REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.141 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. Juma - SPM delivered *on 20th September 2016 in Kibera CM. CR. Case No.32 of 2015)*

J M N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, JMN was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 21st July 2015 at [particulars withheld] Village Riruta in Nairobi County, the Appellant intentionally and unlawfully caused penetration by inserting his male genital organ (penis) into the anus of KSJ, a male child aged seven and a half ($7^1/_2$) years. When the Appellant was first arraigned before the trial magistrate's court, the Appellant pleaded guilty to the charge. However, the court observed that the Appellant appeared not to be mentally fit to plead to the charge. She ordered the Appellant to be taken to Mathare Mental Hospital for psychiatric examination. The order was made on 27th July 2015. The case was mentioned severally before the report was presented to court on 2nd of February 2016. In the report, a Dr. Mucheru Wang'ombe of Mathare Mental Hospital recommended that the Appellant be committed to the hospital for in-patient treatment.

The Appellant was admitted at the hospital until 13th September 2016 when he was again presented before the trial court. On that day, the prosecutor informed the court that another psychiatric report had been prepared. This report indicated that the Appellant had sufficiently recovered to enable him to take plea to the charge. The plea was subsequently taken. The Appellant again pleaded guilty to the charge. He was convicted on his own plea of guilty. This is what the trial court said when sentencing the Appellant:

> **"From the record the accused appears to have committed this offence while he was not sane as from the medical psychiatric reports dated 27th August 2015 by Dr. Ochieng J and that of 30th November 2015 by Dr. Mucheru Wang'ombe both of Mathare Mental Hospital. The further psychiatric report dated 5th September 2015 by Dr. Jumba of Mathare Hospital who stated that the accused is fit to plead. The charges have subsequently been read over to the accused in the language which he understands which he has yet again admitted. At the time of his arrest the accused was roughed up by members of public his life is actually endangered outside the community. From the record the accused admitted the charges earlier as such it is my considered view that he has unequivocally admitted these charges. For this offence the stipulated sentence provided in law is the life imprisonment. However while taking into account the prior and pre-existing mental condition of the accused he has been twice found to be insane. He is likely to have been of unsound mind at the time of the offence. He is therefore found guilty on his own plea and guilty but insane. He therefore sentenced to be detained in prison at the pleasure of the President. This order to be typed and forwarded to the High Court for confirmation under Section 107 of the CPC."**

The Appellant was aggrieved by the conviction and sentence. He filed an appeal to this court challenging the same. In his amended petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for finding him guilty but insane yet the psychiatrist report showed that the Appellant was incapable of making his own defence. The Appellant was aggrieved that he had been sentenced to serve a sentence that had been declared unconstitutional. He faulted the trial magistrate for failing to take into consideration the Appellant's mental condition and thereby sentenced him to serve an indefinite period in prison. He was aggrieved that the trial magistrate failed to appreciate the fact that he suffers for a mental disability which condition should be managed rather than criminalized. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Ms. Karanja for the Appellant and by Ms. Akunja for the State. Ms. Karanja submitted that the specific section of the law that the Appellant was sentenced was no longer part of the statutory fabric of this country, the same having been declared unconstitutional. She submitted that the sentence meted on the Appellant was one of the instances of a sentence being discriminative on people with mental disability. She asserted that the sentence offended **Articles 25** and **29** of the **Constitution**. She explained that the Appellant was a person of mental disability from birth. The disability made him unable to make reasonable judgment. He was therefore unable to understand the nature of the crime or the legal proceedings that led to his conviction. The plea of guilty recorded should therefore be set aside. It was clear from the proceedings that the Appellant did not comprehend what was going on. In the premises therefore, she urged the court to allow the appeal.

Ms. Akunja for the State partially conceded to the appeal. She submitted that the plea of guilty that was recorded was not unequivocal. The psychiatric evaluation clearly showed that the Appellant lacked the requisite mental capacity to take the plea. She submitted that a new psychiatric report should have been obtained before the subsequent plea of guilty was recorded. In the premises therefore, she urged the court to allow the appeal but order that the Appellant be retried.

This being a first appeal, this court has a duty of re-evaluating and reconsidering the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In the present appeal, this court has carefully re-evaluated the evidence before the trial court in light of the submission made by the parties to this appeal. It was clear to this court that the plea of guilty that was recorded by the trial court was not unequivocal. The Appellant did not have the requisite mental capacity to plead to the charge. The trial court itself acknowledged this fact when it sentenced the Appellant. The directions given by the court in **Adan vs Republic [1973] EA 445** was not adhered to. In **Willy Kipchirchir –vs- Republic [2015] eKLR,** the court held as thus:

> **"From the foregoing, it cannot be gainsaid that a plea court in recording a plea of guilty must ensure that an accused person fully understands the offence which he is charged and the manner in which it is alleged that he committed the offence. In order for the accused to fully understand the charge preferred against him, the charge must be read and explained to him in a language that he or she understands and this language must be reflected in the court record. The duty of the court goes beyond just reading the charge to the accused. As emphasized by the Court of Appeal in Kariuki –vs- Republic (supra):**
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> > **"The trial court or Judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands."**
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> **In Kennedy Odhiambo Nyangile –vs- Republic [2004] eKLR, the court held thus:**
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> > **"Regarding the facts of the case, the court Judy Nkirote v Republic (Supra) observed that, "The facts of the prosecution case are supposed to give further details of what it is the accused person is accused of doing or failing to do which led to the circumstances which constitute the offence charged. The statements of facts given by the prosecution must be explained to the accused person by the court in order for the court to be certain that he has understood the facts. The accused is then given an opportunity to either admit or deny those facts. At that point the court should give the accused person an opportunity not merely to admit or deny but also to dispute the facts or explain the facts or add any relevant facts. If the accused person denies the facts then a plea of not guilty is entered. If he admits the facts then the court will enter a plea of guilty and convict him for the offence."**

The obvious presumption when the trial court is recording a plea of guilty is that the accused has a requisite mental capacity to take plea.

In the present appeal, it was clear that the Appellant lacked the requisite mental capacity to understand the nature of the charges that were preferred against him or the consequences of his pleading guilty to the charge. There were two psychiatric reports on record which clearly indicated that the Appellant was mentally challenged. The trial court also observed that the Appellant was in such a state of mind that he may not have been in control of his mental faculties at the time that he is alleged to have committed the offence.

That being the case, it was evident to this court that the plea of guilty that was recorded by the trial court was equivocal. Ms. Akunja for the State rightly in the view of this court conceded to the appeal. That being the case, the appeal is allowed. The Appellant's conviction is quashed. The sentence that was imposed on him is set aside.

The issue that remains for determination is whether the court should order for the retrial for the Appellant as requested by the prosecution. The principles guiding this court in deciding whether or not to order a retrial are well settled. In **Sinaraha & another –vs- Republic [2004] 2KLR 328 at page 330**, the court held thus:

> **"The principles governing whether or not a retrial should be ordered was enunciated in Fatehali Manji –versus- Republic [1966] EA 343 Sir Clement De Lestang, the then acting President of the Court of Appeal stated at page 344 that:**
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> > **"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should be ordered where it is likely to cause injustice to the accused person."**
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> > **In M'Kanake –versus- Republic [1973] EA 67, it was held that a retrial should not be asked for to fill gaps in the evidence or to rectify faults of the prosecution's case. In Mwangi –versus- Republic [1983] KLR 522, the Court of**

Appeal held at page 538 that:

> **"We are aware that a retrial should not be ordered unless the appellate court is of the opinion that a proper consideration of the admissible or potentially admissible evidence, a conviction might result; Braganza versus R [1957] EA 469, Pyarala Bassan versus Republic [1960] EA 854.""**

In the present appeal, the Appellant's counsel informed the court that the Appellant's mental condition is a disability. This court understood the Appellant's counsel to say that the Appellant's mental disability is more or less a permanent one. If this court were to order the Appellant to be retried, it would imply that the Appellant will permanently be in court neither taking plea nor being tried because he lacks the requisite mental capacity to plead to the charge and be tried. The Appellant's case brings to the fore the legal lacuna that exists in cases such as his where the courts are left without statutory guidance on how to deal with people with mental disability who happens to be in conflict with the criminal law. The Appellant's case calls for an enactment of an appropriate statutory instrument to address the challenge posed to courts in dealing with people with mental disability such as the Appellant. This court agrees with the Appellant's counsel that the Appellant's case ought to be treated as a medical condition that requires management rather than to be dealt with as a criminal case that calls for punishment. The above notwithstanding, this court is not oblivious of the danger posed by the people with mental disabilities to the society especially where they have a proclivity to violent conduct. That is an issue also that can be addressed by appropriate legislation.

In the circumstance of this case, this court is of view that the period of four (4) years that the Appellant has been in protective custody precludes this court from directing that the Appellant be retried. The Appellant is therefore ordered discharged. The Appellant's family is ordered to ensure that the Appellant is attended to medically so that he does not pose a danger to society. He is ordered set at liberty forthwith and released from prison. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF JUNE 2019

L. KIMARU

JUDGE