



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NUMBER 208 OF 2017

(From original conviction and sentence in Kwale Chief Magistrate's Court Criminal Case No. 109 of 2017, **P. K. Mutai, RM** on 6th November, 2017)

SULEIMAN MUSA KIMBIRIWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant herein, **Suleiman Musa Kimbiriwa**, was charged in the Kwale Chief Magistrate's Court Criminal Case No. 109 of 2017 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**. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the **Sexual Offences Act, No. 3 of 2006**.

2. On 6th November, 2017, the appellant was arraigned in court and the charge was read out to him and he pleaded guilty to the same. As a result a plea of guilty was entered and after the facts were read out which he similarly confirmed to be correct, he was sentenced to life imprisonment.

3. The appellant, through his learned counsel, **Mr Labwani**, has now appealed challenging the said decision.

4. It was submitted that the plea of guilty was not unequivocal. According to the learned counsel, the Learned Trial Magistrate did not record the plea in the manner laid down in **Aden vs. Republic [1973] EA 446 and Kariuki vs. Republic [1984] KR 809**.

5. It was further submitted that where charges carry long sentences and especially where the accused is not represented by counsel, there ought to be clear warning of the consequences of pleading guilty. In this respect the learned counsel relied on **Ngome vs. R Criminal Case No. 69 of 2014, Kennedy Ndiwa Boit vs. Republic Criminal Appeal No. 96 of 2002, Bernard Injendi vs. Republic [2017] eKLR** and **Paul Matungu vs. Republic [2006] eKLR**.

6. Based on the contents of the P3 form, it was submitted that what was indicated therein was an attempted defilement and not defilement with which the appellant was charged. The evidence of the mother, it was submitted did not also disclose the commission of the offence of defilement. Similarly the P3 form showed that what was proved was attempted defilement as opposed to defilement as there was no evidence of penetration as proved by the fact that though there were swellings and reddening of the vaginal area marked with tenderness, the hymen was intact.

7. The Respondent, through the learned state counsel, **Ms Ogweno**, conceded the appeal based on the failure by the trial court to warn the appellant of the consequences of pleading guilty but submitted that instead of acquitting the appellant the court ought to order a retrial. Even though the State conceded the appeal, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565**, the court said:

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence”.

8. I have considered the material placed before me. The manner of recording of a plea is provided for in section 207(1) and (2) of the **Criminal Procedure Code** provides as hereunder:

(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.

9. 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 —

‘Held:

(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;

(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 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.”

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:

“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.”

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.”

10. It is therefore clear that conviction is necessary before a sentence is passed. In this case, nowhere is it indicated that the appellant was convicted before the sentence was passed. Further, from the decision in **Ombena vs. Republic [1981] eKLR** it is essential for the statement of facts to precede the conviction.

11. In this case it is clear that the manner in which the plea was recorded did not strictly comply with section 207(1) and (2) of the *Criminal Procedure Code*.

12. Apart from that in **K N vs. Republic [2016] eKLR**, 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;

‘...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.’

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."

13. Similarly in Kennedy Ndiwa Boit vs. Republic [2002] eKLR, the Court of Appeal 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... 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."

14. 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 warning 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."

15. 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."

16. In this case the charge which the appellant faced carried a mandatory sentence of life. I agree that in such serious offences where the sentences are either long or indefinite, the Court must ensure not only that the accused understand the ingredients of the offence with which he is charged 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"*.

17. I also agree that the contents of the P3 form seem not to have supported the offence of defilement.

18. 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. This appeal, in my view, was therefore properly conceded by **Ms Ogweno**.

19. I was however urged to order for 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;....."

20. 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:

‘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.’”

21. 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.”

22. 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.”

23. In determining the justice of the case, it is my view that both the interests of the accused and the complainant must be taken into account. In this case the complainant was alleged to have been 3 years old. As was appreciated by Madan, J (as he then was) in Yasmin vs. Mohamed [1973] EA 370:

“The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved.”

24. See also Omari vs. Ali [1987] KLR 616.

25. In my view the circumstances of this case cry loudly for a retrial.

26. In the premises, I allow the appeal, set aside the appellant’s conviction, quash the sentence and direct that the matter be heard de novo before any other magistrate other than Hon. P. K. Mutai.

27. It is so ordered.

Judgement read, signed and delivered in open court at Mombasa this 7th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Ogweno for the Respondent

