



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MAKHANDIA, KIAGE & OTIENO ODEK, J.J.A.)

CRIMINAL APPEAL NO. 311 OF 2018

BETWEEN

RODGERS WAFULA BARAZA APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma, (Ali-Aroni, J.) dated 21st July, 2016 in HCRA NO. 117 OF 2013)

JUDGMENT OF THE COURT

Rodgers Barasa Wafula the appellant herein, was on 25th September, 2013, arraigned before the Acting Principal Magistrate at Bungoma charged with the offence of Defilement of a Girl, contrary to **Section 8(1)(3)** of the **Sexual Offences Act**. The particulars of the offence were that between the 20th and 23rd days of September, 2013 within Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of NW, a child aged 15 years.

He faced an alternative charge of committing an indecent Act with a child contrary to **Section 11(1)** of the said statute the particulars whereof were that at the same time and place he unlawfully and intentionally touched the vagina of the said child with his penis.

In answer to the charge the appellant replied “it is true” whereupon the magistrate entered a plea of guilty against him and called upon the Prosecutor to read the facts of the offence to the appellant. Those facts as presented were that on the early morning of 20th April, 2013, at about 4.00a.m., MW aged 15 years, was coming from a funeral at a home neighbouring hers when she met the appellant, also coming from the same ‘*matanga*’ or funeral wake He chatted her up and persuaded her to accompany him to his house where the two had sexual intercourse, by all indications consensual, until day break. Thereafter they had more acts of intercourse, quite repeatedly, over the next couple of days.

MW was a pupil at the local [Particulars Withheld] Primary School and word soon reached her parents that she was being detained in the appellant’s house. The facts did not state whether it was against her will but, regardless, the girl’s parents reported the matter to Police officers, who went to the appellant’s house and arrested both the appellant and MW and took them first to Kuywa Police Post and later to Kimilili Police Station. She was taken to hospital and a P3 Form was issued upon her being medically examined. The doctor formed the opinion that she had been sexually assaulted and also assessed her age at below 15 years. A letter from the head teacher of the school indicated that she was a pupil in class 6. With that the appellant was charged.

The appellant’s response to those facts as read was;

“The facts are true. I had taken her as a wife and engaged in sexual intercourse with her”

With that the magistrate convicted the appellant “*on his own plea of guilty.*” The Prosecution terming him a first offender, and upon the appellant praying for forgiveness in mitigation, the magistrate sentenced him to serve twenty (20) years in jail, the same being the minimum sentence provided under the Act for the offence charged.

Reality seems to have then dawned on the appellant, for he challenged the conviction and sentence at the High Court complaining, in the

main, that he had been persuaded by a police officer to plead guilty. He also pleaded with that court that MW was pregnant, and sought a retrial.

By a judgment remarkable for its brevity and peremptoriness, Aroni J dismissed the appeal on the basis of these two sentences in the 3-paragraph decision;

“Since the appellant pleaded guilty to the offence and admitted the particulars he can only challenge the sentence which is not the case here. He had all the opportunity to complain about the police which he did not at the trial and I deem his allegation against the police to be an afterthought.”

Undeterred, the appellant has now filed this appeal complaining that the learned judge failed to;

- ***exercise her discretion and analyse the sentence in view of the guilty plea;***
- ***analyse the facts tendered by the prosecution upon the plea of guilty;***
- ***consider his mitigation.***

In written submissions, he reiterated that he pleaded as he did because he had been advised by the police that a plea of guilty would attract a lesser sentence and was therefore surprised to be sentenced to twenty (20) years imprisonment.

In opposition to the appeal, **Ms Karanja**, the learned Prosecution Counsel first contended that the appeal is a non-starter because by virtue of **Section 361** of the **Criminal Procedure Code**, severity of sentence is a question of fact which is expressly outside this Court’s jurisdiction on a second appeal which is limited to questions of law only. Regarding the plea of guilty entered by the appellant, however, and in answer to our questioning on whether it was unequivocal, counsel appeared less certain that the appeal was hopeless. She urged us, should we find that the conviction based on the guilty plea was not proper, to remit the matter to the subordinate court for retrial.

It is plain to us that this appeal turns on the efficacy of the appellant’s plea of guilty as a basis for his conviction. A plea of guilty is a grave matter with a seriousness that is directly proportional to the severity of the sentence that the particular offence attracts. Indeed, when an accused person enters a plea of guilty, he literally gives the prosecution a walk-over. He repudiates his rights to a full trial. He gives up the right to challenge any evidence against him. He divests and releases the prosecution from the duty to prove each and every element of the charge beyond reasonable doubt. He passes over the right to confront his accuser. He disentitles himself to the right to testify, tender evidence and call witnesses in his own defence. And he forfeits the right to appeal by reason of **Section 348** of the **Criminal Procedure Code**, which provides that no appeal is allowed in the case of an accused who has pleaded guilty and has been convicted except as to the extent or legality of the sentence. We dare add that both questions may be raised on a first appeal but a second appeal would be limited to legality only by virtue of **Section 361** as correctly observed by Ms. Karanja.

It is for precisely these reasons that a plea of guilty should be accepted and convictions thereon entered with a great deal of circumspection and upon the court being satisfied that the said plea is entered into freely, consciously, with full knowledge and without equivocation. Simply put, a plea of guilty ought to be certain, clear, unquestionable and without doubt, evasion or ambiguity.

The predecessor of this Court took the trouble to lay down the steps that a court ought to scrupulously follow before it can convict on a plea of guilty in the oft-cited case of **ADAN -vs- REPUBLIC [1973] EA 445** at P.446 as follows;

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should 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 guilty. 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 statement of 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.”

The Court indicated that it was desirable that the practice be followed throughout East Africa and we would say that it is of the greatest importance that all trial courts in Kenya do scrupulously follow those steps and so avoid convictions that are based on questionable pleas of guilty. See also **OMBENA –VS- REPUBLIC [1981] KLR 450**.

In the case before us, even though the appellant seemed to admit that the facts as read were correct to the extent that he did have sexual intercourse with MW, he did add that he *“had taken her as a wife.”* Now, considering that the offence of defilement entails unlawful sexual intercourse, is it not obvious that the appellant was saying that the sexual intercourse was lawful, and was thus denying the unlawful element? An admission of guilt, in order to be efficacious to found a proper conviction, must be wholly unqualified. Once the accused person introduces a qualification, justification or an explanation in answer to the facts as read, that renders the plea not unequivocal and the court is duty bound to change the plea entered from one of *“guilty”* to *“Not Guilty.”* See **BAYA –VS- REPUBLIC [1984] KLR 657, KORIR -VS- REPUBLIC [2006] EA 124**.

We think that had the learned Judge given the due and proper consideration that the appellant's appeal deserved, she would have concluded that the plea was not unequivocal and would have quashed the conviction that was based on it.

Apart from the equivocation or ambiguity that vitiated the guilty plea, the appellant did state before the learned Judge the explanation that he was advised to plead guilty by the police in the expectation that he would receive a light sentence. The learned Judge appears to have given little thought or weight to this, stating, merely, that the appellant had ample opportunity to complain at the trial. It is obvious that there was no trial in the case, for once the plea of guilty was recorded the court went into the motions of sentencing.

We think, with respect, that there was enough evidence before the learned Judge to cast doubt on the freedom of the appellant in entering that plea. He may have been misled or mistaken but the effect is that he did not freely admit the charge. Just like in ADAN -VS- REPUBLIC (Supra), where the appellant had raised a single ground of appeal that he had "*pleaded guilty because of misunderstand*" (sic) and that "*the cattle in question was my own cattle,*" we think that in this case as well, had the plea of guilty been more thoroughly examined, it ought as well to have been changed to one of not guilty and the conviction cannot safely be allowed and stand. It is accordingly quashed and the sentence set aside.

We have wondered whether we should order a new trial and have come to the conclusion that, considering that each case is determined on its own facts, it would be prejudicial to the appellant and would not be in the interests of justice to so order. It does not follow that where a conviction is vitiated by a mistake of the trial court a retrial should be ordered. It should be ordered only where the interests of justice require it, and where no injustice will be caused to the accused person. See PASCAL CLEMENT BRAGANZA -VS- REPUBLIC [1957] EA 152, BERNARD COLIM EKIMAT -VS- REPUBLIC [2005] eKLR. In this case, the appellant has been in custody since his conviction in April, 2011, a period of over 8 years. It would be unjust to subject him to a new trial.

In the result, this appeal is allowed, the conviction is quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED and Delivered at Eldoret this 6th day of June, 2019

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.