REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 276 OF 2010

MUOKA MUSAU...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court (Hon. B.T Jaden, CM), in Criminal Case (SO) No. 22 of 2010 on 28th June, 2010)

REPUBLIC……….……….………………..…………….……….PROSECUTOR

VERSUS

MUOKA MUSAU………………..…....…………..…..…………ACCUSED

JUDGEMENT

1. The appellant, **Muoka Musau**, was charged before the Machakos CM's Court in Criminal Case (SO) No. 22 of 2010 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant, on the 6th day of May, 2010 at [particulars withheld] Location in Machakos District within Eastern Province, he intentionally and unlawfully caused his penis to penetrate the vagina of **SK**, a child aged 5 years. Alternatively, he was charged with the offence of indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he intentionally and indecently assaulted **SK**, a child aged 5 years by touching her vagina with his penis.

2. The record of the proceedings for 7th May, 2010 shows that the accused was absent yet it proceeds to indicate that the elements of the charges were read to him and that he admitted the truth thereof hence a plea of guilty was entered. On 21st May, 2010 the court directed that the accused be taken to the Hospital for age assessment and on 25th May, 2012 there was a further order that the appellant be referred to psychiatrist evaluation. A similar order was made on 8th June, 2010. On 11th June, 2010 the prosecutor reported that the doctor examined the appellant who failed to talk to him and the doctor sought for more time. However, on 28th June, 2010 the charge was once again read over to the appellant and admitted the offence and a plea of guilty was entered and the facts read over to him and he accepted the same as correct. Based on the foregoing the appellant was convicted and sentenced to life imprisonment which the court indicated was the minimum sentence.

3. In this appeal, the appellant contends that he was never informed of of the charge with sufficient details as required under Article 50(b) of the Constitution. The appellant pointed out that the record of the proceedings of the lower court for 7th May, 2010 showed that he was absent yet pleaded guilty. He further pointed out that it was not indicated whether he pleaded guilty to the main charge or the alternative charge and was never warned of the consequences of pleading to the charges in law.

4. According to the appellant, by being referred for psychiatrist evaluation on 25th May, 2010, the court must have realised that there was a possibility that he was unable to comprehend the charges facing him yet no psychiatrist report was ever filed in court but the court proceeded to read over the charges to him.

5. The appellant also faulted the trial court for not informing him of his right to be represented by an advocate as enshrined under Article 50(2)(g) and (h) of the Constitution.

6. The appeal was not opposed by the Respondent.

Determination

7. The manner of recording plea of guilty was dealt with in **Ombena vs. Republic [1981] eKLR** where the Court of Appeal held that:

> **"In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —**
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> **'Held:**
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> > **(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**
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> > **(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
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> > **(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;**
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> > **(iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**
> >
> > **(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."**
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> **In this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said "Facts are as per charge sheets", and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the Adan case the court said, at p 447:**
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> **"The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."**
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> **We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand."**

8. It is therefore clear that the charge, the particulars and the facts must be read to the accused in his language or in a language he understands. This is my understanding of the decision in **K N vs. Republic [2016] eKLR**, where it was held that:

> **"The procedure for taking plea follows a well-beaten path. The leading case, Adan v R (1973) EA 445 emphasises that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in Adan (supra) in Hando S/o Akunaay v Rex (1951) 18 EACA 307 as follows;**
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> **'…before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent.'**
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> **Where an accused person who has been called upon to plead under section 207 of the Criminal Procedure Code in the subordinate court admits the charge, the proviso to subsection (2) requires the prosecution to outline the facts upon which the charge is founded. The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information, as the case may be, as well as the facts outlined where the accused pleads guilty. The facts therefore are as important part of a plea as the charge itself. The nature and elements of the offence in totality must be understood by the accused and the trial court must be satisfied about this before accepting them as true. We think the court should also explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence. In outlining the facts the prosecution's role is to present the evidence that could have been proven if the case had gone to trial. Therefore for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond any reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibits that they would have relied on at the trial."**

9. In this case the record of the proceedings does not indicate the presence of the appellant during the first plea taking date.

10. In this case, the offence with which the appellant was charged was a very serious offence carrying life imprisonment. Whether or not the

appellant was aware of this fact is not clear. Just like in **Elijah Njihia Wakianda vs. Republic [2016] eKLR**, the same court in **Kennedy Ndiwa Boit vs. Republic [2002] eKLR**, expressed the following sentiments:

> **"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… Mr. Mbeche who argued the appellant's appeal before us told us that the appellant's plea was unequivocal. If that was all the complaint we had to deal with, we doubt, on the face of the record, whether it would have succeeded. 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."**

11. A similar opinion was expressed by the Court of Appeal in **Paul Matungu vs. Republic [2006] eKLR** where it was held that:

> **"In offences carrying death sentence, it is essential for the court to warn the accused of the consequences of his pleading guilty namely that he may be sentenced to death if he pleads guilty…What we find difficult to appreciate however, is that after the appellant had stated in response to the charge that "That is true", what followed was that he was warned of the consequences without specifically stating in what way he was warned and what constituted the warning and making it clear in the record that that warning made it clear to the appellant that he faced death as the mandatory sentence for the offence he was pleading guilty to. Further there is nothing to show that after the warning was administered, the appellant was asked whether he understood the waring so that when he is recorded to have stated after the warning that "That is true", one is not certain whether those words were in response to the warning given or whether he was still insisting on his plea of guilty to the charge as the court recorded. In our view, after the warning, the court should have enquired whether the appellant understood the warning and if he said he understood the warning then the charge should have been put to him afresh and that all that should have been recorded."**

12. Whereas one may argue that the said warning only applies to capital offences, in **Bernard Injendi vs. Republic [2017] eKLR**, **Sitati, J** found that:

> **"Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the *Paul Matungu case* (above) the Court of Appeal quoted from Boit vs- Republic [2002] IKLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words "as nearly as possible in his own words". I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty."**

13. In this case since the charge which the appellant faced carried a life imprisonment, it is my view that in such serious offences where the sentences may either be long or indefinite, the Court must ensure not only that the accused understands the ingredients of the offence with which he is charged at all the stages of the plea taking but that he also understands the sentence he faces where he opts to plead guilty. That in my view is what is contemplated under Article 50(2) of the Constitution which provides for the right to a fair trial. Whereas the said Article prescribes certain ingredients of a fair trial, the Article employs the use of the word "includes" which means that what is prescribed thereunder is not exclusive but just inclusive since Article 19(3) of the Constitution provides that (3) The rights and fundamental freedoms in the Bill of Rights "*do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter*" while Article 20(3)(a) thereof enjoins the Court to "*develop the law to the extent that it does not give effect to a right or fundamental freedom*".

14. I therefore agree that the manner in which the proceedings were conducted violated the appellant's right to fair trial and that the plea of guilty was in those circumstances not unequivocal.

15. Apart from that it is clear from the proceedings that there seems to have been some doubt regarding the appellant's appreciation of the proceedings and the charges facing him and the court in its wisdom deemed it fit that he be examined by a psychiatrist. However, the court, without any indication as to whether such a report was filed and its nature proceeded to take the plea and convict the appellant on a plea of guilty.

16. Article 50(2)(h) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

17. In **Macharia vs. Republic HCCRA 12 of 2012 [2014] eKLR** which was considered and cited with approval by the court in the case of **Joseph Ndungu Kagiri vs. Republic [2016] eKLR** which it was stated as follows:

> ***"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result",***

persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

18. In this case, since the court seems to have had some doubt as regarding the appellant’s appreciation of the charges facing him, that factor in my view constituted a ground for possible substantial injustice resulting and at least the appellant ought to have been asked whether in those circumstances he required services of legal counsel.

19. In these circumstances it is my view that the possibility of a miscarriage of justice cannot be ruled out. A miscarriage of justice was discussed in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others** **AIR 2006 SC 1367** where the Supreme Court of India stated:-

> **“It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretense…The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.”**

20. The Supreme Court in **Republic vs. Karisa Chengo and 2 others (2017) eKLR** stated as follows:-

> **“[87] Article 50(2)(h) of the Constitution provides that “[e]very accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.” It does not define what “substantial injustice” means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that “substantial injustice” results to “persons accused of capital offences” with “loss of life” as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are “if substantial injustice would otherwise result…” While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.”**

21. In this case, the court ought to have interrogated the matter a little deeper and ought to have ensured that the report of the psychiatrist was availed before proceeding with the plea taking. In the premises, I cannot say that the appellant was subjected to a fair hearing as required under Article 50 of the Constitution.

22. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> **“...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 or 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...”**

23. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**: -

> **“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of** Ahmed Sumar vs. R (1964) EALR 483**, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:**
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> **‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person’**

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) **when this Court stated as follows:**

> **‘…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.’”**

24. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966)**

EA, 343 the view expressed was that: -

> **"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."**

25. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

> **"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."**

26. In this case the appellant was convicted on 28th June, 2010 and has served 9 years in prison.

27. It is my view that it would be unjust to subject him to a fresh hearing. In the premises, **Ms Mogoi**, learned counsel for the Respondent correctly, in my view, did not oppose the appeal. I allow this appeal, set aside his conviction and quash the sentence meted against him. I direct that he be set free forthwith unless otherwise lawfully held.

28. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 1st day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey