IN THE COURT OF APPEAL

AT MOMBASA

(CORAM:GITHINJI, MAKHANDIA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 372 OF 2012

BETWEEN

MOHAMED ABADADA ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Malindi (Omondi, J.) dated 25th September, 2009

in

H.C.Cr.A. No. 98 of 2008)

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JUDGMENT OF THE COURT

The appellant, ***Mohamed Abadada***, was charged before the Senior Principal Magistrate's court at Malindi with the offences of defilement contrary to ***section 8(3)*** of the Sexual Offences Act and compelled or induced ***Act*** contrary to ***section 6(a)*** of the same Act. The particulars in respect of count one were that on 8th March, 2007 at ***[Particulars Withheld]*** within Tana-River District of the Coast Province, the appellant committed an act causing penetration with a child namely, ***S K*** aged 14 years old. In respect of the second count, the particulars were that on the same day and place, the appellant intentionally and unlawfully compelled or induced or caused ***S K***, a girl aged 14 years to engage in an indecent act with him.

On 15th March, 2007, when the appellant appeared before the trial court to answer to the charges, he pleaded guilty to both. Accordingly the learned magistrate entered a plea of guilty.

The facts in support of the charges were subsequently led by the prosecutor. These were as follows:-

> ***"On 8th March, 2007 at [Particulars Withheld] in Tana River District, the complainant aged 14 years was within their farm at about 6.00 p.m. guarding the same against baboons. Accused came and without any warning, he grabbed the complainant, removed her inner-wear and started defiling her. She screamed for help. Her sister*** *K K* ***who was nearby heard her***

screaming and went to investigate she found accused defiling complainant. She started beating accused who rose up and escaped. Matter was reported at Gambe police station. Complainant was referred to hospital and was treated at Ngao Sub-District hospital. P3 form was filled on 12th March 2007. Accused was arrested on 9th March 2007 and charged. I produce the P3 form. P3 form – Exhibit 1."

Although the record before us indicates that the appellant confirmed that the facts were correct, we are not sure whether the response aforesaid was a result of a question to that effect poised to him by the trial court. Thereafter, the prosecutor is recorded as saying: ***"... He is a first offender."*** In mitigation, the appellant is recorded as saying:

"I have two children at home who depend on me. I was in [Particulars Withheld] to look for work. I ask for liniency. My father is old."

Having considered the mitigation of the appellant, the court took the view that the offences were serious that required stiff sentences to act as a deterrent to others with similar propensities. The trial court then sentenced the appellant to 15 years imprisonment on each count to be served concurrently.

The appellant was not satisfied with the sentence. He appealed to the High Court against the sentence. The High Court, (***H.A. Omondi, J***.), after hearing the appeal, dismissed it and indeed enhanced the sentence to 20 years imprisonment stating that under the provisions of ***section 8(3)*** of the Sexual Offences Act, a minimum sentence is provided irrespective of what mitigation a convicted person may offer. The sentence imposed by the learned trial magistrate was therefore illegal as it offended the minimum sentence imposed by the said provision of the Act which was 20 years imprisonment. Consequently, ***Omondi, J***. set aside the 15 years and substituted it with 20 years imprisonment to take effect from the date of conviction. With regard to the sentence on the second count, the Judge stated that upon conviction one is liable to imprisonment for a term of not less than five years. Under the circumstances the sentence was neither harsh nor excessive, and in any event it was to run concurrently with the sentence on the first count, so the appellant suffered no prejudice. She saw no reason therefore to interfere with the sentence on this count. For the above reasons, the Judge dismissed the appeal.

The appellant still dissatisfied with the decision of the trial court and of the first appellate court, preferred this appeal premised on the four grounds; to wit:-

"1. THAT I was remorseful during plea.

2. THAT I am a first offender of which the sentence imposed on me was harsh and excessive.

3. THAT I am the sole bread winner of my family.

4. THAT I am reformed and ready to join the society."

In support of the appeal, the appellant who appeared in person before us merely stated that he adopted the above grounds as his submissions in this appeal and had nothing to add.

Mr Oyiembo, learned State Counsel opposed the appeal. He submitted that the appellant was convicted on his own plea of guilty. Thereafter he was offered a chance to mitigate and was thereafter sentenced. Finally, he conceded that the appellant should have only been convicted on the first count. The second count would have been preferred as an alternative.

We have anxiously considered the record before us, the submissions by learned state counsel, the decision of the trial court as well as by the first appellate court and the law. We should point out that in the cause of the hearing of the appeal, it emerged that the plea as taken might not have been valid in law. If the plea was invalid then the proceedings were a nullity. That in our view is a matter of law. It is certainly not a second appeal on sentence. It is then an appeal on the legality of the plea which was acted

upon by the trial court. We therefore have no doubt in our minds that we have jurisdiction to entertain this appeal on that basis.

We cannot lose sight of the fact that in this case, the appellant was facing charges under the Sexual Offences Act which has a strict regime on sentences. There is very little discretion in matters of sentence donated to the trial courts by the Act, hence the need for the trial courts to be extremely careful and vigilant when handling such offences. This is not to say however, that in other cases, they should not be equally careful.

The way to take a plea was set out in the celebrated case of ***Adan v Republic (1973) E.A. 445***. In that case, the court stated that "When taking a plea in a criminal case, the accused must be informed of the detailed ingredients of the charge which constitute the offence, in a language that he understands, the date on which the offence was committed, the approximate time when it was committed (if known) and the person or persons against whom the offence was committed. It is only after all those are spelt out to the accused that his plea is taken down in writing in words as close as possible to the words the accused used in an answer to the charge. That is done after ensuring that the accused has fully understood the charge. Consequently the words, "***it is true***" are frowned at by the courts for they mean very little if anything. After the court enters a plea of guilty, the facts are given to the court by the prosecution. Again the facts are stated to the accused in a language he understands. After the facts are read, the accused is then asked if the facts as read out reflect what actually took place. If he agrees that the facts reflect the truth of what happened, then the court proceeds to see if the facts as read do establish an offence and if they do and the offence established is as in the charge, then the court proceeds to convict the accused of the offence. Needless to say, if facts do not establish an offence known to law then the court cannot convict for there would be no offence to convict the accused of. Once a conviction is entered, the prosecution will be called upon to give the previous antecedents of the accused if any; the accused should then be called upon to mitigate. After considering the mitigation, the Court shall impose the appropriate sentence. See also ***Criminal Appeal No. 36 of 2010 John Otieno Ojwang vs Republic (UR)***

This, in our view remains the proper procedure of taking a plea of guilty. However, did the learned magistrate strictly follow the outline above? We do not think so. In this case the record shows that when the charges were read to the appellant, he pleaded "***it is true***" and that was recorded. As a consequence, the court entered a plea of guilty against the appellant. Subsequent thereto the facts were given by the prosecutor as required. Whereupon the appellant may have been asked if they were true. The appellant accepted the facts. So far so good. However, instead of the court moving to the next stage of convicting the appellant on his own plea of guilty, the court proceeded straight to call for the records of the appellant, followed by mitigation and thereafter sentence. In our view from the point onwards that the court failed to convict the appellant onwards, the proceeding became irregular. Accordingly, the plea was not properly taken, and could not be acted upon. There being no conviction of the appellant on any of the charges, the court could not have sentenced the appellant on any of the counts. Thus the subsequent sentencing of the appellant as though he had been convicted of the offences was invalid and a nullity. In our view, the missed step in taking the plea aforesaid was fatal to the subsequent proceedings and an incurable irregularity in the procedure. Sentence could only be embarked on once a conviction had been legally and regularly entered.

We are surprised that the superior court as the first appellate court did not notice this fatal anomaly. Had it done so it would have come to the conclusion that the learned magistrate had not followed the strict legal requirements as to the taking of the plea and therefore the appellant's ***"conviction"*** and sentence if at all was null and void.

Secondly, we also find it rather disturbing that the superior court did not notice that the second count was perhaps bad in law as it arose from the same transaction. At most it should have been preferred as an alternative to the first count. We do not think in any event, that the facts read by the prosecution really supported this second count. That being the case the alleged conviction and sentence on that count was clearly illegal and for the High Court to have retained and confirmed it was clearly perverse to say the least.

On account of what we have already stated, we allow the appeal, quash the ***"conviction"*** and set aside the sentence. The appellant should be set at liberty at once, unless otherwise lawfully held.

Dated and delivered at Malindi this 19th day of June 2013.

E.M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR