IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M KARIUKI & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 77 OF 2015

BETWEEN

OBEDI KILONZO KEVEVO..............................APPELLANT

AND

REPUBLIC ....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (L.N. Mutende, J) dated 27th May, 2014

in

H.C. CR. A. NO. 89 OF 2013)

****

JUDGMENT OF THE COURT

OBEDI KILONZO KEVEVO, the appellant, was charged before the Principal Magistrate,Mr. M. O. Kizito sitting at Makindu, for defilement of a girl aged (13) thirteen years contrary to ***Section 8 (1)*** as read with ***Section 8(3)*** of the **Sexual Offences Act 2006** .

The particulars of the offence are that on the 10th Day of February 2013 at [particulars withheld] Village, Kibwezi District within the Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of **M M**, a child aged 13 years.

The appellant pleaded guilty to the charge and was convicted and sentenced to twenty years imprisonment on his own plea of guilty. His first appeal against sentence was dismissed by the High Court of Kenya at Machakos (L.N. Mutende, J) on 27th May, 2014 and hence this second and possibly the final appeal.

Aggrieved by the decision of the High Court , the appellant filed a home grown memorandum of appeal raising five (5) grounds of appeal which can be crystallized to only two issues for determination by this court. That is, whether the charge sheet was defective and secondly, whether the guilty plea upon which the appellant was convicted was an unequivocal plea?

When the appeal came before us for hearing on 14th October, 2015, the appellant appeared in person, as he did both in his trial and in his first appeal, while ***Mrs. G. Murungi*** SADPP, appeared for the state.

The appellant while relying on his supplementary memorandum of appeal submitted briefly that he pleaded guilty because he was beaten by the Police.

On her part, the learned State Counsel opposed the appeal and supported the conviction. Counsel argued that contrary to appellant's contention, the variance between the dates appearing on the charge sheet and the facts of the case cannot invalidate the appellant's conviction. To this end, Counsel stated that this was a discrepancy which does not go to the root of the conviction and therefore is curable under **Section 382** of the **Criminal Procedure Code**. She submitted that the claim by the appellant that the plea was procured through torture by the police was an afterthought. She urged us to dismiss the appeal.

The appeal before us is a second appeal. The law is that on a second appeal the Court of appeal is restricted to consider only points of law. (See ***section*** **361 of the Criminal Procedure Code).** *See also* ***Njoroge -vs- Republic*** (1982) KLR 388, where this court at page 389 held;

> ***"..On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..' See M'Riungu -vs- Republic (1983) KLR 455."***

This Court has also stated in many previous decisions 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 and ***Kiarie v. Republic*** [1964] KLR 739).

In ***M'Riungu v. Republic*** [1983] KLR 455 the court held:-

> ***"Where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v. Glyneed Distributors Limited (T/A MBS Fastenings – The Times of March 30, 1983)".***

Most recently, this Court in ***George Kamau Gatogo v Republic- Civil Appeal No. 21 of 2011*** cited with approval the holding in ***Kaingo Vs. R*** [1982] KLR 213 at P 219 where the Court held that;

> ***"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 evidence on which the trial court could find as it did (REUBEN KARARI C/o KARANJA VS. R [1956] 17 EACA 146)."***

The court in this case is bound to apply the law as enunciated by the above principles in re-evaluation of the facts and the evidence presented in both the trial court and the first appellate court.

The first issue raised by the appellant in the memorandum of appeal was:

> ***"(1) That the decision of the two courts below were bad in law, irregular, unreasonable and manifestly unsafe as the same was un supported having regard to the following defect in the charge sheet:***
>
> > ***(a) The plea entered was in respect of a charge committed on 10/2/2013 as contained in the particulars of the charge sheet.***

b. ***The High Court judge made a crucial error in law and grossly misdirected himself by dismissing the appeal without that the plea <u>was rendered unequivocal</u>*** (emphasis added) ***by the defect in the particulars of the charge sheet in relation to the difference in date of the commission of the offense and the date on the charge sheet.***[Emphasis supplied]"

We have perused the record and have seen that the charge sheet indicates that the date of the offence was on 10/2/2013 while the facts of the case as read out by the prosecutor refer to 9/2/2013 as the date of the offense. The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' 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 ***<u>JMA v. Republic</u>*** **(2009)** KLR 671, it was held inter alia that:

> ***"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."***

Applying this principle to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under

Section 382 of the **Criminal Procedure Code** which provides;

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The above statutory curative position is also replicated in **Section 214(2)** of CPC which provides that:

> ***"…variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."***

We are therefore of the considered view that the discrepancy on the dates as contained in the charge sheet and as contained in the facts read out to the appellant did not occasion a miscarriage of justice.

However, be that as it may, we now turn to the issue of whether a fundamental procedural error and propriety of the guilty plea upon which the appellant was convicted and sentenced, occasioned the appellant a miscarriage of justice. In this respect, we are tasked to make a determination as to whether the trial court followed the procedure that has been consistently established by the courts where an accused person pleads guilty to an offence charged.

We do this well aware that the even though the appellant raised the issue of unequivocal plea based on the different dates on the charge sheet, we on our part have perused the record, re-evaluated the facts and the evidence in the record and as a court of law, and in the interest of justice we are of the view that the issue on whether the plea was equivocal or not now to be considered further.

The correct manner of recording a plea of guilty and the steps to be followed by the court was laid down in the celebrated case of ***<u>Adan V Republic,</u>*** (1973) EA 446 where Spry V.P. laid the procedure at page 446 in the following terms:

"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."

This case was followed by ***Kariuki V R***(1984) 809 where their Lordships reiterated those steps 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 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 reply.***

See also ***Korir v. Republic*** **[**2006] E.A. 124

Our task in this appeal is therefore to determine whether the above procedure was followed in the trial court. For this reason, we have taken the liberty to reproduce verbatim the facts of the case as read to the appellant in the trial court and his response thereof. The facts as stated by the court prosecutor are that:

"On the 9th of February, 2013 at about 5.00pm, the complainant was going to the river to fetch water when the accused confronted her and took her jerican away and pulled her aside. Later the accused removed the complainant's short, skirt and underpants. The accused later undressed himself and ordered the complainant to lie down. Later the accused defiled the complainant. In the process, the complainant's mother appeared at the scene and found the accused in the act. The accused on seeing the complainant's mother, left the complainant alone and ran away. Later the matter was reported to the village elder at Kibwezi police station where the complainant was issued with a P3 form. Later the P3 from was filled at Makindu district hospital. The complainant was examined and treated at Makindu district hospital. I have the P3 form in Court as Exhibit I. Later the accused was arrested and charged with the present office."

The appellant was asked to respond to the facts and he stated: ***"The facts are correct."***

It is evident from the above statement of facts that age of the victim was not indicated in the statement as read out to the appellant to the extent that the facts as read out to the appellant did not disclose an offence. Whereas the charge sheet contained the age of the victim as 13 years, the facts did not state the age of the victim. The charge sheet was read to the appellant and he pleaded guilty. It is imperative that after a plea of guilty is recorded, the facts of the case are read to an accused. 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 the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.

In the particular circumstances of this case, the victim's age, which is material to the charge was not indicated in the facts as narrated by the prosecution and suffice to state that the facts as narrated did not disclose an offence.

In ***Adan*** (supra), this court emphasized the importance of the statement of facts in the following terms:

> ***"…The statement of facts serves two purposes; it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential for the statement of facts to precede the conviction..."***

We therefore find that the failure by the prosecution to include the age of the victim in the statement of facts read to the appellant rendered the plea equivocal and occasioned a miscarriage of justice.

What orders should we then make in the circumstances of this case? Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant.

In the case of ***Muiruri vs. Republic*** (2003) KLR 552, the court considered a similar situation and held as follows, *inter alia*:

1. ***Generally whether a retrial should be ordered or not must depend on the circumstances of the case.***

2. ***It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."***

In the criminal justice system, the law requires that the right of the appellant must be weighed against the victims right. In this case the appellant has been in confinement for three (3) years. Balancing the two competing interests, we believe justice demands that the case be re-heard in the subordinate court.

Accordingly, we order that the appellant shall be retried on the same charge before a Magistrate of competent jurisdiction other than Mr. M.O Kizito, PM. We further order that the appellant be produced before the court within seven (7) days of today's date. He shall thereafter be tried in accordance with the law.

Those shall be our orders.

Dated and delivered at Nairobi this 18th day of December, 2015.

M. K. KOOME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR