



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 34 OF 2018

DAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the decision of Hon. P. Wambugu, Senior Resident Magistrate, delivered on 27th April, 2018 in Kwale Chief Magistrate's Court Criminal Case No. 308 of 2018)

JUDGMENT

1. The appellant was convicted for the offence of Trafficking in persons contrary to Section 3(1)(e) as read with Section 5 of the Counter Trafficking in Persons Act No. 8 of 2010. The particulars of the charge were that on the 10th March, 2018 at about 0600 hours in Kwale County within Coast Region jointly with others before the court abused their position of authority and transferred BAO a child aged 2½ years to Tanzania for purposes of exploitation.

2. The court imposed a fine of Kshs. 30,000,000/= against the appellant and in default thereof, she would serve a sentence of 30 years in jail. The appellant being dissatisfied with the said conviction and sentence filed a petition of appeal. She amended the same on 10th December, 2018 with leave of the court.

3. Her amended grounds of appeal are that:-

(i) The Learned Trial Magistrate erred in law and fact by failing to follow the strict legal requirements as to the taking of plea and therefore the conviction and sentence was null and void;

(ii) That the Learned Trial Magistrate erred in law and in fact by failing to explain to the appellant the nature and consequences of the charge she was facing;

(iii) That the Learned Trial Magistrate erred in law and fact by failing to note that the appellant did not understand the language used in court;

(iv) That the Trial Magistrate erred in law and fact by failing to record the words used by the appellant to admit the charge; and

(v) That the Learned Trial Magistrate erred in law and fact by failing to give the appellant her right to mitigation.

4. In her written submissions, the appellant stated that the Hon. Magistrate erred in law by convicting her on her own plea of guilty yet he failed to record the language she used to plead to the charge as she did not say "it is true" to the said charge. She asserted that it was necessary for the language she used to have been recorded so that superior courts perusing the proceedings would know if she understood and spoke the language used in court. She thus submitted that the Trial Court contravened the provisions of Section 207(2) of the Criminal Procedure Code.

5. The appellant submitted that she did not understand the language used in the lower court and the language the Court Prosecutor used to outline the facts. She further stated that the exact words she uttered and the language used were not recorded. She relied on the case of **Adan vs Republic** [1973] EA 445 to fortify her arguments. She also relied on the Court of Appeal decision in **Anthony Njeru Kathiari and Another vs Republic** where the court held that failure by the Trial Magistrate to keep records of at least the name of an interpreter and the nature of interpretation was a serious defect in the trial and must render the conviction of the appellant unsafe and unsuitable. She also cited the provisions of Article 50(2)(m) of the Constitution of Kenya which provides for an accused person to have the assistance of an interpreter without payment, if the accused person cannot understand the language used at the trial.

6. The appellant contended that she was not given an opportunity to mitigate. She relied on the case of **Mohamed Abadada vs Republic**, Malindi Court of Appeal Criminal Appeal No. 372 of 2012 and **John Otieno Ojwang vs Republic**, Criminal Appeal No 36 of 210 (UR) where the courts held that failure to record a conviction once an accused person has admitted that the facts are correct, renders the proceedings to be a nullity and incurable, thus making the error to be a fatal anomaly.

7. On her part, Ms Marindah, Prosecution Counsel conceded to the appeal on the basis that the plea was equivocal for the reason that the language used by the court was not reflected on the proceedings. She submitted that the lower court proceedings do not show if the charge was read over to the appellant in a language she understood.

8. Counsel for the respondent further submitted that the appellant was not given a chance to mitigate before being sentenced to 30 years imprisonment for allowing her boyfriend (sic) to traffic her child to Tanzania.

9. Ms Marindah prayed for a retrial and stated that no prejudice would be occasioned on the appellant.

10. In response to the foregoing, the appellant stated that she had no objection to an order for a retrial.

ANALYSIS AND DETERMINATION

11. The issues for determination are:-

(i) If the plea was clear and unequivocal; and

(ii) If failure to accord the appellant the right to mitigate renders the trial in the lower court a nullity.

Plea of guilty and conviction

12. I have perused the proceedings of the lower court. The initial charge sheet filed on 4th April, 2018 was read out to the appellant on the same day. The court proceedings of the said date show that interpretation was from English to Kiswahili. The language used is indicated as Kiswahili. The proceedings further indicate that the charge and every element of it was stated by the court to the appellant in the language she understood, who on being asked whether she admitted or denied the truth of the charge replied that it was not true. A plea of not guilty was entered.

13. The case was then listed for mention on 18th April, 2018. On the said date, the trial court was indisposed. The matter was listed for mention on 20th April, 2018. When she appeared in court, the appellant addressed the Hon. Magistrate by stating that she had not been able to trace the child and that her husband knew where the child was. She further said that she had talked to the child's father and the child was in Iringa, Tanga. The court made orders for the appellant to send Kshs. 2,500/= for fare to enable the child to be brought into jurisdiction. The Hon. Magistrate then lifted the orders for release of the appellant for want of compliance with the order of production.

14. The matter was listed for further mention on 24th April, 2018 when the appellant informed the Trial Magistrate that since she was in remand she was unable to look for the money.

15. The appellant and her co-accused appeared in court on 26th April, 2018 when the prosecution presented a consolidated charge sheet. The charge was read out to the appellant and her co-accused. The appellant who was the 2nd accused responded by stating that the charge was true. The Hon. Magistrate entered a plea of guilty.

16. The facts were immediately read out to the appellant at length. The appellant informed the Hon. Magistrate that the facts were correct and she had nothing to add.

17. The appellant was convicted on her own plea of guilty. The prosecution urged the court to treat the appellant as a first offender and that they still wished to know where the child was. The appellant responded by stating that "those people have refused with the child".

18. Section 207 of the Criminal Procedure Code gives guidance on how a plea should be taken. It provides thus:-

"(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 be sufficient cause to the contrary;

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refused to plead, the court shall order a plea of "not guilty" to be entered for him." (emphasis added).

19. In the present case, after the court entered a plea of guilty, it went ahead to make its observations about the offence the appellant had committed and the relevant penal provisions. The court also noted the fact that the appellant had failed to produce the child in court despite being given an opportunity to do so.

20. I have reproduced the proceedings that took place before Hon. Wambugu, whom I must say went out of his way to give the appellant an opportunity to bring back her child who had been taken to Tanzania by her husband, to the jurisdiction of this court. She failed to do so and eventually, her parting shot was that “those people had refused with the child”. The Hon. Magistrate dealt with this case in a commendable way during the plea taking stage, which evidently demonstrates that he had the best interests of the child at heart.

21. In my considered view of the proceedings before the lower court, the plea that was taken by the appellant was clear and unequivocal. On the first day she attended court, the language of the court was shown to be Kiswahili. Interpretation was from English to Kiswahili. The court record indicates that the appellant understood the said language. The said fact is borne by her active participation in the proceedings that took place before the consolidated charge was read out to her.

22. The appellant on 2 occasions effectively communicated with the Hon. Magistrate about the production of her daughter in court. It cannot therefore be argued that the appellant did not understand the language of the court. She did understand the language which from a totality of the proceedings, this court can without a shadow of a doubt conclude that it was Kiswahili.

23. It therefore follows that the appellant also understood the facts that were read out to her, to which she responded. I do not agree with the submissions of the appellant and Ms Marindah that the *exact words* used by an accused person must be recorded so that a plea can be regarded as being clear and unequivocal. Section 207(2) of the Criminal Procedure Code provides that *the admission shall be recorded as nearly as possible in the words used by an accused person*. In circumstances where there is interpretation from one language to another, it is sufficient to record the words uttered by the appellant by giving them their natural meaning. Where the court record clearly indicates that an accused person followed the said proceedings, a plea of guilty should not be vacated.

24. In this case, on the facts being read to the appellant she said they were correct and she had nothing to add. In the said circumstances the Hon. Magistrate correctly convicted the appellant on her own plea of guilty.

25. Contrary to what the appellant submitted that proceedings of the lower court do not reveal name of the Court clerk that attended to the said court, the names of the Court Assistants who were present in court on the dates that the lower court case came up for either mention or hearing are reflected on the court record.

26. The authorities cited by the appellant do not apply to this case as different cases are determined according to their own circumstances.

Lack of mitigation

27. The only shortcoming in the proceedings was that the appellant was not given an opportunity to mitigate. Courts have however held that failure of a Court to give an accused person an opportunity to mitigate, does not from the face of it, vitiate a conviction. This was held in the case of **Amos Changalwa Juma vs Republic** [2009] eKLR, where the Court of Appeal gave examples of cases in which lack of mitigation would not prejudice an accused person.

28. Mitigation is an important element that is considered in sentencing and is an integral component of fair trial. The offence the appellant was charged with carries a fine of Kshs. 30,000,000/= and in default a minimum sentence of 30 years imprisonment, or both payment of a fine and imprisonment. 30 years behind bars is a long time. The Hon. Magistrate should have given the appellant an opportunity to mitigate. Mitigation would not have changed the nature of the sentence but the appellant would have left the court knowing that all that needed to be done to accord her a fair hearing, was done.

29. Due to the failure of the Hon. Magistrate to accord the appellant an opportunity to mitigate, I hereby quash the conviction and set aside the sentence. I hereby make an order for retrial. The appellant will be retried before any other Magistrate at Kwale Law Courts save for Hon. Wambugu, SRM. She will be escorted to the said court to be charged afresh as soon as practicable.

DELIVERED, DATED and SIGNED at MOMBASA on this 8th day of March, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Appellant present in person

Ms Ogwen, Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant