REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 129 OF 2014

E M M……..……...……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal arising out of the conviction and sentence of Hon. A.W. Mwangi. SRM delivered on 26th April 2011 in Sexual Offences Act case No. 16 of 2011 in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was convicted and sentenced to serve life imprisonment for the offence of incest , contrary to section 20(1) of the Sexual Offences Act. The particulars of the offence were that on 9th April 2011 at [particulars withheld] in Yatta District within Machakos County, the Appellant unlawfully and intentionally committed an act which caused penetration with his genital organs namely penis into her genital organ namely vagina of J N, a female person who was to his knowledge his niece a girl aged 9 years.

He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 9th April 2011 at [particulars withheld], the Appellant unlawfully and intentionally committed an indecent act by touching the private parts of J N namely vagina buttocks a child aged 9 years.

The Appellant was arraigned in court on 26th April 2011 when he pleaded guilty to the charges. The trial court then convicted the Appellant of the offence on his own plea of guilty, and sentenced him to serve life imprisonment.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition and supplementary Grounds of Appeal and submissions that he availed to the Court. In summary the Appellant asked the Court to review his sentence and grant him a non-custodial sentence, and alleges that the trial magistrate made an error in both law and facts by accepting and acting on his plea of guilty without making any inquiry as to why he was pleading guilty; without bearing in mind that he was unlawfully detained in police custody for 4 days without being brought to Court; and without ascertaining his mental status.

The Appellant availed written submissions to the Court, wherein he urged that his detention in police custody for more than 4 days after his arrest was contrary to Article 49(1) (f) and (g) of the Constitution.

He submitted that the trial magistrate ought to have ordered for his mental examination report and exercised caution prior to accepting his plea of guilt. He relied on the decisions **Adan vs Republic, (1973) EA 45, Olel vs R, (1989) KLR 444** and **Boit vs R, (2002) 1KLR 815**.

Mr. Cliff Machogu, the learned prosecution counsel, filed submissions dated 26th February 2016 wherein he opposed the appeal stating that the Appellant had been convicted and sentenced on his own plea of guilt. It was pointed out that section 348 of the Criminal Procedure Code states that no appeal shall be allowed in the case of an accused person who pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence. Further, that section 20 of the Sexual Offences Act in this regard provides for a mandatory sentence of life imprisonment.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the arguments by the Appellant and Prosecution, and I am alive to the provisions in section 348 of the Criminal Procedure Code that no appeal shall be allowed in the case of an accused person who pleaded guilty, and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence. I therefore find that the issues for determination by the court are firstly, whether the plea of guilty by the Appellant was unequivocal; secondly, whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute; and lastly, whether the said sentence is amenable to reduction and /or variation.

The procedure to be applied in taking a plea of guilty were well enunciated in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held 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 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 facts relevant to sentence together with the accused's reply should be recorded."***

The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code which provides as follows:

> **(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.**

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

Coming to the present appeal, the record of the trial Court shows that after the charge was explained to the Appellant he replied that "it is true" to the main count and the proceedings continued as follows:

> **" On 9.4.2014 at** [particulars withheld]**, the complainant, a girl aged 9 years was left at home by her mother. Accused who is the complainant's uncle asked the latter to fetch him water which she did. Accused then grabbed her, removed her underpant and defiled her severally and then left. In the evening the complainant told her mother what had transpired. It was late and the following day the complainant was taken to Kikesa dispensary for treatment. The matter was reported to Yatta police station and complainant issued with a P.3 form which was filled and it was confirmed the child was defiled. Accused was at large and was arrested on 22nd April 2011 and charged with this offence. I produce the P3 form in respect of the complainant J N who is the accused's niece – exhibit"**

The applicable law requires that the prosecution outlines the facts upon which the charge is founded after a plea of guilty is entered. I note in this regard that the prosecution in the facts that were given in the trial Court stated that the Appellant "defiled her severally" in relation to the complainant. Defilement and to defile is the offence as stated in law and in the charge sheet, and is a technical and legal term.

Consequently, the facts giving rise to that offence and showing that the essential ingredients of that offence, which is penetration, took place, needed to have been given by the prosecution, and explained to the Appellant in a language and manner that he understood, for him to have an opportunity to admit or challenge the same. I therefore find that the Appellant's plea of guilty was not unequivocal to this extent, and the sentence imposed upon him was also unlawful in the circumstances.

I note that the Appellant in his submissions seeks a retrial , and I accordingly allow the Appellant's appeal and quash his conviction for the offence of offence of incest , contrary to section 20(1) of the Sexual Offences Act. I also set aside the sentence imposed upon him for the said conviction. I direct that the Appellant shall be retried on the same charge before a Magistrate of competent jurisdiction other than Hon. A. W. Mwangi and for that purpose he shall remain in custody and shall be taken before a Senior Resident Magistrate at the Kithimani Principal Magistrate's Courts, on **10th November 2016** to plead to fresh charges.

It is so ordered.

DATED AT MACHAKOS THIS 1ST DAY OF NOVEMBER 2016.

P. NYAMWEYA

JUDGE