IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), NAMBUYE & OKWENGU JJA)

CRIMINAL APPEAL NO. 134 OF 2015

BETWEEN

WAMBUA MUSILI.....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Garissa (G. Dulu, J.) dated 6th November, 2014

in

Garissa HCCRA NO. 86 OF 2012)

****

JUDGMENT OF THE COURT

This is a second appeal arising from the Judgment of the High Court of Kenya at **Garissa** in Criminal Appeal No. 86 of 2012 (**George Dulu, J**) dated 6th November, 2014.

The facts leading to the appeal are that, the appellant was arraigned before the Senior Resident Magistrate's court at **Mwingi** charged with the offence of defilement contrary to **section 8(1**) as read with **section 8(2)** of the Sexual Offence Act (SOA) No. 3 of 2006. The particulars were that, on 27th July, 2012 at **Nduluku village, Itendeo** sub-location, **Kyathani** location in **Mwingi** Central District within **Kitui** County, he did an act which caused the penetration of his male genital organ namely: penis into the female genital organ, namely vagina of **NM,** a girl aged 5 years old. In the alternative, he was charged with committing an indecent act with a child contrary to **section 11(1)** of the same Act, particulars being that, the appellant on the same date and place committed an indecent act which caused contact of his male genital organ namely penis with the female genital organ namely vagina of **NM,** a child aged five (5) years.

The appellant appeared in court for taking of plea on 30th July, 2012. The substance of the charge and every element thereof was stated by the court to him in a language that he allegedly understood but which was not indicated on the record save for indication that interpretation was from Kiswahili to Kikamba. Upon being asked whether he admitted or denied the truthfulness of the charge, the appellant replied, **"It is true",** on the basis of which the trial court entered a plea of guilty. The court was then informed that the P3 form of the victim was due for completion by the Doctor on that very day necessitating narration of facts to appellant to be deferred. On 31st July, 2012, **Mr. Ngala**, counsel on record for appellant intimated to court that appellant was mentally unstable and handed to court a medical report to that effect. The prosecution also informed the court that investigation officer had also informed the prosecution that the appellant was mentally unstable. Acting on the above representations, the trial court directed the appellant to be examined by a **psychiatric** to determine his mental status.

On 2nd August, 2012, the prosecution informed the court that appellant had been examined and found to be in normal mental state, but was nervous and suspicious which affected his situation. **Mr. Ngala** on the other hand had no comment save for stating that the Doctor who had examined the appellant and who was present in court at the time could explain his findings to court better. The Court reacted to the above representation as follows:

> ***"Court: According to the report, the accused is normal which implies that he is of sound mind."***

On that account, the Court reminded the appellant of the charge to which he similarly replied "**It is true.**" A plea of guilty was once again

entered against him. Facts were outlined to which the appellant replied that "**All facts were correct**," where upon the court found him guilty on his own plea. The prosecution intimated to the court that he may be treated as a first offender to which **Mr. Ngala** requested the Court to allow appellant mitigate for himself. When given an opportunity to mitigate the appellant stated that he had nothing to state. On the totality of the above sequence of proceedings, the trial court made observations that the appellant was not remorseful and though he was a first offender, he had committed an inhuman act against a helpless child and on that account, sentenced him to life imprisonment.

The appellant was aggrieved. He appealed to the High Court raising various grounds. On 14th January, 2013, **Mr. Ngala**, handed to court two medical reports from **Mwingi Hospital**. **Mr. Mulama** who was for the State is on record as saying that he had seen the reports which confirmed what the Doctor in Garissa had previously said of the appellant. The appellant was therefore mentally stable and requested the High Court to proceed with the appeal. **Mr. Ngala,** however, insisted that the appellant should first of all undergo mental treatment, first before his appeal could proceed for hearing.

