REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

HIGH COURT CRIMINAL APPEAL NO. EOO3 OF 2021

EMODOKO EMOIDIT .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.Collins Ombija,RM in Marsabit PM`s Court Sexual Offence Case No.30 of 2020 delivered on 2/3/2021)

JUDGMENT

1. The appellant was on his own plea of guilty convicted of the offence of gang rape contrary to section 10 of the Sexual Offences Act No.3 of 2006 and sentenced to serve 20 years imprisonment. The particulars of the offence were that on the 12th day of September 2020 in Loiyangalani sub-county within Marsabit county in association with Namoyan Emoidit intentionally and unlawfully caused his penis to penetrate the vagina of one NN, a child aged 12 years. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal.

2. The grounds of appeal are that the appellant was misled by police officers into pleading guilty to the charge; that he was not informed of the danger of pleading guilty to the charge; that the age of the complainant was not proved; that the trial court failed to consider the mitigatory factors and that the sentence was harsh and excessive.

3. The court record indicates that the appellant was arraigned in court on the 15th September 2021 when the charge was read over and explained to him in Ki-Turkana language. He admitted the charge. The prosecutor then gave the facts of the case. The facts were that the complainant was on the material day sent by her aunt to fetch water from a nearby well. That she found the appellant and a colleague rearing sheep and goats near the well. The appellant stopped her and demanded to know where she was going. She told him that she was going to the well. The appellant then grabbed her by the hand and with the assistance of his colleague dragged her to the nearby bushes where they had forceful sexual intercourse with her in turns. After they finished with her they abandoned her in the bush. The complainant went home and reported to her aunt and village elders. The appellant and his colleague were arrested by members of the public and escorted to Loiyangalani Police Station. Both the complainant and her assailants were later escorted to Loiyangalani Health Centre where the complainant was examined by a clinical officer who found presence of spermatozoa in her cervical wall. The clinical officer made a conclusion that the complainant had been defiled. She was examined on her age and it was assessed at 12 years. The appellant was also examined on his age and it was assessed at over 18. The appellant was charged with the offence. During plea taking the P3 form for the complainant, her medical notes and her age assessment report were produced as exhibits. The age assessment report for the appellant was also produced as exhibit. It indicated that he was above the age of 19 years. The appellant pleaded guilty to the charge and was dealt with accordingly. His colleague pleaded not guilty to the charge but the charges were later on withdrawn for non-availability of witnesses.

4. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced before the trial court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify- see **Okeno v Republic** (1972) EA 32.

5. The appellant states that he was not conversant with the court process and that he was misled by policemen into pleading guilty to the charge. I however find no substance in this argument. The accused was jointly charged with a co-accused who pleaded not guilty to the charge. There is no reason why policemen would have tricked the appellant into pleading guilty and did not use the same tricks on his colleague. There is no evidence that the alleged policemen were in court when the plea was taken or whether they exerted any influence on him during plea taking. The allegation that the appellant was tricked into pleading guilty is unsubstantiated.

6. The appellant alleged that the age of the complainant was not known. It is now settled that the age of a person can be proved in various ways as was held by the Court of Appeal in **Mwalango Chichoro V. Republic, Mombasa Cr. Appeal No. 24 of 2015(UR)** that:

"The question of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as birth certificate, baptism card or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or, medical evidence."

(See also the decision in the Ugandan Court of Appeal in **Francis Omuroni v Uganda**, Criminal appeal No. 2 of 2000 as cited in PMM v Republic (2018) eKLR).

7. The facts given in the appellant`s case show that the age of the complainant was assessed by a clinical officer at Loiyangalani Health centre. The age assessment report was produced as exhibit during plea as Pexh.1. It shows that the age of the complainant was estimated at between 11 and 12 years. The method the clinical officer used to assess the age is indicated in the report. The report is therefore credible in proving the age of the complainant. There is no doubt that complainant was aged at between 11 and 12 years. The submission that the complainant`s age was not known is not supported by any evidence. In any case, all that the prosecution needed to prove under section 10 of the Sexual Offences Act that creates the offence of gang rape is that the victim was a child under the age 18 years, which was indeed proved. This ground of appeal does not hold water.

8. The appellant contends that he was not informed of the danger of pleading guilty to the charge. The appellant was facing a serious charge of gang rape that attracted a minimum sentence of not less than 15 years imprisonment but which could be enhanced to imprisonment for life. It is the practice in our courts that where an accused is charged with a serious offence that may attract a long prison term the trial court should inform the accused of the consequences of pleading guilty. In **Elijah Njihia Wakianda –Vs- Republic Nakuru Criminal Appeal Number No. 437 of 2010 (2016) eKLR** the Court of Appeal stated that:-

"… We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare.

… 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."

9. In **Simon Gitau Kinene –Vs- Republic [2016] eKLR where the accused faced a charge of trafficking in narcotic drugs,** Joel Ngugi J. held the following on the issue:-

"Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)* this is what I said and I find it relevant here:

In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see

that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.….to put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea."

10. In **Fidel Malecha Weluchi –Vs- Republic [2019] eKLR** Odunga J. held that:-

"In this case since the charge which the appellant faced carried a prima facie minimum sentence of twenty years, it is my view that in such serious offences where the sentences may either be long or indefinite, the Court must ensure not only that the accused understands the ingredients of the offence with which he is charged at all the stages of the plea taking but that he also understands the sentence he faces where he opts to plead guilty. That in my view is what is contemplated under Article 50(2) of the Constitution which provides for the right to a fair trial. Whereas the said Article prescribes certain ingredients of a fair trial, the Article employs the use of the word "includes" which means that what is prescribed there under is not exclusive but just inclusive since Article 19(3) of the Constitution provides that (3) The rights and fundamental freedoms in the Bill of Rights "do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter" while Article 20(3)(a) thereof enjoins the Court to "develop the law to the extent that it does not give effect to a right or fundamental freedom".

11. In **Bernard Injendi –Vs- Republic [2017] eKLR** where the appellant was charged with defilement, SitatiJ. (as she then was) considered a similar matter and held that:

"Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case (above) the Court of Appeal quoted from Boit vs- Republic [2002] IKLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words "as nearly as possible in his own words". I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty."

12. The appellant was unrepresented when he took plea before the magistrate. It is clear from the above authorities that where an accused person is charged with a serious offence that carries a long-term sentence, it is the duty of the trial court to warn him/her of the consequences of pleading guilty to the charge. The trial magistrate in this case did not warn the appellant of the consequences of pleading guilty to the charge and that the offence attracted a minimum sentence of 15 years imprisonment, which is not in any way a short prison term. The failure to so warn the appellant amounted to a breach of the principle of fair trial as prescribed in Article 50(2) of the constitution. The appeal succeeds on this ground.

13. Having found that there was a breach of the appellant`s right to fair hearing, I do not see the need for me to consider the last ground of appeal that the sentence meted out on the appellant was harsh and excessive. I do hereby quash the conviction entered against the appellant and set aside the sentence of 20 years imprisonment.

14. Upon reaching the above decision, the question is whether I should order a retrial. The general principle in regard to re-trials is that a re-trial should only be ordered where it is unlikely to cause injustice to the accused. In **Obedi Kilonzo Kevevo –Vs- Republic (2015) eKLR** the Court of Appeal held that:-

"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:-***

"Generally, whether a re-trial should be ordered or not must depend on the circumstances of the case. 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 victim's 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."

15. In **Samuel Wahini Ngugi –Vs- Republic (2012) eKLR** the said court held that:-

"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.'

16. In this case it is the trial court that was to blame for the breach of the appellant`s right to fair trial. The appellant was facing a serious offence of defiling a minor. Two years have lapsed since when the charges were brought against him. I do not consider that period to be detrimental to a fair hearing. The justice of the case calls for a re-trial. I thereby order that the appellant be re-tried of the offence by a magistrate of competent jurisdiction other than Hon. Collins Ombinja.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 23RD DAY OF NOVEMBER

2021

JESSE N. NJAGI

JUDGE

Present Virtually:

Mr. Ngige - **for Respondent- at Marsabit Law Courts**

Appellant -. Present in person at Marsabit Law Courts

Court Assistant - Mr. Kashane at Marsabit Law Courts

30 days R/A.