JMM v Republic (Criminal Appeal 49 of 2021)
[2023] KECA 532 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 532 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 49 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

MAY 12, 2023

BETWEEN

JMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Machakos (Kemei, J.) dated 3rd November, 2017 in HC. CR.A. No. 24 of 2015)

JUDGMENT

1. The appellant, JMM was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006 it being alleged in the particulars of the charge that on 26th January, 2014 at the place named in the charge sheet, being a male person, he caused his penis to penetrate the vagina of DKM, a child aged 12 years, who he knew to be his sister. There was an alternative charge of indecent act with a child contrary to Section 11(1) of the said Act where it was alleged that on the same day and place he unlawfully and intentionally touched the vagina of the said girl using his penis. He was presented before the Chief Magistrate's Court, Machakos, on 29th January, 2014 and the record shows that proceedings were conducted in English language and translated by a court clerk to Kiswahili language. The record shows:

> " The substance of the charge and every element of it read and explained to accused and understood. Accused in his own words replies in Kiswahili: - Guilty."

2. The court prosecutor then gave facts of the case to the effect that on 26th January, 2014 the appellant lured his 12-year-old sister to his house on pretext that they were to have a meal; he locked the door, took hold of her and laid her on a bed; he removed her clothes while covering her mouth with his hand and that he then used his penis to penetrate her vagina. He released her after the act and that she

immediately reported the matter to her grandmother and uncle who rushed her to Wamunyu Police Station and to hospital. A P3 form was produced into the record as was the girl's baptism card to prove her age. Asked what he had to say to those facts as narrated by the court prosecutor the appellant answered:

> " Facts are correct."

3. The Magistrate convicted the appellant on his own plea, and in respect of sentencing, the court prosecutor stated that although the appellant was a first offender a deterrent sentence was called for in the circumstances of the case.

4. In mitigation the appellant told the trial court that he was 32 years old, was married; he was a barber. He prayed for leniency. The Magistrate considered all those factors and sentenced the appellant to serve 25 years imprisonment.

5. The appellant filed a first appeal to the High Court of Kenya at Machakos. The amended grounds of appeal stated that the charge before the trial court was bad in law for duplicity; that he was not sufficiently warned of the severity of the charge to which he was pleading guilty and that the trial Magistrate had erred on facts and law by exceeding the statutory minimum sentence thus making the sentence meted out excessive and unfair. The appeal was heard by Kemei, J. who in a Judgment delivered on 3rd November, 2017 found no merit in it and dismissed it both on conviction and sentence.

6. The appellant is now before us in this second appeal where in homemade "Memorandum Grounds of Appeal" he says that the High Court erred in law in failing to observe that the evidence offered by the prosecution did not establish the offence stated in the charge sheet; that the Judge on first appeal erred in law in upholding the conviction of the appellant on unreliable evidence of the relationship between him and the complainant "... and then shifting the benefit of doubt created from the appellant which is against the law"; that the Judge erred in relying on contradictory evidence; that the appellant's rights to a fair trial were violated; that the Judge erred by failing to consider the appellant's defence. The appellant prays that the appeal be allowed.

7. When the appeal came up for hearing before us on 6th February, 2023 on a virtual platform the appellant appeared in person from Manyani Prison while learned counsel Mr. O.J. Omondi appeared for office of Director of Public Prosecutions. Both sides had filed written submissions which we have perused and given due regard to.

8. This is a second appeal and our mandate in such an appeal is limited by Section 361(1) (a) *Criminal Procedure Code* to consider issues of law only but not matters of fact which have been considered by the trial court and re- evaluated by the High Court on first appeal – See the case of *John Kariuki Gikonyo vs. Republic* [2019] eKLR where this Court stated of that mandate:

> "(15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the Criminal Procedure Code:
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> "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* (1984) KLR 213"."

As we have seen that the appellant pleaded guilty before the trial Magistrate and the only issue of law we can see in this appeal is a consideration of whether the plea taken was unequivocal or not.

7. When the charge was read out to the appellant in english and translated to kiswahili language he pleaded guilty. Facts of the case were read out to him and it is recorded that he stated that those facts were correct. He was then convicted. The Judge on first appeal considered the way the plea was taken by the trial Magistrate and applied the principles set out in *Adan vs. Republic* [1973] EA 445 how a plea should be taken. It was held in that case:

> " When a person is charged, the charge and particulars should be read out to him, so far as possible in his own language, but if that is not possible, 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 guilt. 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 statements or 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."

8. Section 348 Criminal Procedure Code disallows an appeal where an accused person has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent and legality of sentence. It was held by this Court in the case of *Alexander Lukoye Malika vs. Republic* [2015] eKLR as follows:

> " A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

9. In *Obedi Kilonzo Kerero vs. Republic* [2015] eKLR this Court stated on the same issue:

> " The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence.
>
> The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well as the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal."

10. We have in this Judgment reproduced the record on how the plea was taken. The charge was read out in english language and was translated to kiswahili language, a language which the appellant understood, and the appellant entered a plea of guilty. Facts of the case were then read out and he confirmed the same to be correct. The appellant did not say before the Judge on first appeal or before us that he did not understand the language of the court. He understood the charge and facts of the case and pleaded guilty. Like the Judge on first appeal we find the plea of guilty to have been unequivocal. The appellant was properly convicted. The sentence imposed was lawful as Section 20(1) of the *Sexual Offences Act* gives a maximum life sentence. This appeal lacks merit and we accordingly dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR