REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.28 OF 2013

(Being an appeal from the conviction and sentence in Sotik SRM SO No.37 of 2013 by Hon. J. Kasam)

RICHARD KIPNGETICH CHERUIYOT A*lias* FELIX.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. This appeal arises from Sotik Senior Resident Magistrates Sexual Offence Criminal Case No.37 of 2013 wherein the appellant was recorded as having pleaded guilty to the charge of rape contrary to section 7 of the Sexual Offences Act, was convicted and sentenced to serve 20 years imprisonment on 1st July 2013.

2. He has now come to this court on appeal through counsel Motanya & Company Advocates on several grounds as follows-

a) The Learned Magistrate erred in law and in fact in failing to read and explain to the appellant the charge and all the ingredients in the appellant's language or in a language he understood.

b) The Learned Magistrate erred in law and in fact in failing to record the appellant's own words and if they were an admission she should have recorded a plea of guilt.

c) The Learned Magistrate erred in law and in fact in failing to ascertain that the facts were well stated to the appellant and the appellant given to dispute or explain the facts or to add any relevant facts, if the appellant did not agree to the facts or raised any question of his guilt and his reply ought to have been recorded.

d) The Learned Magistrate erred in law and in fact in failing to satisfy herself that the plea was totally unequivocal and that the appellant understood the elements of the offence and its penalty.

e) The Learned Magistrate erred in law and in fact in failing to satisfy herself that the plea was totally unequivocal and yet she went ahead to convict the appellant without realizing that he pleaded guilty to a serious offence without being accorded a chance to be represented by an advocate as envisaged under Article 50 (2) (g) & (h) of the Constitution.

f) The Learned Magistrate erred in law and in fact in convicting the appellant without realizing that the charge sheet was fatally defective for it did not disclose the penalty on the offence charged and thus the appellant (then accused) was greatly prejudiced.

g) The Learned Magistrate erred in law and in fact by convicting the appellant in contravention of the provisions of Section 169 (2) of the Criminal Procedure Code by failing to specify the offence upon which the appellant (then accused) was convicted.

h) The Learned Magistrate erred in that she imposed a sentence which is manifestly excessive considering all the circumstances of the case.

i) The sentence awarded was harsh and excessive in all the circumstances of the appellant and of the case before the court.

3. At the hearing of the appeal, Mr. Motanya for the appellant relied on the petition of appeal especially grounds 4, 5 and 7. Counsel Stated that the plea was not unequivocal taking into account that the appellant was unrepresented and did not understand the elements of the offence and the resultant penalty. Counsel argued that this being a serious offence, the trial court should have complied with the provisions of Article 50 (2) (g) and (h) of the Constitution with regard to legal representation.

4. Counsel argued further that the magistrate did not specify the offence for which the appellant pleaded guilty in convicting contrary to section 169 (7) of the Criminal Procedure Code (Cap.75). Counsel also submitted that it was not clear from the record what language was used in court and what language the accused used in the proceedings. Counsel concluded by stating that the Constitutional rights of the appellant were violated and urged the court to quash the conviction, or order a retrial.

5. In response, Mr. Ayodo for the Director of Public Prosecutions submitted that the appellant had all the time and opportunity to appoint an advocate of his choice, and he did not do so. Counsel further submitted that the offence and all elements were specified in the charge sheet. Counsel concluded by stating that the appellant understood the charge and properly pleaded to it and was convicted, and thus the appeal should be dismissed.

6. I have considered the appeal and submissions both for the appellant and the State. I have perused the record of the proceedings.

7. The appellant was charged with rape contrary to section 7 of the Sexual Offences Act No.3 of 2006, and in the alternative with indecent act contrary to section 11 (a) of the same Act. He was recorded as having pleaded guilty to the main charge of rape and convicted and sentenced to twenty (20) years imprisonment. He has now come to this court on appeal on both conviction and sentence, claiming that the plea was not unequivocal.

8. With regard to legal representation, there is no legal or constitutional requirement that the State provides legal representation to all accused persons. The Constitution however, provides that an accused person has a right to be represented by an advocate of his choice. It was therefore for the appellant to inform the court if he wanted to be represented by counsel. He did not. Therefore, his rights to legal representation were not violated.

9. With regard to the language used in court, it was recorded very clearly that the language of interpretation was Kiswahili. The record however, does not show that the charge was read to him in Kiswahili. That notwithstanding, there is no record that the accused complained that Kiswahili was not used or that he did not understand Kiswahili. He was recorded as saying it was true to the charge, and that facts were true. In mitigation, he said – "I plead for leniency. The complainant was my girlfriend." In those circumstances, it cannot be said that he did not understand the language used. Even on appeal, he does not say that he does not understand Kiswahili language. That complaint is dismissed.

10. With regard to the court not informing the appellant about the seriousness of the offence, before recording a plea of guilty and convicting him, the record does not show such a warning. There is no rule of law requiring that a trial court must warn an accused person who pleads guilty to a serious offence. However, the Court of Appeal has held that such a warning should be given, which is a rule of practice meant to serve the broader interests of justice. I will revert to this point later.

11. On the issue of the trial court not specifying the section of law and offence under which the appellant was convicted, in my view in the circumstances of this case where a plea of guilty was recorded for rape from the beginning, one cannot say that the appellant was convicted of any other offence. If there was a contravention of section 169 of the Criminal Procedure Code (Cap.75), in my view that is a minor error curable under section 382 of the Criminal Procedure Code.

12. Coming back to the issue of failure of the court in not warning the appellant on the seriousness of the offence and sentence, before convicting him, I note that this matter went on appeal to a Judge, and then to the Court of Appeal at Nakuru and was remitted back to this court for hearing because the Judge who heard the appeal was not a High Court Judge. The Court of Appeal did not deal with the substantive appeal. Counsel for the appellant has not referred to any decided case authority on the requirement for warning on the severity of the sentence before convicting on a plea of guilty to a serious offence. He has however asked for a retrial. I cannot order a retrial at this stage, as the matter has taken very long from 2012 which is not more than seven (7) years now to be brought before me for appeal re-hearing. It would in my view be unjust to order a retrial.

13. I note that the trial court sentenced the appellant to serve 20 years imprisonment while the minimum sentence under section 7 of the Sexual Offences Act is 10 years imprisonment, which provides as follows-

> *"7. A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disability is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."*

14. In my view the failure of the trial court to warn the appellant in the present case could only affect the sentence. It was not fatal for the conviction.

15. Since I see no specific aggravating factors in the present case, I am of the opinion that the sentence imposed was excessive. I will set aside the sentence and substitute is with the minimum sentence.

16. Consequently, I dismiss the appeal on conviction. With regard to sentence, I set aside the sentence of 20 years and instead order that the appellant will serve 10 years imprisonment from the date he was sentenced by the trial court. Those are the orders of this court.

Dated and delivered at Kericho this 14th day of November 2019.

George Dulu

JUDGE