



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARSEN
CRIMINAL APPEAL NO. 19 OF 2015

KGK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court

at Garsen Criminal Case No. 18 of 2013 by Hon. J. Kituku (PM) dated 23rd January 2013)

JUDGMENT

1. The Appellant was charged with incest contrary to section 20 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 24th September 2012 and 27th September 2012 within [particulars withheld] in Mwina location Tana Delta District within Tana River County, the Appellant caused his penis to penetrate the vagina of HH a female person who was to his knowledge his niece.

2. The Appellant pleaded guilty and was convicted and sentenced to imprisonment for 20 years.

3. Despite the Appellant being convicted on his own plea of guilty he still appealed against the conviction and sentence and lodged his appeal on the following amended grounds reproduced verbatim:-

- i. "That the learned trial Magistrate erred in law and fact by not considering that I was not warned during plea hence prejudice to me.
- ii. That the learned trial Magistrate did not consider that I was not represented by an advocate leading to pleading guilty.
- iii. That the learned trial Magistrate erred in not considering that the language used by the Appellant was not captured in the record."

4. The Appellant filed written submissions on the 14th March 2019 in support of his appeal. His submissions were to wit that despite not having an advocate on record, the trial court failed to inform him of the danger of pleading guilty otherwise, he would not have pleaded as such. Additionally, he submitted that the trial magistrate did not record the language used during plea and he was therefore not accorded a fair hearing. He relied on the case of **Abdalla Mohamed Cr. App No. 90 of 2012** and **Simon Gitau Kinene v R Cr App No. 8 of 2016 (2016) eKLR**.

5. During the hearing, the Respondent opposed the appeal in its entirety. Mr. Kasyoka learned counsel for the Respondent orally submitted that the plea taking process was legal and that the plea was unequivocal. He submitted that the Appellant pleaded guilty and that no appeal can lie on an accused's own plea of guilty. On the sentence, Mr. Kasyoka submitted that section 20 of the Sexual Offences Act provided that an accused was liable for conviction of up to life imprisonment. He argued that the Appellant had been sentenced to 20 years imprisonment, which was fair. He urged the court to uphold the conviction and dismiss the Appeal.

6. The Appellant orally submitted that he did not have knowledge of court proceedings and therefore accepted the plea. He asked the court to reconsider his sentence as his children were suffering and were living with neighbours.

7. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions. See **Okeno v R (1972) EA 32**; See also **Eric Onyango Odeng' v R [2014] eKLR**.

8. Section 348 of the Criminal Procedure Code (CPC) provides that:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

9. However, there are instances in which an Appellate court can intervene despite a guilty plea. In **Alexander Lukoye Malika v Republic [2015] eKLR**, the Court of Appeal interpreted section 348 of the CPC in the following terms:-

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged.”

10. In the present case, the Appellant contends that the language used was not recorded and that he was not warned of the consequences of his plea as a result of which the plea was unfinished. Thus, the court has a duty to step where it feels the plea was equivocal and therefore the submission by the Respondent was erroneous.

11. On whether the plea was unequivocal, section 207 of the CPC provides the procedure for to be followed when taking plea and provides as follows:-

“207. (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 it sufficient cause to the contrary;

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

12. The above procedure was further expounded in the celebrated case of **Adan versus Republic (1973) E.A.445** where the Court of Appeal outlined the procedure as follows:-

“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 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.”

13. In **Elijah Njihia Wakianda versus Republic Criminal Appeal No. 473 of 2010 (2016) eKLR** the Court of Appeal pronounced itself on the need to state the language used during plea taking and stated thus:-

“Indeed, the court taking the plea is required to read and explain to the accused the charge and all the ingredients in the accused person's language or a language he understands.

We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language.”

14. To ascertain whether the plea taking process was observed, I have looked at the trial court’s record which shows as follows:

23/01/2013

Before Hon. J. Kituku – PM

CI Onyango – Prosecutor

Osman – Court clerk

Accused – present in person

Interpretation – English/Kiswahili

Accused -it is true

Court – Plea of guilty entered

15. While the court entered a plea of guilty, it cannot be ascertained from the court record what substance of the charge and elements were read to the Appellant, in which language they were read, and; whether the Appellant understood the said language. There is nothing on record to show that the trial court explained the elements of the offence or informed the Appellant of the consequences of a plea of guilty.

16. It is clear therefore that the plea taking process in this case did not strictly comply with the provisions of section 207 of the C.P.C.

17. On whether the failure of the trial magistrate to inform the Appellant of the consequences of his plea affected the plea taking process the Court of Appeal in **Kennedy Ndiwa Boit V Republic Criminal Appeal No. 96 Of 2002 [2002] Eklr** held that:-

“Stopping there for the moment, it is abundantly clear to us that at no stage did the Magistrate warn the appellant of the consequences of his pleading guilty to the charge. Indeed the appellant’s plea in mitigation that “I am asking for pardon” clearly shows that the appellant was wholly unaware that he ran the risk of being sentenced to death... The High Court rejected that complaint on first appeal to that court (Etyang & Omondi-Tunya, JJ) but in rejecting the appeal, the learned Judges of the High Court said absolutely nothing about the failure by the trial Magistrate to warn the appellant of the consequences of his pleading guilty. The High Court’s failure to address that issue is a question of law which entitles us to interfere with their finding and that of the Magistrate.”

18. Similarly the Court of Appeal in **Elijah Njihia Wakianda versus Republic (supra)** stated as follows:-

“We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare.”

19. The record reveals that after the plea of guilty was entered the trial magistrate never informed the Appellant of the consequences of his plea and proceeded to record the facts as presented by the prosecution.

20. Section 20 (1) of the Sexual Offence Act provides for a mandatory minimum sentence of 10 years which can be enhanced to life imprisonment where the victim is a minor. The Appellant risked being sentenced to a long and severe sentence. It was therefore incumbent on the trial magistrate to inform him of the risks.

21. After consider all the above, I find that the plea was not unequivocal.

22. Having found that the plea was not unequivocal, the only question before this court is whether to acquit the Appellant or to order a retrial.

23. There are clear principles which guide when a court may order a retrial. The primary consideration is where the interest of justice demands. In **Charo Karisa Salimu v Republic Criminal Appeal No. 499 of 2010 [2016] eKLR** the Court of Appeal stated as follows:-

“Where a trial is declared a nullity, the first option usually is to order a retrial. A retrial will, however, not be resorted to where it is likely to occasion injustice, or where it will be used merely to fill up gaps in the prosecution case. The Court will also consider the length of time that has elapsed since arrest, and whether the mistake leading to the quashing of the conviction was entirely of the prosecution making or not. See Muiruri v R (2003) KLR 552.”

24. In **John Njenga Kamau v Republic Criminal Appeal No. 203 of 2016 [2018] eKLR** the Court of Appeal further held that:-

“The unmistakable thread in all the authorities is that 'each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the appellant”

25. The court went on to explain the “interest of justice” in the following terms:-

Explaining what the 'interests of justice' entail, and in its own summary, the court, in the English case of Reid vs R - (1978) 27 WIR 254, held:-

“The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury... It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Among the factors to be considered in determining whether or not to order a new trial are:

(a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at

the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

26. In **Abdallah Mohammed v Republic Criminal Appeal No. 90 OF 2012 [2018] eKLR** the court (Korir. J) faced with the same question on whether to order a retrial or acquit held that:-

“23. This is a matter that was concluded about seven years ago. A retrial will be prejudicial to the Appellant who is almost halfway through his sentence. It is also important to note that the Appellant is entitled to remission of sentence if the prisons authorities are satisfied that he has earned it. In the circumstances, I allow the appeal, quash the conviction and set aside the sentence. The Appellant is thus set free forthwith unless otherwise lawfully held.”

27. I am persuaded by the above decision. In the present case the Appellant was charged and sentenced over 6 ½ years ago. The complainant, who was his niece, may have moved on with her life and may have wanted to banish the ordeal of the past from her mind. Further, the witnesses may have changed location or may not be willing to cooperate in a new trial. It is also a material fact that the Appellant has already served a third of his sentence. I find it would not be in the interest of justice to order a retrial.

28. In the upshot, I find that the appeal succeeds. I quash the conviction and set aside the sentence imposed. The appellant is set at liberty forthwith unless otherwise lawfully held.

29. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 18th day of June, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

The Appellant in person

Sharon - Court Assistant

Mr. Kasyoka - for the Respondent