REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 47 OF 2016

J K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. G. Sogomo. Senior Resident Magistrate in Tigania Principal Magistrate's Court Criminal Case No. 5 of 2016 delivered on 23/08/2016)

JUDGMENT

1. This is an appeal against the conviction and sentence resulting from a plea of guilty which was entered upon admission of the offence by the appellant.

2. On 22/08/2016 the appellant was arraigned before the Senior Resident Magistrate in Tigania facing the charge of incest contrary to **Section 20(1)** of **the Sexual Offences Act,** No. 3 of 2006**.** The particulars of the charge were that *on the 15th day of August 2016 at about 4:00pm in Tigania West Dustrict within Meru County, intentionally touched the breasts of K M with his hands who was to his knowledge his mother*.

3. The record indicates that the charge and its particulars were read to the appellant in English and interpreted to Kimeru which language the appellant indicated to understand. When called to respond the appellant admitted the charge. The facts of the case followed immediately which briefly disclosed that on the said 15/08/2016 at the said *[particulars withheld]* village the appellant while drunk and in a vulgar language insulted her mother, the complainant, by insinuating that he wanted to have sex with her. The incident was witnessed by the complainant's granddaughter one **L G** where the appellant went ahead and fondled the complainant's breasts with his hands. The appellant then went away and returned with a machete. The appellant was disarmed by the complainant who then rushed to Miathene Police Station and reported the matter. The appellant was arrested and charged.

4. The appellant admitted the facts.

5. The court then considered the facts and the law and on being satisfied that an offence had been committed convicted the appellant own his own plea of guilty. On taking mitigations, the appellant was sentenced to 10 years imprisonment with hard labour.

6. It is on that background that the appellant being dissatisfied with both the conviction and sentence lodged a Petition of Appeal on 30/08/2016. The appellant contended that he did not understand the proceedings since the interpreter used Kimeru language with a different dialect from the appellant's and that he effectively understood that he was being charged with threatening to harm the complainant. He further contended that the plea was not equivocal. He also contended that the sentence was so severe in the circumstances.

7. The appeal was heard by way of oral submissions where the appellant appeared in person and **Learned State Counsel Mr. Odhiambo** appeared for the State. At the hearing of the appeal the appellant mainly submitted for a retrial of the case given that he was drunk during the incident.

8. The appeal was opposed. It was argued that the plea was equivocal as all the requirements in the case of **Republic -vs- Adan** were complied with and under **Section 348** of the **Criminal Procedure Code** an appeal could only lie on sentence. It was however conceded that the aspect of hard labour in the sentence was not provided for under the Sexual Offences Act and this Court was asked to substitute the sentence to only 10 years imprisonment. Further, it was submitted that the defence of intoxication was not available to the appellant since he acted consciously and he even went away after committing the offence and returned with a panga ready to cut the complainant.

9. As this is the Appellants' first appeal the role of this court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. In

this case however since the matter did not proceed on for trial, the court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

10. Due to the centrality of the issue of plea-taking, I will first revisit the law on that subject. **Section 207** of the Criminal Procedure Code states as follows:

> ***'207 (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 plea agreement;***
>
> ***(2) If the accused person admits the truth of the charge otherwise than by 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.'***

13. The above provisions have previously been subjected to Court's interpretation. The procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of **Adan -vs- R (1973)EA 445** and in the Court of Appeal case of **Kariuki –vs- R (1954) KLR 809** as follows:-

> ***(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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.***
>
> ***(iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.***
>
> ***(v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.***

14. Further in the case of **Kariuki -vs- R (supra)** the Court went on and stated that:-

> ***"The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."***

And in the case of **Atito -vs- R (1975) EA 278** the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

15. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that: -

> ***"(2) Every accused person has the right to a fair trial, which includes the right-***
>
> ***(a)……..***
>
> ***(b) to be informed of the charge, with sufficient detail to answer it.***

11. I have perused the record before the subordinate court. The plea was taken in English and interpreted to Kimeru language. The appellant did not raise any objection to the language used and instead proceeded to respond to the charge and its particulars. That was the case when the facts were presented to him. I therefore find the contention that the Kimeru language was of a different dialect and that he did not understand what transpired in court to be unsustainable and is hereby dismissed as afterthought.

12. I also wish to state that in cases where an accused person pleads guilty to an offence and facts are taken, the court is duty bound to scrutinize the facts and to ensure that the facts disclose the ingredients of the offence in issue. That is the only time when a court, in the further guidance of the law aforesaid, can proceed to convict the accused person. In this case the facts were clear that the appellant was drunk when the alleged offence was committed. Under **Section 13** of the **Penal Code**, Chapter 63 of the Laws of Kenya, **intoxication** is a complete defence in law. Having been clearly stated that the appellant was drunk and he even went further and attempted to attack the complainant with a panga, the court ought to have further ascertained from the appellant if he had any explanation to offer especially on the aspect of intoxication. Further, the court ought to have declined to enter a conviction based on the facts then disclosed and would have instead entered a plea of not guilty so as to accord an opportunity to the appellant to see if he could benefit from the defence. I say so further to the fact that the appellant raised the very issue that he was drunk and did not know what happened both before the trial court and on appeal. I therefore find that the plea of guilty was not equivocal.

13. I have also confirmed from the record that the learned magistrate did not enter a guilty plea when the appellant admitted the charge and the particulars but instead jointly entered a plea of guilty and a conviction when the facts were admitted. What the court failed to do was to enter a plea of guilty upon the admission of the charge and the particulars but it rightly convicted the appellant upon admitting the facts. However, by invoking **Section 382** of the Criminal Procedure Code and without losing sight of **Article 50(2)(b)** of the Constitution, I find that the arnomaly is legally curable.

14. The last issue for consideration is the aspect of the sentence. **Section 20(1)** of the **Sexual Offences Act** provides that anyone convicted of the offence of incest is liable to a minimum sentence of 10 years imprisonment subject to the proviso thereto. The appellant was sentenced to a sentence of 10 years with hard labour. There is no provision for hard labour under this law. The sentence meted on the appellant was hence unlawful and cannot be allowed to stand.

18. The upshot is that the appeal is allowed, the conviction quashed and the sentence set-aside.

19. Having so found, I must consider if the appellant is to be retried or released. The principles upon which this Court can order a retrial are well settled. 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 where the conviction is set aside because of insufficient 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 v. 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. Applying these principles to this appeal and considering the gravity of the offence, the facts as recorded, the possibility of the availability of the witnesses most of whom are from the appellant's homestead and the fact that the appellant was convicted barely one year ago and since that eliminates the risks of faded memory, I am of the considered finding that this is a case for retrial.

22. Consequently, the appellants shall be released into police custody and be produced before any court competent to try him within 5 days of this judgment.

Orders accordingly.

DELIVERED, DATED and SIGNED at MERU this 21st day of July 2017.

A. C. MRIMA

JUDGE