NTN v Republic (Criminal Appeal 40 of 2020)
[2021] KECA 301 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 301 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 40 OF 2020

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

DECEMBER 17, 2021

BETWEEN

NTN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garsen (A. Ongeri, J.) delivered on 1st March 2018 in High Court Criminal Appeal No. 6 of 2015)

JUDGMENT

1. The appellant, NTN, was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between January 2009 and November 2011, in [Particulars Withheld] area in Tana River District within Tana River County, he caused his penis to penetrate the vagina of JN a female person who was to his knowledge his daughter. On arraignment before the Magistrate's Court at Garsen on 7th November 2012, the appellant pleaded guilty to the offence and was convicted. In mitigation, he stated that he had eight children at home who depended on him. He was sentenced to a prison term of 30 years.

2. Aggrieved, the appellant appealed against the conviction and sentence before the High Court where his main complaints were that the trial magistrate did not consider that he (the appellant) remained silent during plea taking; that the trial magistrate did not inquire from prosecution whether the appellant committed the offence; and that the trial court failed to consider his constitutional rights under Article 50(2) of the *Constitution*. After considering the appeal and submissions, the learned Judge of the High Court (A. Ongeri, J.) found no reason to tamper with the conviction or the sentence and dismissed the appeal.

3. Still dissatisfied, the appellant lodged the present appeal. Based on his memorandum of appeal and supplementary grounds of appeal, his complaints are that the learned Judge failed to consider that: his

plea of guilty was not unequivocal; that no medical evidence was not produced; that the age of the victim was not proved beyond reasonable doubt; and that his mitigation was not considered and that the sentence imposed was harsh.

4. During the virtual hearing of the appeal before us, the appellant relied entirely on his written submissions in which he urged that when he pleaded guilty to the charge, the particulars of the charge were not read to him to enable him to make an informed decision; that he was not warned of the consequences of his plea to enable him to reconsider his plea. As regard the age of the complainant, the appellant submitted that age of a complainant is "one of the ingredients of the offence of defilement"; that in this case no evidence of the age of JN was tendered; that under the *Sexual Offences Act*, the age of the victim is crucial as it has a bearing on the severity of sentence; that even where, as here, an accused person pleads guilty to a sexual offence, the prosecution has a burden to table all the facts. As regards mitigation, the appellant argued that the trial court failed to consider the same and consequently his right to a fair trial was breached.

5. Opposing the appeal, learned counsel Alex Gituma for the respondent submitted that the procedure for taking pleas as set out in Section 207 of the *Criminal Procedure Code* and as explained by this Court in *Adan vs. Republic [1973] E. A. 445* was fully complied with; that the trial court was not under a duty to explain the penalty; that the appellant had the opportunity to change his plea prior to being sentenced but he did not do so; and that the plea of guilty was unequivocal.

6. Counsel submitted that for the offence of incest with which the appellant was charged, the issue of age does not arise; that it is only with regard to sentencing that age becomes relevant in light of the proviso to Section 20(1) which provides that if it is proved that the victim of incest is below the age of 18 years, then the accused is liable to life imprisonment.

7. On the complaint that medical evidence was not produced, counsel submitted that having admitted that he impregnated his daughter twice, and two children born out of the incestuous relationship, that was sufficient proof of the offence.

8. As regards sentence, counsel submitted that severity of sentence is not a matter for consideration on a second appeal such as this. Section 361(1)(a) of the Criminal Procedure Code was cited.

9. We have considered the appeal and the submissions. This is a second appeal. Our mandate on a second appeal is confined to a consideration of matters of law by reason of Section 361 of the Criminal Procedure Code. In *Karingo vs. Republic [1982] KLR 213* the Court stated:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja vs. R (1956) 17 EACA 146*)"

10. Based on the grounds of appeal and submissions, the appellant's main grievance is that he was wrongly convicted on his own plea of guilty which was equivocal. The issue for determination therefore is whether the plea of guilt was unequivocal.

11. The way a plea of guilty should be recorded and the steps that should follow was explained in Adan vs. Republic (above) where the Court of Appeal 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 the facts relevant to sentence together with the accused's reply should be recorded.

12. What then, were the circumstances in the present case and was that procedure followed? The appellant was arraigned before the Resident Magistrates Court at Garsen on 7th November 2012. The record shows that the charge was read and explained to him "in Swahili a language he understands" and in reply, the appellant stated, "Ni kweli." Thereafter, the prosecutor then stated the facts thus:

> "On diverse dates from January to November 2011 the accused person was defiling his daughter of 16 years and impregnated her twice. One child is named GN of 2 years and GN, 11 months. This was happening in Kalsagani. This was reported in secret by her mother to Joy Muthoni, Fact Director about this case. She reported to the police who arrested the accused, and the accused was charged. The children have been brought in court. The child who was impregnated is in court and the 11-month-old. The other child is at home. I wish for the court to note the presence of the minors."

13. The appellant is then record as having stated "Ni Kweli" after which the court convicted him on his own plea. Section 207 of the Criminal Procedure Code requires that the substance of the charge be stated to the accused person in court to which he is then asked whether he pleads guilty or not guilty. If the accused person admits the truth of the charge, his admission is required to be recorded as nearly as possible in the words used by the accused and the court shall convict the accused and pass sentence upon him unless there appears to it sufficient cause to the contrary. Having examined the record of proceedings before the trial court, we are satisfied that the way the plea of guilty was recorded in this case accorded with the law and there is no merit in the complaint that the plea was equivocal.

14. The complaint that no medical evidence was produced and that the age of the victim was not established are predicated on a misapprehension that the court was obliged to conduct a hearing and take evidence notwithstanding the appellant's admission of having committed the offence. No doubt a hearing and production of evidence would have been mandatory under Section 208 of the Criminal Procedure Code had the appellant pleaded not guilty. Having unequivocally pleaded guilty to the charge, a hearing for purposes of production of evidence was dispensed with.

15. As regards the complaint regarding harshness of the sentence of 30 years jail term imposed by the trial court, Section 361(1) of the Criminal Procedure Code limits the jurisdiction of this Court on a second appeal such as this to matters of law. Under Section 361(1)(a), severity of sentence is a matter of fact and therefore outside our mandate. Moreover, given that the victim in this case was under the age of

18 years, the appellant escaped a harsher sentence in view of the proviso to Section 20(1) of the *Sexual Offences Act* which provides that:

> " Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

16. All in all, the appeal lacks merit. It is accordingly dismissed.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR