Case Number:	Criminal Appeal 13 of 2019
Date Delivered:	20 Dec 2019
Case Class:	Criminal
Court:	High Court at Kajiado
Case Action:	Judgment
Judge:	Enock Chacha Mwita
Citation:	Christopher Mutie Musyoki v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	OKUCH, SRM
County:	Kajiado
Docket Number:	-
History Docket Number:	riminal case No.3 of 2018
Case Outcome:	-
History County:	Kajiado
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 13 OF 2019

CHRISTOPHER MUTIE MUSYOKI ……………………….APPELLANT

VERSUS

REPUBLIC…………………………………………………RESPODENT

(Appeal from original conviction and sentence (HON. OKUCH, SRM) at the Senior Resident Magistrate's court, Loitokitok in criminal case No.3 of 2018, Republic v Christopher Mutie Musyoki, delivered on 10th April 2018)

JUDGMENT

1. The appellant was charged with the offence of defilement of a child contrary to Section 8(1), (3) of the Sexual Offences Act, No. 3 of 2006. Particulars were that on the 5th day of April, 2018 in Kajiado South Sub-County within Kajiado County, intentionally caused his private organ to penetrate the private organ of AM, a child aged 11 years.

2. The appellant pleaded guilty to the charge on 9th April, 2018. The court then adjourned the case to the following day 10th April, 2018 for facts. On that day, 10th April 2018, the charge was again read to the appellant and once again, he pleaded guilty. Facts were then read to him and he admitted them. He was convicted of his own plea of guilty and was sentenced to life imprisonment.

3. The appellant filed this appeal against both conviction and sentence and raised the following grounds of appeal, namely:

1. That the trial magistrate erred in law and fact in failing to consider that he was unrepresented during the plea taking and did not understand the essence of pleading guilty because he is illiterate.

2. That the trial court erred in law and fact in convicting him on his own plea of guilty which was equivocal.

3. That the trial court erred in law and fact in handing him the sentence of life imprisonment which was harsh and excessive

4. That the trial court erred in law and fact by failing to consider that he was a first offender.

5. That the trial court erred in law and fact in failing to note that the charge sheet was defective.

4. The appellant's advocates filed a supplementary grounds of appeal which actually reiterated his earlier grounds of appeal filed by the appellant...

5. During the hearing of this appeal Mr. Mwaura, learned counsel for the appellant, submitted both orally and highlighting their written submissions dated 16th October, 2019 and filed on 23rd October, 2019. He submitted that even though the appellant pleaded guilty to the offence, his plea was not unequivocal. He also submitted that the charge was defective and that the sentence was excessive.

6. In the written submissions, it was submitted that the plea was not unequivocal. According to the counsel, although section 348 of the Criminal Procedure Code disallows appeals where an appellant pleaded guilty and was convicted on that plea, it was his submission that according to the record, the appellant sought to explain his conduct and therefore that was not a plea of guilty. According to counsel, the appellant was recorded to be telling the trial court that he was sick and that was why he committed the offence.

7. According to counsel, the trial court was aware of the circumstances of the case raised as to the appellant's mental status and that was why the trial court ordered for an assessment report on his mental capability. The report however stated that he was of normal mental status.

8. It was therefore contended that the appellants' plea of guilty was not unequivocal because he stated that he committed the offence because he was sick. This, in their view, amounted to a qualified plea of guilty. It was also submitted that a history of substance abuse should have informed the trial court to find that the appellant was not in a proper mental status.

9. Further submission was to the effect that the trial court should have cautioned the appellant during plea taking. It was argued that section 207 of the Criminal Procedure Code provides how a plea should be taken which was not complied with. Reliance was placed on ***Osike Emongonyang' & 2 Others v Republic*** (Criminal Appeal No. 69 of 1990, [1996] eKLR where the Court of Appeal held that a court should not accept a plea of guilty without warning the accused person of and explaining to him fully the consequences of his plea of guilty.

10. In the appellant's view, it was submitted, the principles in the above case should have applied to the appellant's case given the nature of the sentence he faced on conviction.

11. On whether a retrial should be ordered, it was submitted that a retrial should only be ordered where the initial trial was illegal or defective. Reliance was placed on ***Opicho v Republic*** [2009] KLR 369***; Falehali Manji v Republic*** [1966] EA 343; ***Muiruri v Republic*** [2003] KLR 552 and ***Mwangi v Republic*** [1983] KLR 522, where the court stated that in considering whether to order a retrial or not the court should take into account circumstances such as prevalence of the offence and gravity of the offence as well as public interest.

12. However according to counsel, the offence took place some 7 years ago there is no basis for holding the view that the prosecution would not get witnesses to prosecute the case. He did not therefore oppose an order for retrial.

13. Miss Thyaka learned Prosecution counsel opposed this appeal. She submitted also highlighting their written submissions dated and filed on 6th May, 2019, that the appellant pleaded guilty and therefore no appeal is allowed in terms under section 348 of the Criminal procedure Code. According to counsel, the plea of guilty recorded was unequivocal and the appellant had sought legal representation but chose to proceed without one.

14. Counsel further submitted that the charge was read and explained to the appellant by the court and he understood it and therefore the plea of guilty was unequivocal. She urged the court to dismiss the appeal.

Determination

15. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. I have also perused the record and considered the judgment of the trial court. This being a first appeal, it is the duty of this court as the first appellate court to reanalyse, reassess and reconsider the evidence adduced before the trial court and come to its own conclusion.

16. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

17. This appeal arises from a conviction on a plea of guilty. The respondents argued that the law disallows appeals against conviction where such conviction was on the basis of one's own plea of guilt. They have relied on Section 348 of Criminal Procedure Code to support their argument. Section 348 provides as follows:

"No appeal shall be allowed in the case of an accused person who has pleaded

guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

18. It has been argued on behalf of the appellant that the plea was equivocal and therefore this is a proper appeal for this court to consider both on conviction and sentence. Counsel for the appellant has argued relying on Section 207 of the Criminal Procedure Code and authorities that the plea of guilty recorded by the trial court against the appellant was equivocal and, therefore, the conviction was unsafe and the sentence erroneous.

19. Section 207 of Criminal Procedure Code provides how a pea should be taken. It provides:

"(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 <u>as nearly as possible in the words used by him</u>, 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:

<u>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.</u>

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads—

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."

20. The Section gives the manner in which a plea should be recorded. In the appellants' view, the plea record was equivocal. They also blamed the trial court for not explaining to the appellant the meaning of the plea and inform him of the consequences of pleading guilty. They have relied on a number of decisions to support this argument.

21. I have perused the record of the trial court. Although counsel for the appellant raised a number of issues, including the fact that the appellant stated that he was sick and that is why he committed the offence, the record does not reflect this.

22. According to the record, the appellant was presented to court on 9th April, 2018. When he appeared before the trial court the record shows that interpretation was in Kiswahili/English. The records then states:

"The substance of the charge and every element thereof has been stated by the court to the accused in kiswahili a language that he understands, who being asked whether he admits or denies replies;

Principal Charge

It is true.

Plea of guilty entered.

Marete: Facts on 10th April, 2018.

23. On 10th April, 2018 the record shows that the charge was again read to the appellant and he was once again recorded to say ***it is true.*** The court entered a plea of guilty. Facts were then read to the appellant and he is recorded to have stated;

"The facts are true"

24. The Court then entered a plea of guilty. the court then stated:

"Court: the accused is convicted on his own plea of guilty."

25. In mitigation, the appellant is recorded; ***"I seek forgiveness***." The court then recorded:

"I have considered the mitigation of the accused person; he is convicted to serve life imprisonment"

26. As already reproduced above, section 207 of Criminal Procedure Code, is clear that the court when taking plea should record ***as nearly as possible,*** the words the accused uses in answering to the charges. The trial court recorded the words "**it is true"** are English words yet the accused was answering the charge in Kiswahili translated into English because the charge was read to him in Kiswahili. It is not clear to this court which exact words the appellant used in Kiswahili that would be as nearly as possible to the answer he gave to the plea that would be equivalent to or as near as possible to *"**It is true**"*

27. Second, the appellant faced a serious charge and although the plea appears to have been taken twice, the record is silent on whether the trial court warned the appellant on what the plea of guilty meant and the consequences to expect for pleading guilty to the charge he was facing.

28. In ***Osike Emongonyang' & 2 Others v Republic*** (supra), the Court of Appeal sounded a warning that trial courts should not readily accept pleas of guilty in serious offences unless satisfied that the accused understood what to expect for such a plea. In that case the appellants had twice pleaded guilty to the charge after it was read and explained to them in Teso language and were convicted on their own plea of guilty. On a second appeal, the Court of Appeal was satisfied that the plea was voluntary and unequivocal. What however was of concern to the court was failure to warn the appellants on the consequences they faced for pleading guilty.

29. The court expressed the concerns as follows:

"But what has given us considerable unease, is the further arguement advanced in support of the present appeal that the fact that the appellants had not been warned of the dire consequences that would befall them if they changed their plea of not guilty to one of guilty, rendered their plea of guilty defective and the retrial a mistrial. We think that there is merit in this arguement."

30. The court then referred to its own decision of ***David Mundia Onkoba v. Republic Criminal Appeal No. 14 of 1990,*** where it was satisfied with the warnings the trial magistrate had given to the appellant in that case as to the mandatory death sentence which he would be bound to impose upon the appellant if he pleaded guilty to the charge of robbery with violence. The court had stated in that case:

"The principal magistrate then informed the appellant of the mandatory sentence of death prescribed for that offence and asked him if he understood that. After the appellant confirmed that he had understood all that was explained to him the Principal Magistrate then asked him if he still wished to plead guilty to that offence for which the magistrate could only sentence him to death the appellant replied. Yes, because I committed this offence...... In fact as we pointed out earlier, and as did the learned judges, the Principal Magistrate was reluctant to accept a plea of guilty. Time and again he had warned the appellant of the mandatory sentence of death which the law prescribed."

31. The court of Appeal then stated:

"Granted that the Senior Resident Magistrate's court is not a court from the decision of which, no appeal lies, it must still be remembered that the appellants were unrepresented; that since they had not been warned of the dire consequences of their plea of guilty to the offence charged, they had been as it were, sentenced to death "out of the blue so to speak"; and had thus, had no

chance to change their minds about pleading guilty as charged or to consider the devastating effect of their decision to plead guilty."

32. Guided by the above decisions, it is not clear to this court that the appellant understood the charge and the consequences of the plea he was returning to that charge. Although the decisions referred to above dealt with the charge of robbery with violence which carried a mandatory death penalty, the same can be said of the offence of defilement of a child aged 11 years which carries a mandatory sentence of life imprisonment. It is a serious offence and the sentence is severe. One must be fully aware of the consequences to expect if he pleads guilty.

33. The appellant was unrepresented and the trial court did not warn him that he would probably be jailed for life if he pleaded guilty. If the trial court had done so and the appellant maintained his plea, the plea of guilty would be voluntary and unequivocal. The appellant would also have an opportunity to rethink the decision to plead guilty once it was made clear to him the sentence that awaited him for that plea. In the circumstances, therefore, I agree with the appellant's counsel that the trial court did not exercise caution in this matter and the plea of guilty recorded against the appellant was neither voluntary nor unequivocal.

34. Having determined that the appellant's conviction based on his plea of guilty was unsafe, the question that remains is whether this court should order a retrial. The appellant's counsel did not oppose a retrial while the prosecution counsel said nothing about it. Whether or not to order a retrial is a matter at the discretion of the court to be decided based on the circumstances of each case. The court must take into account factors such as public interest and the cause of justice.

35. In ***Ahmed Sumar v R*** [1964] EA 483 the East Africa Court of Appeal held that:

"…in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered"

36. Further in ***Pius Olima & another v Republic*** [1993] eKLR, the Court of Appeal stated that a retrial may be ordered where the original trial, is defective, if the interest to justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.

37. And in ***Laban Kimondo Karanja &2 others v Republic*** [2006] eKLR, Khamoni, J. reiterated the factors to be taken into account in deciding whether to order a retrial and stated:

"In general a retrial will be ordered only when the original trial was illegal or defective, and from the particular facts and circumstances of the case, the appellate Court, or the court on revision, is of the opinion that on a proper and judicious consideration of the admissible or potentially admissible evidence, a conviction might result, and further that the court is satisfied, not only that the interests of justice require the order for a retrial to be made, but also that such an order when made is not likely to cause injustice to the accused person."

38. Applying the above principles to this appeal, an order for a retrial should not be made if it will cause prejudice to the appellant or where on the admissible evidence on record the retrial will return a conviction. In this appeal, the appellant's case did not go to trial and therefore this court cannot determine whether there would be likelihood of a conviction should a retrial be ordered. The court must also be alive to the fact that both the appellant and the victim are entitled to justice.

39. The prosecution did not have an opportunity to present evidence before the trial court because the appellant pleaded guilty to the charge, I am of the view that it is in the interest of justice that a fresh trial is conducted to give the prosecution a chance to prove its case against the appellant thus serve interests of justice given that the offence was only committed on 5th day of April, 2018 and there is no indication that the prosecution will not be able to procure its witnesses.

40. In the circumstances, I hereby make the following orders.

1. This appeal is allowed, conviction quashed and sentence set aside.

2. The appellant is to undergo a new trial. He should be produced before the senior principal Magistrate's court at Loitokitok on 3rd January 2020 for purposes of taking plea.

Dated Signed and Delivered at Kajiado this 20th Day of December 2019.

E C MWITA

JUDGE

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions. Read our Privacy Policy | Disclaimer