



**Mohamed v Republic (Criminal Appeal E082 of 2022)
[2024] KEHC 10738 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E082 OF 2022
LW GITARI, J
AUGUST 21, 2024**

BETWEEN

HALKANO MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged in the Principal Magistrate’s Court at Isiolo Sexual Offence Case No E002 of 2022 with committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). The particulars of the charge are that on 8/1/2020 at around 1400 Hours at [particulars withheld] area in Isiolo County within Eastern Region intentionally touched the private parts of R.H. a child aged ten (10) years using his hands. Upon being arraigned in court, the charge was read out to him and he readily pleaded guilty to the charge.
2. The facts of the charge were read out to him as follows:

“The facts are that on 8/1/2020 at around 2.00pm at [particulars withheld] area the complainant minor was on her way to Madrassa when she met the accused person who greeted her to by shaking her hand and in the process pulled her commanded a kiss from the complainant. The complainant declined to kiss the accused. The accused at his point grabbed the complainant and started touching her private parts using his hands. The complainant screamed and this made the accused to release the complainant. The complainant informed the sister who turned informed their parents and the matter was reported at Isiolo Police Station and the accused was arrested. The minor is aged 10 years.”
3. The appellant admitted the facts of the case and the court entered a plea of guilty and sentenced to serve ten years imprisonment.



4. The appellant was dissatisfied with the conviction and sentence and filed this appeal which initially raised three grounds. He however abandoned the grounds of appeal and filed written mitigation for review of the sentence. He thus submits that he is thirty two (32) years old and self-employed. That he has not previous record of crime or conviction and prays to be treated as a 1st offender. He submits that he has already served more than one year and nine months in prison.
5. In addition he mitigates that he suffers from epilepsy and the prison environment is not conducive for his health. He submits that his wife is deceased having lost her life in a road traffic accident shortly after his arrest and their child has no one to take care of it. He has urged the court to give him a second chance and forgive him for his crime.
6. The appellant relies on paragraph 22 of the [Judiciary Sentencing Policy Guidelines](#) and the Ruling in [Titus Ngamau Musila alias Katitu](#) Criminal Case No 78/2014 which quoted the case of [Santa Singh v State of Punjab](#) [1978] 4 SCC 190 where it was stated as follows:-

“Proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances-extenuating or aggravation of the offence. The prior criminal record, if any, of the offender, the age of the offender the record of the offender as to employment, the background of the offender reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence.”

7. He pleads for a non-custodial sentence. The respondent has opposed the appeal and submits that the plea was unequivocal. The respondent relies on Section 348 of the [Criminal Procedure Code](#) (Cap 75 Laws of Kenya) which provides that-

“No appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a sub-ordinate court except as to the extent or legality of the sentence.”

8. The respondent further relies on the case of [Alexander Lukoya Maliku v Republic](#) [2015] eKLR where the Court of Appeal stated that an appellate court may only interfere with the guilty plea if the plea taken is ambiguous, imperfect, unfinished or that the trial court erred in treating it as a plea of guilty. The respondent also relies on the case of [John Muendo M. v Republic](#) [2013] eKLR where the court stated:-

“The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of [Adan v Republic](#) [1973] EA 445 where the court held:-

- “(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.
The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.
- (ii) The prosecution should 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.



- (iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.
- (v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.”

9. The respondent submits that the procedures stated above were followed by the trial court. He again relies on *Obedi Kilonzo Kevevo v Republic* [2015] eKLR where the Court of Appeal stated that-

“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 and he pleads guilty, thereafter the facts are narrated to the accused person and he is once more asked to respond to the facts. It is important that both the statement of the offence as contained in the charge sheet as well as facts narrated by the prosecution must each disclose an offence. Otherwise the plea is not unequivocal.”

10. The respondents further submits that the sentence was lawful and both the conviction and sentence should be dismissed.

Analysis and Determination:

11. I have considered the proceedings before the trial court, and the submissions. The issues which arises for determination are:

1. Whether the plea was unequivocal:

The procedure in plea taking in the sub-ordinate court is laid down under Section 207 (1) (2) and (3) of the *Criminal Procedure Code*.

The Section provides as follows:-

“207.

- (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 as nearly as possible in the words used by him, 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: 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.
- (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.”



12. The court is supposed to read the charge and the particulars to the accused in a language that he understand. The accused is then asked whether he admits the charge. If the accused pleads guilty, the court shall record that plea accurately in the words stated by the accused and if it amounts to a plea of guilty the trial magistrate shall record a plea of guilty. The court shall then read or cause the facts in support of the charge to be read to the accused. The trial magistrate shall ensure that the facts support the charge and the particulars. The trial magistrate shall then ask the accused whether he admits the facts which have been read to him and he admits the facts, the court shall proceed and record the admission as nearly as possible in the words used by the accused and then formerly enter a plea of guilty. This procedure was laid down in the case of *Adan v Republic* [1973] EA 445
13. This procedure was affirmed by the court of appeal in the case of *John Muendo Musau v Republic* (*supra*). The purpose of following this procedure is to ensure that the plea of guilty is unequivocal and the plea cannot be interpreted in any other way as an admission guilt. The accused must admit he facts as stated for the court to satisfy itself that that the plea is unequivocal.
14. The court must be satisfied that the accused wishes to admit the charge without any qualifications each and every element of the offence charged See *Elijah Njihia Wakianda v Republic* and only when satisfied that the accused wishes to admit the charge record a plea of guilty. Upon admitting the charge the court shall call upon the prosecutor to state the facts upon which the charge is based. The detailed facts must be given and not just the particulars outlined on the charge sheet. In case there are any exhibits which forms evidence in support of the charge, they must be produced when the facts are being read out in court. In a case of defilement, evidence in prove of the age of the victim must be availed or stated.
15. In this case the learned magistrate read the charge to the appellant and on realizing that he wanted to plead guilty cautioned him of the consequences of his plea of guilty and adjourned the matter to give the appellant time to rethink the guilty plea. The plea taking was thereafter adjourned three times but the appellant indicated that he was pleading guilty to the charge. The charge was read and he stated as follows: Nikweli- True. The facts were then read out. The record does not show whether the facts are rue. The record only shows, “Accused (In Borana) It is true. Court plea of guilty entered”) leaned trial magistrate was supposed to enquire from the appellant whether he admits the facts of the case.
16. In *Kariuki v Republic*, (Court of Appeal Kisumu Criminal Appeal No 22/1984)- [1984] KLR 809 held that the accused persons plea must be specific and not merely a general assertion of guilt. The court has held that for an accused person to say. “It is true”, is not necessarily a plea of guilty, See *Jason Makokha v Republic*. The accused should be asked if he admits the facts and his answer should be recorded. The plea was not properly taken. I find that the plea of guilty entered by the appellant was not unequivocal.
17. It is trite law that sentencing follows the conviction of an accused. It is not enough to enter a plea of guilty, the court should proceed and convict the person charged. That is the reason why the sentencing policy guidelines talks of a convicted person. It is mandatory that a conviction forms the basis of a sentence. Section 348 of the *Criminal Procedure Code* (*supra*) provides in mandatory terms that shall be allowed in a person.

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea.”



Conviction is defined in the *Oxford Dictionary* as follows:-

“A from declaration by the verdict of a jury or the decision of Judge in a court of law that someone is guilty of a criminal offence.”

18. The court must therefore first of all convict an accused person before passing the sentence. The Court of Appeal in *Alexander Lukonya Maliku v Republic* (*supra*) held that an appellate court may only interfere with a plea of guilty if the plea taken was ambiguous imperfect and unfinished. In the case of *Adan v Republic* the court stated that a conviction should be recorded.
19. The record of the court shows that after the facts were read the appellant stated, it is true. She then proceeded to state that-plea of guilty entered. The appellant was therefore not convicted and the plea of guilt was flamed and uncompleted. It is my view that the plea of guilty was not unequivocal as the court did not inform the appellant that he was convicted on his own plea of guilty. Conviction entails informing the person charged with sentencing would follow: Where a plea of guilty is unequivocal, there is a miss trial and a retrial should be ordered.

Conclusion:

20. Upon analyzing the above case law and perusing the record of the learned magistrate. I am of the view that the plea was unequivocal. I allow the appeal.

I order as follows:-

1. The appeal is allowed.
2. The sentence imposed on the appellant is set aside.
3. There shall be a retrial of the appellant before another magistrate with jurisdiction.
4. The appellant shall be remanded at Isiolo Police Station, and be produced in Chief Magistrate’s Court Isiolo within two (2) days for retrial.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

