REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO.35 OF 2014

DAVID SIMIYU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(from original conviction and sentence in SPM Court Butali (Hon T.K. Kwambai) in Criminal Case No. 139 of 2014 dated 11th March, 2014)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to ***section 8(1)(4)*** of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on the 5th March 2014 in Kakamega North District within Kakamega County he unlawfully and intentionally caused his penis to penetrate the vagina of MTK, a child aged 17 years. The appellant pleaded guilty to the charge and was sentenced to serve 15 years imprisonment. He was aggrieved by the outcome and has now appealed against both conviction and sentence.

2. The grounds of appeal as per the petition of appeal are that:-

(1) That the learned trial magistrate grossly erred in convicting the appellant when the plea was not un-equivocal.

(2) The learned trial magistrate conducted proceedings in a language that was not understood by the appellant. .

(3) The learned trial magistrate grossly erred in failing to warn the appellant on the consequence of pleading guilty to the offence.

(4) The learned trial magistrate's sentence was excessive in the circumstances.

3. The lower court's record indicates that the appellant appeared before court on the 13th March, 2014. That the charge was read out to the appellant three times in Kiswahili language and replied in Kiswahili:

"***Ni Ukweli.***"

That the facts were then read out to the accused to which he replied that they were correct. The trial magistrate then recorded:-

"***plea of guilty entered accused is hereby convicted on his own plea***"

The prosecution then thereupon said that the appellant could be treated as a first offender. The appellant then stated the following in mitigation:

"***I was found with the said mistake and the complainant is my wife. I am 19 years***."

The trial magistrate then imposed the minimum sentence of 15 years that is provided for under the ***section 8(4)*** of the Sexual Offences Act No.3 of 2006.

4. The appeal was filed by Mr Kiveu advocate on behalf of the appellant. Later the appellant withdrew the services of the said advocate and conducted the appeal on his own. He filed submissions. He argues in the submissions that the trial magistrate did not forewarn him of the consequences of pleading guilty thereby making him to admit to an offence that he had not committed. That it is the police who had convinced him to admit to the charges and that he would be released. That he was confused at the time of taking plea which made him to

admit to things which were false. That he did not know the court process and that he ought to have been provided with an advocate.

5. The State opposed the appeal. The State Counsel submitted that the charge was read to the appellant in kiswahili language that the appellant understood. That the charge was read over three times. That the appellant understood the charge. That the facts were read out to the appellant in Kiswahili language and that he understood them. He admitted the facts. That the plea was therefore unequivocal. That there is nothing to show that the appellant was coerced to admit the charge. The State asked the court to dismiss the appeal.

6. The procedure for taking pleas in subordinate courts is provided for under ***section 207*** of the Criminal Procedure Code and was restated by the Court of Appeal in the case of ***Adan vs Republic*** (1973) EA 446 where the court stated the following:-

> "***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, hen 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 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 sentence. The statement of facts and the accused's reply must, of course, be recorded***."

The question then is whether this procedure was complied with procedure.

7. I will consider the 4 grounds of appeal as raised by the appellant.

First is the language used in the proceedings. The lower court's record indicates that the proceedings were conducted in Kiswahili language and that the charges were read out to the appellant in the said language. It is recorded that the appellant replied to the charges in Kiswahili language and said that the charged were true. In his written submissions the appellant did not raise any issue about the language used in the case. He addressed this court in Kiswahili language. The appellant therefore understands Kiswahili language. The argument raised by his then counsel at the time of filing the appeal that the proceedings were conducted in a language that he did not understand is not true. There is nothing to show that it is the police who coerced the appellant to admit the charge.

8. Second is the issue whether the plea was unequivocal. As set out in ***section 207*** of the Criminal Procedure code and as stayed in ***Adan vs ~ Republic***, an accused is required to be given an opportunity to dispute or explain the facts or to add any relevant facts. When an accused asserts any facts that might raise any question as to his guilt the court is under an obligation to record a change of plea to "***not guilty***". The accused can even change plea during mitigation. In ***John Muendo vs Republic, Nairobi Cr. Appeal No.365 of 2011*** (2013) eKLR, the Court of Appeal stated that:-

> "***We want to add here that if the accused wishes to change plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say, an accused person can change plea at any time before sentence.***"

9. In this case the appellant stated in mitigation that the complainant was his wife.

It is appropriate at this stage to re-state the facts of the case so as to understand the circumstances under which the appellant stated that the complainant was his wife. The facts were that the complainant was a 17 year old Form 2 student at [Particulars Withheld] Secondary school. That on the 1st March 2014 she had accompanied other students to [Particulars Withheld] Secondary School to watch a football match between her school and [Particulars Withheld] Boys Secondary school. That the match ended at 6 pm. That after the match, the appellant who was working at a local shop approached the complainant and lured her to his house. He seduced her and promised to marry her. She spent the following 4 nights and days at his house. They were having sexual intercourse every night. On the 5th March, 2014 her father found her. They were taken to the police station. The complainant was issued with a P3 form. The accused was charged. During plea the prosecution produced the P3 form, a letter from the complainant's School indicating that she was a student there, a birth certificate, indicating that she was born on 7th August, 1997. It is upon the appellant admitting the facts that he stated in mitigation that the complainant was his wife.

10. The court record indicates that the charge was read out to the appellant three times. The record however does not indicate what the appellant replied on each occasion the charge was read out to him. Neither does the record indicate why the charge had to be read to the appellant three times. The question now is whether the charge was read out three times because the trial magistrate wanted to satisfy himself that the appellant understood the charge or was it because the appellant was confused. The appellant says that he was confused. I would tend to agree with the appellant that he was confused during plea taking when it is taken into account what he stated in mitigation that the complainant was his wife. This meant that he had not understood the charge properly. This is an indication that the plea was not unequivocal.

11. It is noteworthy that the victim had run away from school to live with the appellant. Under ***section 8(5)(a)*** and ***(b)*** of the sexual Offences Act, an accused person can raise a defence that he believed that the child in question was above the age of 18 years. Once the appellant in the case stated that the victim was his wife, the court was bound to inquire as to the reason why he was saying so. The appellant was not represented by an advocate. In cases where an accused is unrepresented, it is the duty of the trial court to make all the relevant inquiries so as to be satisfied that the plea is unequivocal. In my view the assertion by the appellant that the victim was his wife meant that he was not admitting the offence and that he had a defence to the charge. The plea was thereby equivocal. The court should therefore have recorded a plea of not guilty.

12. Thirdly is the question whether the trial magistrate was under an obligation to warn the appellant of the consequences of pleading guilty to the charge and whether he should have been provided with the services of an advocate as he did not understand the court process.

Article 50(2) of the Constitution of Kenya 2010 provides that every accused person has the right to a fair trial which includes the right:-

> .....
>
> (h) 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.

There is no legislation on the nature of cases that accused persons are entitled to representation by an advocate at state expense. In the absence of this it is my considered view that every case should be considered on its own merits. It is an accused person who should make an application to the court requesting to be assigned an advocate at the expense of the State. In this case the appellant did not make such a request. The argument that an advocate should have been assigned to him automatically does not thereby hold any water.

13. There is no requirement in law for a court to warn an accused person of the consequences of pleading guilty to a charge. The only requirement is for courts to take extra care when taking plea to ensure that the plea is unequivocal (especially in cases where an accused person is unrepresented.) In ***David Eyanae & 2 others vs Republic*** (2007) eKLR, the Court of Appeal emphasized this point when it held that:-

> ***"As regards the manner of taking plea, section 207 of the Criminal Procedure Code is the guiding principle law in plea taking in criminal cases and in as far as the trial court strictly complied with the same, that court cannot be faulted merely because the nature or the punishment resulting from such plea is serious."***

The trial magistrate did not break any law in failing to warn the appellant of the consequences of pleading guilty to an offence of defilement. He was only required to ensure that the plea of guilty was unequivocal.

14. The last issue is whether the sentence imposed by the trial court was excessive. The sentence provided by ***section 8(4)*** of the Sexual Offences Act for a person who commits an offence of defilement with a child of between the age of 16 and 18 years is imprisonment to a term of not less than fifteen years. The birth certificate produced during plea indicted that the victim was at the time the offence committed aged sixteen and a half years. The charge sheet however stated that the victim was aged 17 years. The operative words in the sub-section are "***between the age of 16 and 18 years***." It was established that the victim was within that age bracket. The appellant was given the minimum sentence imposed by the sub-section. Where an Act of Parliament provides for a minimum sentence the court has no option other than to impose the minimum sentence – see ***Rotich vs Republic*** (1983) KLR 541.

15. In view of what I have stated above, I find that the plea in this case was not unequivocal. The magistrate should have entered a plea of not guilty. The appeal thereby succeeds. The plea taken by the trial magistrate on the 11th March, 2014 together with the sentence imposed thereon are hereby quashed.

16. Having found that the plea was not unequivocal the question is whether I should order a retrial in the case.

In ***Muiruri vs Republic*** (2003) KLR 553 the Court of Appeal stated that a retrial will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. The court held as follows:-

> (1) Generally whether a retrial should be ordered or not must depend on the circumstances of the case.
>
> (2) It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

17. In ***Opicho vs Republic*** (2009) KLR 369, the Court of Appeal sitting in Nakuru stated that:-

> ***"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; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it."***

18. In this case the appellant has served over three years of the sentence imposed on him. The victim in the case is now nearly 20 years of age. She had ran away from school to marry the appellant. I do not think that the interests of justice in such circumstances require a re-trial. I do order that the appellant be released from prison forthwith unless he is being lawfully held for any other lawful cause.

Delivered, dated and signed at Kakamega this 20th day of July, 2017.

J. NJAGI

JUDGE

In the presence of:

Appellant acting in person

Juma for respondent/State

Court assistant Paul

Appellant present