The High Court (**S.N. Mutuku, J.)** made orders as follows:-

> ***"Court: The appellant is referred back to Garissa Provincial General Hospital for a second opinion and recommendation on the way forward since the appellant is not fit to stand trial. The mother of the appellant who is in court should present herself to GPGH for interview. Dr. to write to superintendent GPGH to this effect. Mention on 23/4/2013."***

On 23rd June, 2014, the following entries were made on the record**.**

> **"Mr. Okemwa: We were to file written submissions. We have done so.**
>
> **We need time.**
>
> **Hon. George Dulu**
>
> **6/10/2014**
>
> **Appellant: True, I have no submissions to make. I rely on the petition.**
>
> **Hon. George Dulu**
>
> **6/10/2014**
>
> **Clerk: The appellant appears to have a medical challenge.**
>
> **Hon. George Dulu**
>
> **6/10/2014**
>
> **Court: file set aside for State to respond.**
>
> **Hon. George Dulu**
>
> **6/10/2014**
>
> **Later at 11.30a.m.**
>
> **Coram as before.**
>
> **Appearance as before.**
>
> **Mr. Okemwa: I have perused the record, the grounds. I concede to ground one of appeal. On ground 2, it follows my concession to ground 1. There are recommendations in the file for appellant to be referred to Mathare Hospital. I ask the court to consider the issues raised by the medical reports in its decision.**
>
> **Appellant: I have nothing to add.**
>
> **Hon. George Dulu**
>
> **6/10/2014**
>
> **Court: Judgment on 4/11/2014. Production order to issue."**

It is against the above sequence of proceedings before the High Court that the High Court analyzed the record, reminded itself of its role as a

first appellate court as enunciated in **Okeno versus Republic [1972] EA 32,** and made findings thereon *inter alia*, that, the appellant appealed against conviction and sentence; that he had perused the hand written psychiatrist report of **Dr. Nyambati Philemon Ogeto,** medical officer **Mwingi** District Hospital issued at the trial, the learned Judge expressed himself as follows:

> ***"The report was not filed by a psychiatrist. It was on plain paper without letter head. It did not state that the suspect was fit to plead or stand trial. It was on the basis of the above medical report that the learned magistrate found that the appellant was fit to stand trial and proceeded to take the plea and convicted and sentenced the appellant."***

The Judge also observed that after the appeal before him was filed, two psychiatrist reports were made and filed; that both psychiatrist reports were signed by **Dr. Mulupi P.** Psychiatrist from the **Provincial General Hospital, Garissa**. The first of the two was dated **24th January, 2013**, while the second was dated **7th May, 2013** both of which recommended for the appellant to be taken to Mathare Hospital Nairobi for further assessment and evaluation.

Considering the above in light of the record, the learned Judge rendered himself as follows:-

> "***Though neither the appellant nor the State has cited any law or case authority in the appeal, I am of the view that their respective position is that the appellant was in such a mental state at the time he pleaded to the charge and was convicted, that he did not understand the proceedings.***
>
> ***The procedure to be adopted by the court in such a situation is provided for under section 167 of the Criminal Procedure Code. (Cap.75), the relevant part of which states as follows:***
>
> > "*167(1) If the accused, though not insane, cannot be made to understand the proceedings, in cases tried by the subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and if the defence has been called upon, offer of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused; but if the court is of the opinion that the evidence which it has heard would justify a conviction, it shall order the accused to be detained during the presidents pleasure, but every such order shall be subject to confirmation by the High Court."*
> >
> > ***During hearing in the subordinate court, the appellant was medically examined for a mental report. There is nothing on record to show that he did not understand the proceedings or that he was prejudiced in any way, though the medical report relied upon did not specifically state that he was fit to plead, the medical tests on his mental status relied upon herein on appeal, were made after he was convicted and sentenced. They were not available to the learned Magistrate. Those reports could therefore not be considered by the subordinate court during proceedings. I find and hold that the two reports are not relevant with regard to the proceedings. The said medical reports cannot therefore assist the appellant on appeal. The mere fact that the appellant responded to the charge in a monosyllabic "yes" or "no", does not establish that he did not understand the proceedings. Though the prosecuting Counsel conceded to the appeal on this ground, I respectively*** (sic) ***differ.***
> >
> > ***The second ground of appeal is that the facts given by the prosecutor did not disclose the offence of defilement. I have perused the facts narrated by the prosecutor. The facts were in my view sufficient to demonstrate that the appellant committed the offence of defilement. The P3 form produced indicated that spermatozoa was found in the vagina of the complainant. The hymen had an orifice, which was an opening. In my view, partial penetration had occurred, which established the commission of the offence. I will dismiss the appeal on conviction.***
> >
> > ***The appellant also challenged the sentence imposed. The law provided that, for defilement of a child aged 11 years or below, the mandatory sentence is life imprisonment. In my view therefore, the sentence imposed was lawful and not excessive.***
> >
> > ***In the result, I find no merit in the appeal, though the prosecuting counsel has conceded to the same. I dismiss the appeal and uphold both the conviction and sentence of the subordinate court."***

The appellant was aggrieved and is now before this Court on a second appeal raising four grounds of appeal as per a supplementary memorandum of appeal indicated in his written submissions as dated 27th March, 2019. Although we could not trace the memorandum on record, the grounds were replicated in the appellant's written submissions dated 6th September, 2019 and filed on 9th September, 2019. These may be paraphrased as follows: that the learned Judge of the High Court erred in law when:-

> ***"He affirmed conviction of the appellant by the trial court without appreciating that appellant was suffering from mental illness both as at the time of the act and at the time of plea taking."***

The appeal was canvassed by way of written submissions adopted and orally highlighted by Mr. **Mwalimu,** for the appellant and oral submissions by **Mr. Obiri,** Assistant Director of Public Prosecution (ADPP) on behalf of the state.

Supporting the appeal, Mr. **Mwalimu** relied on the case of **Daniel Maitha Sammy versus Republic [2019] eKLR,** and faulted the High Court for affirming the entire plea taking process, that the appellant was subjected to by the trial court, as the Court failed to accord with the guidelines on plea taking as set by the predecessor of the court in the case of **Adan versus Republic [1973] EA 445**, approved in the case of **John Muendo Musau versus Republic [2013] eKLR**; second, the process contravened **section 207** of the Criminal Procedure Code, which requires that the language an accused person uses to respond to the charge be recorded; that he be warned of the consequences of accepting a plea of guilty, especially when he is unpresented at the time plea is taken; and that the charges in respect of which plea is taken and an

accused person convicted of should be clearly recorded down.

Relying on the case of **Leornad Mwangemi Munyasya versus Republic [2015] eKLR,** Mr. **Mwalimu** faulted the High Court for failing to appreciate that the trial court fell into error when it acted on the medical report of **Dr. Nyambati Philemon Ogeto**, a medical officer then attached to **Mwingi District Hospital** who was not a psychiatrist as the basis for finding the appellant fit to plead, contrary to the court's own direction calling for a medical report from a psychiatrist. There was therefore, no way the trial court could have established that appellant properly appreciated the consequences of his act before allowing him to plea. Lastly, for the failure to heed two medical reports called for by the High Court and both of which indicated that appellant was mentally unstable and recommended that he should undergo mental treatment at Mathare mental hospital before the proceedings could proceed further. On account of the totality of the above submissions, **Mr. Mwalimu** urged the court to allow the appeal, vitiate the entire plea taking process undertaken by the trial court and order a retrial.

Opposing the appeal, **Mr. Obiri** conceded that the Doctor who examined the appellant for mental fitness was not a psychiatrist as directed by the court but submitted that since the Doctor was a qualified medical practitioner he was competent to render the medical opinion he gave that appellant was fit to plead. The trial court was therefore entitled to proceed with the plea taking process to its logical conclusion; that the High Court rightly declined to act on the medical reports called for by the High Court as those directions came more than a year later after the plea taking and were therefore inconsequential. **Mr. Obiri** urged us to find that no irregularity was committed by the two courts below on plea taking.

This is a second appeal. This Court has stated many times before that it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. **In Kaingo Vs. R., [1982] KLR 213** at p. 219, this Court said:-

> ***"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., [1950] 17 EACA 146)".***

We have considered the record in light of our above mandate and the rival submissions of the respective parties as well as principles of case law that the appellant relied upon in support of his appeal. Only one issue falls for our determination namely; whether the High Court fell into error when it sustained the plea taking process that the appellant was subjected to by the trial court.

It is not in dispute that appellant was charged with two offences, one forming the main charge, and the other in the alternative; that both charges were dealt with and determined through the plea taking process culminating in the conviction of the appellant indicated as convicted on his own plea but without specifically indicating that it was on the main count; that the above process as undertaken by the trial court was sustained by the High Court, which the appellant has now invited us to overturn for reasons advanced in submissions in support of the appeal as highlighted above.

Section 207 of the Criminal Procedure Code which is the procedural substantive provisions on plea taking states *inter alia* 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 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.***
>
> **……..."**

The above guidelines were crystalized by the predecessor of the Court in the case of **Adan versus Republic [1973] EA 445,** as approved by the Court in **John Muendo Musau versus Republic (supra)** among numerous others. These are 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 accuseds' 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.***

(vi) If the accused wishes to change his 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.

(vii) An accused person can change his plea at any time before sentence."

Considering the above threshold, our perusal of the record of the proceedings at the trial on plea taking reveals that on 30th July, 2012 the appellant appeared before court for plea; that interpretation was done from Kiswahili into Kikamba; that the charge was read to the appellant in a language which he understood; that there is no indication as to which of the two languages, Kiswahili or Kikamba the appellant understood best. The appellant's reply to the charge is recorded as "**it is true**" which appears to be a direct translation of what appellant stated in whatever language the court communicated to him in. The above proceedings do not however count towards the determination of the merits of this appeal as the Court did not finalize the plea taking on account of lack of medical evidence to back up the facts in support of the charge which the court needed to put to the appellant in order to confirm his plea.

On 31st July, 2012, before the same trial court, there is a reflection on record that, before the prosecution narrated the facts in support of the charge to the appellant for purposes of confirming the plea of guilty recorded the previous day, it was brought to the attention of the court through the prosecution that the appellant appeared to have a mental problem. It is this information that prompted the court to make an order that the appellant be examined by a psychiatrist to determine his mental status before the plea taking process could be concluded.

When the matter came up for mention on 2nd August, 2012, a purported medical report prepared on a sheet of plain paper containing an opinion of Doctor **Nyambati Phelemon Ogeto,** who was not a qualified psychiatrist doctor, but a qualified medical Doctor, and who was also present in court was produced. The reaction from the prosecution was that, the report was sufficient proof of appellant's mental stability to plead. The defence lawyer on the other hand, requested the court to allow the Doctor who was present in court to speak for himself as regards the entries on the said plain sheet of paper. The trial court declined to accede to the defence lawyer's request. Instead, it accepted the report as presented because, according to the court, the entries in the report indicated the appellant was fit to plead, the Court proceeded to take the plea a fresh. The charge was read over to appellant in Kikamba language which he understood. The reply recorded which was not in Kikamba but in English, stated as **"it is true."** We believe this was a direct translation. The trial court then entered a **"nil"** against the alternative charge. A plea of guilty was entered. There is no indication as to whether the plea was entered for the main charge or the **"nil"** alternative charge.

It is on the basis of the above sequence of proceedings on the appellant's plea taking process that appellant was sentenced to life imprisonment. When his appeal came up for hearing, the issue of his mental status was raised, prompting the High Court (S**.N. Mutuku, J.)** to make an order for him to be referred for mental assessment. Two reports were filed. The file however landed before **George Dulu, J**, who having heard the appeal for reasons stated in the excerpt of the court's judgment highlighted above disregarded those medical reports.

It is against the above background that appellant has now invited us to interfere with the Judge's failure to vitiate the plea taking process undertaken by the trial court pursuant to which the appellant was found guilty on his own plea of guilty, convicted and sentenced to life imprisonment. The record is explicit that the appellant raised the issue of mental instability at the earliest opportunity. That is why the trial court deferred the narration of facts consequent to him pleading guilty to the charges, to await a report from a psychiatrist on his mental status. It is on record that none was tendered. Instead, what was received as already stated above was a hand written medical opinion by **Dr. Ogeto** on a plain sheet of paper, not even on the letter head of **Mwingi** hospital where **Dr. Ogeto** was then based, who the court was informed was in court and could even have been put into the witness stand to explain his opinion. The trial court's reaction was as follows:

"Court: According to the report, the accused is normal which implies that he is of sound mind."

Our take on what transpired at the trial is that in the absence of an order varying the trial court's order calling for a psychiatrist report on the mental status of appellant, the trial courts' hands were tied. It could not act on any other report. It therefore fell into error when it acted on the medical report of **Dr. Ogeto** a medical practitioner who was not a psychiatrist and more so when the purported report was not presented officially but casually on a plain piece of paper. The trial court was in the circumstances obliged to defer the plea taking process until a psychiatrist report was availed.

The proper approach the two courts below ought to have taken in resolving the appellant's plea of mental instability to plead to the charge at the trial and to prosecute his appeal before the High Court is as set out in **section 162(1)** &**(2)** of the CPC which provides as follows:

162 (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

……"

It is only upon complying with the above procedure namely, holding of inquiry that the trial court would have made an informed decision in terms of **section 167** of the CPC as to whether to proceed and complete the plea taking process or take any other action as deemed fit within the meaning of **section 167** of the CPC. Likewise, the High Court was also obligated not to sweep aside the two medical reports having been called for and submitted to the High Court prior to hearing of the appeal. In the High Court. **Section 280(1)** is the equivalent of section 162 aforesaid. Though relating to the original jurisdiction of the High Court, it should apply *mutatis mutandis* to first appeals. The section empowers the Judge, if he is of the opinion that the accused (read the appellant) is of unsound mind, and consequently incapable of making his defence, to postpone the proceedings and in the meantime order the appellant to be kept in safe custody in such place and manner as the court thinks fit, and shall report the case for the order of the President. This last part has been declared by the High Court to offend the Constitution in **Hussan Hussein Yusuf v Republic,** Criminal Appeal No. 59 of 2014.

In light of the above reasoning, it is our finding that the two courts below fell into error in the manner they responded to appellant's plea of mental instability both for purpose of plea and appeal. There is nothing to suggest that the approach the two courts' below took measures up to the threshold set by the Court in the case of **Leonard Mwangemi Munyasia versus Republic** (supra), in which the Court was categorical that where issues of mental instability of an accused person at the time of commission of offence comes into question, it is the duty of the Court to satisfy itself of that position before making a final order. Both processes therefore stand vitiated.

Having found that the plea taking process in the trial court and the appellate proceedings resulting in this appeal were defective, it is imperative for us to balance the scales of justice and make appropriate orders in order to meet the ends of justice taking into account the interests of the appellant and the complainant. The competing positions are whether to order a retrial or acquittal of appellant.

In Benard Lolimo Ekimat Vs. R. [2005] eKLR, the Court stated:-

> ***"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that, each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

See also **Muiruri Vs. R. [2003] KLR 552** wherein, the Court at page 556 observed as follows:

> ***"Generally whether a trial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (see Zededkiah Ojoundo Manyala Vs. R. Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's."***

Applying the above threshold to the peculiar circumstances in this appeal, it is our considered opinion that the ends of justice would be best served by ordering a retrial considering the fact that the proceedings in the two courts' below were vitiated by the failure to follow the correct procedure in determining the mental status of appellant both for purposes of plea taking and hearing of his appeal before the High Court.

In view of the conclusions reached above, we do not find it appropriate to delve into the merits of the appeal. We accordingly allow the appeal, set aside the conviction and sentence handed down by the trial court against appellant and affirmed by the High Court on a first appeal. We substitute thereto an order for retrial and direct that the appellant be produced before Garissa SRM's court before a Magistrate other than **H.M. Nyaberi, PM,** for proper plea procedures to be undertaken and thereafter proceed expeditiously according to law.

Order accordingly.

Dated and Delivered at Nairobi this 24th day of April, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPTY REGISTRAR