REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 146 OF 2017

WCO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by Hon. F. Makoyo, SRM,

in Butere SRMC Sexual Offence Case No. 36 of 2017

delivered on 1/12/2017)

JUDGEMENT

1. The appellant herein was convicted of the offence of incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 30 years imprisonment. The appellant was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal are:-

1. The learned trial magistrate grossly erred and/or erred in law and facts in hastily handing sentence without informing the appellant of his constitutional rights as guaranteed under article 50 (2) (g) (h) and (j) of the constitution.

2. The learned magistrate grossly erred in law and facts in hastily holding a plea of guilty as unequivocal without first inquiring into the state of the appellant's mind as at the time of plea taking.

3. The learned magistrate grossly erred in law and or misdirected himself in law and facts in handling sentence without warning the appellant of the dangers of pleading guilty to such a serious charge.

4. The learned magistrate grossly erred in law and facts in hastily handing a sentence without looking into the need of a full trial for such a serious charge.

2. The particulars of the charge against the appellant were that on the 21st November, 2017 in Khwisero Sub-County within Kakamega County, being a male person caused his penis to penetrate the vagina of MOS (herein referred to as the complainant) a female person who was to his knowledge his grandmother.

3. The appellant took plea on 1st December, 2017. The court record indicates that the charge was read and explained to the accused and when asked whether he admitted or denied the truthfulness of the charge he replied in Kiswahili language that –

"Ni ukweli" (it is true).

4. The prosecution then proceeded to give the facts of the case which were that the accused was a grandson to the complainant. That on the material day at 9 p.m. the complainant was at the sitting room of her house with a grandson called JO aged 8 years. It was raining heavily. That the appellant forced the door open and entered into the house. He was armed with a panga. He threatened the complainant and JO with death if they screamed. He covered the complainant's mouth. He removed her inner pant and raped her infront of the grandson and left. He had not used any protection. The complainant was left bleeding. She later informed her daughter, J. On 25th November, 2017 her daughter took her to Namasoli Health Centre. She was also seen at Khwisero Health Centre. They reported at Khwisero Police Station. A p3 form was issued. The P3 form and treatment notes from Namasoli Health Centre and Khwisero Health Centre were produced as exhibits, PEx.1, 2 and 3 respectively.

5. Upon being asked whether he admitted the facts, the appellant answered that –

"Facts are correct".

6. The trial court then convicted the appellant on his own plea of guilty. The prosecution asked the court to treat the appellant as a first offender. The accused then mitigated that he was requesting for forgiveness. That he was drunk at the time. That he was pleading with his grandmother to forgive him and that he would not repeat the offence again. After listening to the mitigation, the trial magistrate sentenced the appellant to serve 30 years imprisonment.

7. In his submissions the appellant did not raise the issues raised in the appeal. He instead stated that he was not challenging the conviction but that he was contending that the sentence imposed on him was harsh. That the trial magistrate failed to consider that he was a first offender and was remorseful for committing the offence. That the magistrate also failed to consider that the appellant was under the influence of alcohol at the time of committing the offence. He mitigated to this court that he is aged 25 years of age, unmarried and with no child. He pleaded with the court to review the sentence to 5 years imprisonment.

8. The state opposed the appeal through the submission of the prosecution counsel **Mr. Juma**. The prosecution counsel submitted that the charges were read to the appellant in Kiswahili language which he understood. That he was informed of the seriousness of the offence that he was facing. That besides that there is no requirement in law for a magistrate to warn an accused person of the seriousness of the offence if the accused wanted to plead guilty to the charge. That what is required is for the court to ensure that the accused understood the charge. That in this case, the accused understood the charge which is indicated in his mitigation that he was requesting for forgiveness and that he will not repeat the offence. That the appellant stated that he was drunk. That drunkedness is not a defence but a mitigatory factor. Therefore that the plea was unequivocal.

9. The prosecution counsel supported the sentence of 30 years imprisonment when it is considered that the victim was the appellant's grandmother who was aged 83 years. Further that the appellant was armed with a panga and threatened the complainant if she dared to scream. That he raped her in front of her grandson. That the victim was left with injuries in her vagina. The prosecution counsel urged the court to uphold the conviction and the sentence.

Analysis and Determination

10. This is a first appeal and as such the court is guided by the principles set out in the case of **David Njuguna Wairimu -Vs– Republic [2010] eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

11. The appellant contended that the plea of guilty entered by the trial magistrate was not unequivocal as the trial magistrate did not inquire into his state of mind at the time of plea taking. He also complains that the trial magistrate failed to warn him of the dangers of pleading guilty to such a serious sentence.

12. The manner of taking pleas was stated in the case of **Adan –Vs- Republic 1973 (EA) 445 at page 446** where it was held that:-

> ***"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 guilty, 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, off course, be recorded."***

13. It is the duty of a plea taking court to ensure that an accused person understands the charge levelled out against him. This is particularly so when the accused person is unrepresented by counsel as was in this case. This point was stressed by Joel Ngugi J. in **Simon Gitau Kinene –Vs- Republic (2016) eKLR** where he stated that:-

> *Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In* ***Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)*** *this is what I said and I find it relevant here:*
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> ***"In those cases [where there is an unrepresented accused charged with a serious offence], care should always be taken to see that the accused understands the elements of the offence, especially if the evidence suggests that he has a defence…..To put it plainly, then, one may add that where an unrepresented accused person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the accused person understands the consequences of such a plea is***

heightened. Here, the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the court was about to convict and sentence the accused person for, it behooved the court to warn the accused person of the consequences of a guilty plea."

14. The lower court's record indicates that the proceedings were being interpreted into Kiswahili language. The record indicates that after the charge was interpreted to him he replied in Kiswahili language that –

"Ni ukweli" (It is true).

15. The court record indicates that after the prosecutor read out the facts the court addressed the accused as follows:-

"Asked whether the facts are correct and the seriousness of the offence and the severity of sentence the accused states:

"Facts are correct".

16. It is then apparent that the appellant was warned of the seriousness of the offence that he was facing and the severity of the sentence that he faced if he went ahead to plead guilty to the charge. Despite this warning the appellant went ahead to plead guilty to the charge. In his mitigation the appellant asked his grandmother to forgive him. This showed that he fully understood the charge that was facing him. The facts read out to the appellant were simple and not complicated in any manner. That he said he was drunk at the time of committing the offence was a mitigatory factor. He did not state he was drunk to the extend that he did not know what he was doing. The fact that he was armed with a panga and threatened the complainant and her grandson with death if they screamed indicated that he knew what he was doing. The plea was therefore unequivocal. That ground of appeal must fail.

17. The minimum sentence for the offence of incest under the provisions of Section 20 of the Sexual Offences Act is 10 years imprisonment. The appellant was sentenced to serve 30 years imprisonment. That being a minimum sentence the appellant's prayer that the sentence be reviewed to 5 years cannot stand. A court does not have a discretion to award a sentence lower than the minimum sentence where it is provided by the law.

18. Sentencing is a discretion of the trial court. In **Shadrack Kipchoge Kogo –Vs- Republic** the Court of Appeal held that:-

"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

19. The Supreme Court in **Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR** mentioned the following guidelines as mitigating factors in a re-sentencing sentence for a conviction of murder charge –

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the court considers relevant.

These mitigatory factors are also applicable in a case of incest.

20. In as much as the appellant's act of raping his 83 years old grandmother was heinous and abominable, I find that the learned trial magistrate failed to consider the appellant's mitigating factors before meting out the sentence of 30 years imprisonment. The magistrate did not state why he considered the sentence of 30 years to be appropriate. Mitigation forms an important part of the trial process and is not a mere formality. The appellant was a first offender. He pleaded guilty to the charge and thus saved the court of some valuable time of going through a full trial. Though his age was not stated at the time of sentence, the appellant has in his submissions to this court stated that he is aged 25 years, unmarried and with no children.

21. Considering that the minimum sentence for incest is 10 years, I find that the sentence of 30 years meted out on the appellant was too harsh and excessive. The sentence meted out was three times the minimum sentence provided by the law. The appellant is a young man who may need to serve sentence for the offence committed and come out of prison to re-start his life when he is still productive. Taking into account the mitigating factors I find that this is an appropriate case for me to interfere with the sentence imposed by the learned trial

magistrate.

22. The upshot is that the appeal on conviction is dismissed. However, the sentence of 30 years imprisonment is set aside and substituted with one of fifteen years imprisonment.

Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 22nd day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Ng'etich for State

Appellant - present

Court Assistant - George

14 days right of appeal.