REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO 107 OF 2014

BETWEEN

JS.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence by Hon. S. M. Shitubi,

Chief Magistrate in Kakamega CMC Cr (SO) case no. 60 of 2014 on 15.7.2014)

CORAM: RUTH N. SITATI

JUDGMENT

Introduction

1. The Appellant herein JS was charged with the offence of ***Incest contrary to Section 20 (1) of the Sexual Offences Act No 3 of 2006.*** The particulars of the offence are that on the 29th June 2014 in Kakamega Central District within Kakamega County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of EM a female who is his daughter.

2. In the alternative to the main count, the appellant faced a charge of committing an ***indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006***, the particulars thereof being that on the 29th June 2014 in Kakamega Central district within Kakamega County, the Appellant intentionally and unlawfully caused his penis to touch the vagina of EM a female who is his daughter and a minor aged 11 year.

3. The Appellant pleaded guilty and was convicted on his own plea of guilty and sentenced to serve life imprisonment.

The Appeal

4. The appellant, being dissatisfied with both conviction and sentence, brought this appeal and set out two grounds in the Amended Petition of Appeal.

5. That the Learned Trial Magistrate erred by convicting the appellant on his own plea of guilty notwithstanding the provisions of ***Article 50 2 (b) of the constitution.*** This further violated the appellant's rights as dictated under ***Article 50 2(j).***

6. That the leaned Trial Magistrate did not take into account the fact that the police tricked the Appellant into accepting the charges so that the matter would be solved at home.

The Proceedings and Submissions

7. The appellant appeared for plea on 15th July 2014 when the charge and every element thereof were read to him in Kiswahili language. Before the appellant responded to the charge, the Trial magistrate went ahead and explained to him the gravity of the offence and the sentence that it attracted and had the charges read over and explained to him again and when asked whether he admitted or denied the charge,

he replied in Kiswahili language as follows:-

> ***"Ni ukweli" (it is true).***

8. The prosecution counsel then gave the facts of the case to which the appellant responded:-

> ***"Facts are correct".***

9. The court then convicted him on his own plea of guilty and when asked to mitigate, the appellant requested Court to go ahead and sentence him. He was then sentenced to life imprisonment.

10. The Appellant now submits that he did not plead guilty out of his own volition but due to the fact that the police had tricked him in accepting that if he accepted the charges he would go home and solve the issue.

11. He further submits that his rights as envisaged under ***Article 50 2 (b) and (j)*** had been violated as he was not given the necessary information to prepare for the case.

12. The State opposed the appeal. Mr Juma submitted that all the steps were taken by the Trial Court to ensure that the plea was unequivocal and that the appellant's rights were not violated as alleged.

Issues ,analysis and determination.

13. This is a first appeal and thus this 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 analyze and 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 appellate 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."***

14. From the Appeal and the submissions, the issues for determination for this Court are:

1. Whether the plea was unequivocal

2. Whether the Appellant's rights as envisaged under ***Article 50(2)(b) and (j) of the Constitution*** were violated.

a) Whether the Plea was unequivocal

15. The requisite steps to be followed in plea taking were enunciated in the case of ***Adan Vs Republic (1973) E. A 445,*** wherein the court held as follows

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in the language or in a language he understands***
>
> ***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
>
> ***(iv) If the accused does not agree with the facts or raises any questions of his guilt his reply must be recorded and the change of plea entered.***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded"***

16. In ***Joseph Kathini Kivuva V Republic [2016] eKLR*** the court held that

> ***"Caution in accepting a plea of guilty is built into the provisions of the Criminal Procedure Code where section 207 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 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 refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads -

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."

The court of Appeal in OSIKE EMONGONYANG' AND 2 ORS V. R, COURT OF APPEAL AT NAIROBI (KWACH, AKIWUMI & SHAH, JJ.A.) CRIMINAL APPEAL NO. 69 OF 1990 counsels the trial courts to exercise caution in accepting the plea of guilty particularly in capital offences as follows:

"No matter what may have been the case before, it is to us now well settled and for obvious good reasons, that a court these days should not and will not as a matter of course, accept a plea of guilty to a charge of murder which carries the mandatory capital sentence, without first warning the accused person of, and explaining to him fully, the consequences of his plea of guilty. Similarly in this day and age, where the mandatory sentence upon conviction of the offence with which the appellants were charged is the death sentence, we are of the view that even if the plea of guilty is to be accepted, it must only be done after due warning has been given to the accused person of the consequences of pleading guilty, so that he may fully consider the full implications of the step that he wishes to take." [emphasis is mine].

17. In ***Abdallah Mohammed V Republic [2018] eKLR*** the Court stated that:-

"In a case where an accused person who is undefended pleads guilty to a charge, the court has a duty to ensure that the plea is unequivocal. As pointed out, the Appellant had no legal representation and the trial court ought to have taken steps to ensure that the Appellant understood every element of the charge and the facts read out to him. He also ought to have been warned, and that warning captured on record, that the offence he was about to plead to carried a prison sentence of not less than fifteen years. In my view, extra caution includes the question as to whether or not the facts as read out are true and whether the accused person would wish to make any comment. In fact an accused person should be asked what he means by saying that the charge read to him is true. His explanation should then be captured on the record so as to form part of his plea. From the record, it is apparent that the Appellant was just but a lad aged 21 years and the trial court ought to have gone the extra mile to ensure he understood the consequences of entering a plea of guilty."

18. The court in ***Abdalla Mohammed Case*** (above) also adopted the finding of the court in ***Kinene V Republic [2016] eKLR*** where the court held that

"19. 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:

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. "

19. The Proceedings herein give an elaborate account of the steps the Learned Trial Magistrate took to ensure that the Appellant understood the consequences of his plea of guilty. The trial Magistrate warned him of the seriousness of the charge, but in spite of the warning, the Appellant still pleaded Guilty.

20. I am therefore satisfied that all the step prescribed in the above cases were taken by the Learned Trial Magistrate and the plea as taken by the Appellant was unequivocal.

21. The Appellant contends that he was tricked into pleading guilty by the police. It should be noted that at no point in the proceedings does the Appellant inform court of such trickery and who in particular tricked him. It was his right to have raised the issue as soon as possible

especially after being informed of the sentence and the consequences of his plea. He also had an opportunity even before sentencing to change his plea but he did not. My humble view of the matter is that this allegation of trickery by the police or whoever it was is an afterthought. I accordingly dismiss this ground. See ***Albanus Mutua Lemba V Republic [2004] eKLR.***

b) Whether the Appellant's rights as envisaged under Article 50 2 (b) and (j) of the Constitution were violated.

22. ***Article 50(2)(b)*** and ***(j)*** provides that:-

> ***(2) Every accused person has the right to a fair trial, which includes the right—***
>
> **…….**
>
> ***(b) To be informed of the charge, with sufficient detail to answer it;***
>
> **……**
>
> ***(j) To be informed in advance of the evidence the prosecution Intends to rely on, and to have reasonable access to that evidence;***

23. The right to be provided with copies of the documents that the prosecution intends to rely on in a case was emphasized by the Court of Appeal in ***Thomas Patrick Gilbert Cholmondeley –Vs- Republic Nairobi CA Criminal Appeal No. 116 of 2007 (2008) eKLR***, where the court observed that:-

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under …. our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."***

24. In the present case however, the appellant was informed of the charge facing him with sufficient detail. This is supported by the fact that the court after explaining the details of the charge to him, also explained to him that the minimum sentence that could face him was 10 years imprisonment. The court then read and explained the charge again to the appellant. The appellant admitted the charge. Though courts have not looked favourably upon a plea of guilty based on such answers as "it is true", the circumstances under which the plea in this case was taken show that the appellant was under no illusion about the charge facing him and the possible minimum sentence. After the facts were read out by the prosecution to the court the appellant replied, **"The facts are correct"** without either adding or subtracting anything. There was therefore no violation of the provisions of ***Article 50(2)(b) of the Constitution, 2010.***

25. The provisions of ***Article 50(2)(j)*** are to the effect that an accused person has the right "***to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."*** In the present case the appellant's trial began and ended with the plea. The case against the appellant did not proceed to hearing after he unequivocally pleaded guilty to the charge. It was therefore not necessary to provide the appellant with witness statements as envisaged under ***Article 50(2)(j)*** of the Constitution 2010. This ground of appeal therefore fails.

The sentence

26. In his initial Petition of Appeal filed in court on 12.8.2014, the appellant averred therein that the sentence meted out upon him by the learned trial court was harsh. The sentence was passed in 2014. To be exact, it was passed on 15.7.2014. Before the sentence was passed the prosecutor told the court: "**Though I have no previous record, the offence is serious and calls for deterrent sentence,**" and in mitigation, the appellant stated, "**The court can just sentence."**

27. What comes out from the above record is that the appellant showed no remorse whatsoever for the offence to which he had just pleaded guilty. In sentencing the appellant, the learned trial magistrate stated:-

> ***"I have noted the circumstances of the offence. To serve life imprisonment."***

28. The sentence prescribed u***nder section 20(1) of the Act*** for the offence of incest is a term of imprisonment for a term of not less than 10 years. The proviso thereto however prescribes that where the victim is under the age of 18 years ***"the accused person shall be liable to imprisonment for life, and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."*** Effectively therefore the trial court properly sentenced the appellant to life imprisonment.

29. The issue surrounding imposition of minimum statutory sentences has come into sharp focus in the recent past beginning with the Supreme Court decision in ***Francis Karioko Muruatetu & another versus Republic [2017] eKLR*** in which the Supreme Court held that the requirement upon courts to impose minimum sentences took away the discretion given to the same courts to pass such sentences against accused persons in line of the circumstances of each case.

30. The Court of Appeal has followed in the footsteps of the Supreme Court and declared that the mandatory minimum sentences provided under the Act are unconstitutional and have gone head to reduce the mandatory sentences and to impose appropriate sentences in line with the circumstances of each case.

31. In the present case, I am of the humble view that the recent jurisprudential growth gives me the latitude to interfere with the life sentence imposed upon the appellant. After considering all the circumstances of this case, I will set aside the life sentence and in lieu thereof, sentence the appellant to thirty five (35) years imprisonment from the date of original sentence.

32. In light of all the above, I now make the following orders in this appeal:-

1. The appellant's appeal on conviction be and is hereby dismissed.

2. The appellant's appeal on sentence be and is hereby allowed to the extent that the sentence of life imprisonment is set aside and in lieu thereof, I sentence the appellant to thirty five (35) years imprisonment with effect from 14.7.2014.

3. Right of appeal within 14 days from the date of this judgment.

33. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Kakamega in open court on this 18th day of October, 2019

WILLIAM M. MUSYOKA

JUDGE

In the Presence of:-

JS in person

No appearance for Respondent

Eric Court Assistant