



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 52 OF 2017

BONIFACE MUTUA MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the conviction by Hon. A. W. Mwangi (S.R.M) in Kithimani

P.M's Court in S.O. Case No. 8 OF 2011 delivered on 4th March, 2011)

JUDGEMENT

1. The Appellant herein **BONIFACE MUTUA MUTUKU** had been charged with an offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act. The particulars were that on the 8th day of March, 2011 in Masinga District of Machakos county intentionally and unlawfully did an act which caused penetration with his genital organ namely penis into the genital organ namely vagina of RNM a girl aged 8 years. The Appellant also faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual offences Act with the particulars being that on the 8th day of March, 2011 in Masinga District within Machakos County committed an indecent act to RNM by touching her private parts namely vagina and breast.

2. The Appellant was convicted and sentenced to serve life imprisonment on his own plea of guilty for the offence of defilement contrary to Section 8(1) (2) of the Sexual offences Act. He was dissatisfied by the said conviction and sentence and lodged the present appeal in which he raised the following grounds of appeal:-

(a) That he was compelled to plead guilty to the offence which he did not know or understand.

(b) That he was threatened and forced at gun point by the arresting officer to plead guilty to the offence.

(c) That the trial magistrate erred in law and fact by not giving him time to express and defend himself against the allegations before being convicted.

(d) That the trial magistrate erred in law and fact by not taking into consideration that the Appellant was not conversant with the procedures as well as the consequences upon conviction.

3. Parties agreed to canvass the appeal by way of written submissions. It was submitted by the Appellant that he was not fully informed of the charge and facts as he was not fully conversant with the procedures. It was further submitted that there was undue pressure exerted upon the Appellant by the police to admit to the charges. The Appellant sought for a retrial of the matter and relied on the case of **Fatehali Manji =Vs= Republic [1996] EA 343**.

Learned Counsel for the Respondent opposed the appeal. It was submitted that the Appeal offends the provisions of Section 348 of the Criminal Procedure Code which bars appeals brought by persons who had pleaded guilty by subordinate courts except as to the extent and legality of the sentence. Reliance was placed in the case of **Olel =Vs= Republic [1989] KLR 444**. Learned counsel submitted that the plea was unequivocal and was recorded in line with the guidelines in the case of **Adan =Vs= Republic [1973] EA 446**. It was finally submitted that since the procedure of taking plea by the trial court was correctly followed then the appeal lacks merit and should be dismissed.

4. This is a first appeal and the duty of this court is to evaluate and analyze the evidence and come to its own independent conclusion. Indeed there was no trial in this matter since the Appellant pleaded guilty to the charges upon which the trial court proceeded to convict and sentence him. The Appellants grounds of appeal can safely be collapsed into one main ground namely that the procedure of taking the plea by the trial court was not properly conducted. This then shall form the main issue for determination in this appeal. I shall also address

myself on the issue of the extent and legality of the sentence imposed by the trial court.

5. I have carefully perused the lower court record and note that the charge was read to the appellant in Kiswahili language to which he admitted. Again the facts were read to him in the same language and he confirmed that those facts were correct as read to him whereupon the trial magistrate proceeded to convict him. The appellant was also given an opportunity to mitigate before being sentenced to life imprisonment. It is necessary for this court to establish whether the trial court strictly followed the procedure in section 207 of the criminal procedure code and the guidelines in the case of **Adan =Vs= Republic [1973] 446**.

The correct manner of recording a plea of guilty and the steps to be followed by the court was stated in the case of **Adan =Vs= Republic [1973] 446 Spry** where **V.P.** laid down the procedure in the following terms:-

“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 that 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 alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to the sentence. The statement of facts and the accused’s reply must of course be recorded.”

The Appellant according to his names on the charge sheet reveals that he hails from the Kamba tribe and that the local language is Kikamba. It seems the appellant opted to have the charge read to him in a language which he could speak and understand namely Kiswahili. This is the language that was used in the trial court and in which the Appellant duly engaged the court during the plea taking exercise. It is therefore clear that the appellant understood the charge and facts properly and responded to the same appropriately. He was given a chance to mitigate before sentence. Under those circumstances I am unable to fault the trial court regarding the manner the plea was taken. I find the plea was therefore an unequivocal one. The conviction of the appellant was therefore safe and might not be interfered with since the trial magistrate adhered to the provisions of Section 207 of the Criminal Procedure Code and the guidelines in **Adan =Vs= Republic [1973] EA 446**.

As the plea was unequivocal, the eventual conviction of the Appellant by the trial court ought not to be appealed against as dictated by the provisions of Section 348 of the Criminal Procedure Code which provides as follows:-

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

The provisions of Section 348 aforesaid were amplified in the case of **Olel =vs= Republic [1989] KLR 444** where the court held as follows:-

“Having considered the submissions by both learned counsels on the interpretation of Section 348..... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states.”

From the above provisions and the cited authority, it is clear that the Appellant’s chances to have another bite at the cherry are not available in view of the fact that the plea entered was an unequivocal one. He cannot challenge the conviction arrived at by the trial court. I find the appeal on conviction lacks merit. The Appellant’s luck might lie only on the aspect of the sentence. The Appellant’s prayer for a re-trial lacks merit and is hereby rejected.

6. As regards the aspect of sentence I note that the appellant was convicted and sentenced for the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act which provides for a penalty of life imprisonment where the victims’ age is below 11 years old. The trial court upon convicting the appellant sentenced him to life imprisonment. It is noted that the victim was examined by a doctor the following day and was established to be aged 8 years old. Indeed the Sexual Offence Act provides for minimum sentences and does not give a leeway or room to the trial court to interfere with the said sentences once a conviction is made. Indeed the general principles upon which the first appellate court can interfere with sentences by trial courts are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is established that in arriving at the sentence the trial court did not take into account a relevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see the case of **Wanjema =Vs= Republic [1971] EA 493**). Following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu and others =Vs= Republic [2017] eKLR** several persons serving long sentences have made a beeline to the courts seeking the sentences to be reviewed. Indeed the Muruatetu case (supra) had dealt with the issue of death penalty which has now led to several prisoners being released from prison after their sentences were reviewed upon resentencing. A majority of those had had their sentences convicted to life imprisonment from death sentence courtesy of the prerogative of mercy by His Excellency the President but who have also petitioned the courts to review the sentences. Those serving long sentences imposed by trial courts in relation to the Sexual offences Act have also not been left behind as they too have moved to the courts for review of their sentences following the decision of the Supreme Court in Muruatetu case (Supra). The argument fronted by those affected by the Sexual offences Act is that they have been discriminated against yet they are entitled to equal protection and benefit of the law as enshrined under Article 27 of the Constitution. The Supreme Court’s decision has had the effect of allowing courts whose hands had been tied upon convicting offenders due to the relevant statute to now have a free hand to mete out sentences that are appropriate to the circumstances of the case at hand. Both the High Court and Court of Appeal have entertained applications for review of sentences by several prisoners. In the case of **Jared Koita Injiri =Vs= Republic [2019] eKLR in Kisumu Court of Appeal Cr. Appeal No. 93 of 2014** – the Court of Appeal considered an appeal against life sentence under Section 8(2) of the Sexual offences as follows:-

“In this case the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(2) of the Sexual Offences Act and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis..... We would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court”.

It is clear from the above authority that the issue of mandatory and sole nature of sentences has been well settled by the Supreme Court in the case of **Francis Karioko Muruatetu & Another =vs= Republic [2017] eKLR** so much so that courts are now not hamstrung by the mandatory nature of sentences but are now able to consider the circumstances of each particular case and to impose the appropriate sentence even if it be life imprisonment as long as the relevant factors have been put into consideration. I am guided by the above authority. I note from the relevant facts that the Appellant had waylaid the complainant near a river and pushed her into a bush and defiled her. The victim was confirmed to be aged 8 years old at the time. The incident must of course have affected her physically and psychologically. The Appellant was nabbed at the scene of crime. He must atone for his sins. I find a sentence of thirty (30) years imprisonment would be commensurate with the offence.

7. In the result the appeal partly succeeds. The conviction is hereby affirmed. The sentence imposed is set aside and substituted with a sentence of thirty (30) years from the date of the sentence by the trial court namely 14/3/2011.

It is so ordered.

Dated and delivered at Machakos this 12th day of November, 2019.

D. K. Kemei

Judge