact that the trial was in a language that he appeared to have understood. As a matter of principle the appellant cannot be allowed to approbate and reprobate or change positions by turning around and saying the exact opposite of what he told the lower court and in the process use the appeal process as machinery to help him do so.

14. The doctrine of 'approbation and reprobation' has been elucidated in Halsbury's Laws of England, 4th Edn, Volume 16, at page 1012, paragraph 1507 thus:

> "*The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent*."

15. Further, such action also amounts to abuse of the court process and this court has every power to cull actions that it deems amount to abuse of the court process as well as to preserve the integrity of the judicial system.

16. Justice Mativo in the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** expressed himself in the following terms;

"*23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-*

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action. [13]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

17. In these premises, I find that the belated raising of the propriety of plea has no basis and the appellant is barred from appealing against the conviction in terms of Section 348 of the Criminal Procedure Code. The sentence that was meted on him falls within Section 11(1) of the Sexual Offences Act and I see no illegality in the sentence that was passed by the trial court.

18. The appellant sought that the sentence meted on him be reduced to the time served. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **Ogolla & S/O Owuor v Republic [1954] EACA 270** where the court stated:

"The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES Vs. REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."

19. Similarly, Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that**:**

"*Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

20. As indicated earlier, I see no impropriety in the manner that the plea was taken and I see no irregularity occasioned by the trial court in passing the sentence or in passing the conviction. I therefore find that the appeal lacks merit, the conviction is upheld, sentence maintained and the appellant shall continue to serve his sentence in accordance with the law. For the avoidance of doubt and by dint of Section 333(2) of the Criminal Procedure Code the sentence shall run from the date of arrest for the appellant as it appears that he was in custody from 11.1.2015 when he was arrested.

It is so ordered.

Dated and delivered at Machakos this 13th day of October, 2020.

D. K. Kemei

Judge