IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MAKHANDIA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 44 OF 2018

BETWEEN

DK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*An appeal from the judgment of the High Court at Kajiado*

(Nyakundi, J) dated 8th May 2017 In **HC.CR.A 48 of 2015)**

JUDGMENT OF THE COURT

BACKGROUND

[1] **DK,** the appellant, was charged before the Chief Magistrate's Court at Kajiado for the offence of incest contrary **to Section 20(1) of the Sexual Offences Act**. The particulars of the offence were that the appellant, on several days unknown and on 27th November 2015 in Kajiado Central Sub-County, within Kajiado County, intentionally caused his penis to penetrate the vagina of **JN** (name withheld) a child aged 10 years, who was to his knowledge his daughter.

[2] The appellant pleaded guilty to the charge and was convicted and sentenced to life imprisonment on his own plea of guilty. His first appeal against sentence was dismissed by the High Court at Kajiado **(Nyakundi, J.)** on 8th May 2017 and hence this second appeal.

[3] The appellant filed a home grown memorandum of appeal raising five (5) grounds of appeal which can be crystallized into two for our determination; firstly, whether the charge sheet was defective; and secondly whether the guilty plea upon which the appellant was convicted was an unequivocal.

SUBMISSIONS

[4] When the appeal came before us for hearing, the appellant appeared in person, as he did both at his trial and in his first appeal. **Mr. O'Mirera**, the learned State Counsel appeared for the State.

[5] The appellant, while relying on his supplementary memorandum of appeal and written submissions submitted that he pleaded guilty as he had been pressured by the police to so plead and that he did not understand the charges levelled against him as he had been in a state of mental confusion during the plea taking. The appellant further submitted that the charge sheet as framed was at variance with the facts in support thereof and therefore defective. It was the appellant's further submission that the complainant indicated in the charge sheet was one **Jackline Mwikali** while the facts of the case read to him was in respect of **MN;** that the dates indicated in the charge sheet and the facts of the case were at variance and his conviction was therefore manifestly unsafe and a nullity.

[6] **Mr. O'Mirera** opposed the appeal and supported the conviction.

Counsel argued that contrary to the appellant's contention, the plea was taken in Kiswahili, a language which the appellant understood; that the appellant did not qualify the plea; that the appellant failed to raise any objection regarding the facts given at trial; that the appellant's mitigation was unequivocal that he was the sole bread winner and sought forgiveness; that the claim by the appellant that the plea was procured through pressure by the police was an afterthought; and that the medical evidence was properly produced. Counsel urged us to dismiss the appeal.

DETERMINATION

[7] This is a second appeal. By dint of **Section 361** of the Criminal Procedure Code, we are restricted to consider points of law only.

See Njoroge v Republic (1982) KLR 388) This Court has also stated on many previous occasions that it will not interfere with concurrent findings of fact by the two courts below unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision. (See **Chemagong v Republic [1984] KLR 61**).

[8] The first issue raised by the appellant in the memorandum of appeal was that his conviction on his own plea of guilty was a nullity as the charge pleaded to was defective in nature**.**

[9] We have perused the record and have observed that the amended charge sheet reads as follows; *"DAVID KUDOSI: On the several days unknown and on 27th of November 2015 at Ngatataek in Kajiado central sub-county within Kajiado county, intentionally caused his penis to penetrate the vagina of JN a child aged 10 years who was to his knowledge his daughter."* On being read the charge in Kiswahili, the appellant replied ***"It is true".***

[10] The learned Judge found that the appellant was aware of the charges levelled against him. On the appellant's claim that he was forced by the police who arrested him to plead guilty, the learned Judge found that there was no evidence to buttress this assertion and that the appellant should have raised this issue with the trial court when he was arraigned before the trial court to take plea.

[11] Section 207 of the **Criminal Procedure Code** provides for the procedure of taking a plea of guilty in the following terms:

> ***"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."***

[12] The correct manner of recording a plea of guilty and the steps to be followed by the trial court was laid down in the celebrated case of **Adan v Republic (1973) EA 446** and reiterated in **Kariuki v Republic (1984) 809** as follows;

> ***"(a) the trial magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;***
>
> ***(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;***
>
> ***(c)the prosecution may 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;***
>
> ***(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply".***

(See also **Korir v. Republic [2006] E.A. 124)** and **Henry O. Edwin V R [2015] eKLR.**

[13] Our task in this appeal is therefore, to determine whether the High Court erred in upholding the trial court's finding on this issue. We have taken the liberty to reproduce vertabim the facts of the case as read to the appellant in the trial court and his response thereof. The court prosecutor stated as follows:

> ***"The facts are that on 27/11/15 one Jackline Mwikali was going by the accused person's home and heard some noise. She heard a voice of (sic) young girl crying telling a person to stop what he was doing because she was in pain. She was bleeding and wanted to urinate. She reported the matter to the village elder. The village elder reported to the chief. The chief went and took the complainant to the hospital. At the hospital it (sic) was informed that the minor had been defiled. When the minor was interrogated she confirmed that the accused person had been defiled for (sic) several occasions again from 27/11/15. A p3 form was prepared in regard to the incident. I wish to produce the p3 form."***

The appellant was asked to respond to the facts and he stated;

"The facts are true".

[14]It is i mperative that after a plea of guilty is recorded, the facts of the case are read to an accused. The importance of the 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.

[15] This Court in **Elijah Njihia Wakianda v Republic [2016] eKLR** stated as follows**:**

> ***"We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language."***

Regarding the responsibilities of the trial court, this Court stated:

> ***"The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."***

[16] In the particular circumstances of this case, we find that the trial magistrate properly applied the principles set down in **Adan** and **Kariuki** *(above).* Upon consideration of the record, we find that the offence was correctly stated together with the particulars and that the appellant pleaded guilty to both the charge and the facts. We are therefore satisfied that the appellant was accorded fair trial as provided under **Article 50(1) (b)** of the Constitution which states that '***Every accused person has the right to a fair trial, which includes the right to be informed of the charge, with sufficient detail to answer it, and if convicted, to appeal to, or apply for review by a higher court as prescribed by law."***

[17] On the appellant's claim that the charge sheet wasdefective, the test applicable by an appellate court when determining firstly, the existence of a defective charge, and secondly its effect on an appellant's conviction, is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of **Yongo v Republic [1983] KLR**, the elements of a defective charge sheet were stated as where:

> ***(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or***
>
> ***(b) it does not, for such reasons, accord with the evidence given at the trial; or***
>
> ***(c) it gives a mis-description of the alleged offence in its particulars."***

[18] Further, this Court in **Isaac Nyoro Kimita & another v Republic [2014] eKLR cited** with the approval the case of **Willie (William) Slaney V State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391],** where the Supreme Court of India held that:

> ***"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form…Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guild just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."***

[19] By parity of reasoning, the learned Judge did not err when he found that the there was no defect in the charge sheet which occasioned a miscarriage of justice as **Jackline Mwikali** was a witness who rescued the victim of the sexual assault; and that any irregularities regarding the dates the offence took place did not occasion the appellant any prejudice and was curable under

[20] In the circumstances of this appeal, we are satisfied that the offence against the appellant was clearly disclosed, the facts were in accord with the prosecution evidence including the P3 form, and that the offence was clearly described in the particulars.

[21] The upshot is that we find that this appeal has no merit. We order that the same be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 22nd day of May, 2020.

M. WARSAME

JUDGE OF APPEAL

ASIKE MAKHANDIA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR