



REPUBLIC OF KENYA



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**WON v Republic (Criminal Appeal E017 of 2023)
[2024] KEHC 15996 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E017 OF 2023
WA OKWANY, J
DECEMBER 18, 2024**

BETWEEN

WON APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment and Sentence in the Senior
Principal Magistrate's Court at Keroka, S.O. No. E008 of 2023 delivered
by Hon. C. Ombija - Senior Resident Magistrate on 9th March 2023)*

JUDGMENT

1. The Appellant herein was convicted, on his own plea of guilty, of the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 24th January 2021 at (particulars withheld) Location in (particulars withheld) Sub-County within Nyamira County intentionally and unlawfully caused his penis to penetrate the vagina of D.K.O. (particulars withheld) a child aged 4 years who was to his knowledge his daughter.
2. He was, upon conviction, sentenced to serve life imprisonment.
3. Aggrieved by the trial court's decision, the Appellant filed the instant appeal and listed the following grounds of appeal in the Petition of Appeal: -
 1. That the trial court erred in both law and facts by convicting the Appellant who was not versed with the matters of law, this is after pleading.
 2. That the learned trial magistrate erred in both law and facts by violating the Appellant's right of a fair trial since the witnesses were not called to testify in court.



3. That it was prudent for the court to test the credibility in a case which warrants life sentence thus infringing the Appellant's right of fair trial hearing (sic).
 4. That this court has inherent powers to order for a retrial, to give the Appellant opportunity to interrogate the witnesses for a fair disposal of this matter.
 5. That the appellant prays to be served with the true copies of the original proceedings to enable him erect more grounds.
4. The Appeal was canvassed by way of written submissions which I have considered. I find that the main issue for determination is whether the Appeal herein is merited. The court will also consider whether the guilty plea was unequivocal and whether the sentence passed by the trial court was legal and appropriate.

i. Whether the Plea of guilty was unequivocal.

5. Section 348 of the Criminal Procedure Code (CPC) stipulates as follows on appeal against convictions where the appellant is convicted on his or her own plea of guilty.

348. 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 and legality of the sentence.

6. In *Olel vs. Republic* [1989] KLR 444, it was held that:-

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely.”

7. The principle that emerges from Section 348 of the CPC is that an appeal does not lie against a conviction where the Appellant unequivocally pleads guilty to the charge. In such a case, an appellate court may only examine the plea process and in order to satisfy itself on its legality and propriety in order to determine if the guilty plea was unequivocal. Where the plea is found to have been properly taken and therefore unequivocal, an appellate court will only be limited to determining the legality of sentence passed by the trial court.
8. In *Alexander Lukoye Malika vs. Republic* [2015] eKLR the Court of Appeal explained the circumstances under which an appellate court may interfere with a plea of guilty thus: -

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged.”

9. Section 207 of the Criminal Procedure Code, on the other hand, outlines the manner in which a plea is to be recorded as follows; -

- (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.

(See also *Adan vs. Republic* [1973] EA 445)

10. It is also trite that where an accused person pleads guilty to a charge, the trial court must take extra care to satisfy itself that the plea is unequivocal, especially where the charge is serious in nature, by explaining every element of the charge and by taking further steps to explain the likely consequences of such a plea. In *Hando S/o Akunaay vs. Rex* (1951) 18 EACA 307 it was held that: -

“...before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent.”

11. In *Elijah Njihia Wakianda vs. Republic* [2016] eKLR the Court of Appeal held thus: -

“Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms.....

...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.”



12. I will now turn to apply the principles expressed in the above cited cases to the instant case by examining the manner in which plea was taken before the trial court with a view to establishing if the guilty plea was unequivocal. The plea was recorded as follows: -

27. 1.2023

Before Hon. C. Ombija S.R.M.

DPP - Ogada

C.A. - Mwita

Accused – I understand Kiswahili.

Interpretation – Kiswahili

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language that he understands who being asked whether he admits or denies the truth of charge replies –

True – main count.

Court: The Accused is hereby warned of the consequences of pleading guilty, the same is expressed in Kiswahili and Ekegusii language.

Accused: I have understood and could stand by the response.

Court: The charges are hereby read again to the Accused in Kiswahili and Ekegusii language who being asked whether he admits or denies the truth of the charge replies:-

Accused: It is true.

Ms. Ogada: Facts are as that on 24th January 2023 at Gesima, the complainant was left in the house with the father while the mother went to the farm. After a short time, the accused left his bed and joined the complainant in children's bed, removed the minor's trouser and also lowered his long trouser. He then spread the 4-year-old minor's legs and started penetrating her vagina using his penis. The minor cried when the accused removed his penis, and ejaculated on the minor. After the act, he walked outside the room, upon the mother coming, after the act, he walked outside the room. Upon the mother coming back, the minor narrated to her what happened. She had difficulty in walking and was taken to Gesima Dispensary, she was examined by the doctor, the mother was taken to Keroka Police Station. The accused was also taken for examination.

Birth Certificate for minor - P.Exh 1

Treatment Notes for minor – P.Exh 2

P3 Form for the minor – P.Exh 3

Accused: Facts are correct.

Court: Plea of guilty entered.

Accused is convicted on his own plea of guilty

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C. Ombija S.R.M. 27/1/2023

9. 2.2023



Before Hon. C. Ombija S.R.M.

DPP - Sitati

C.A. - Mwita

Accused – Present

Mr. Mathenge, Probation Officer: The Pre-Sentence Report is not ready. I pray for more time.

Mr. Sitati – No Objection.

Court: Further Mention for sentencing on 23.2.2023

C. Ombija S.R.M. 9/2/2023

Court: The consequences of pleading guilty is hereby explained to the accused person in Kiswahili language that he understands. The substance of the charge and every element thereof has been stated again to the accused three consecutive times in Kiswahili language which he understands, who being asked whether he admits or denies the truth of charges replies.

Accused: It is true and facts are also correct as read to me from the court file. I maintain my position that the facts are correct. I only ask for pardon, I do not know what came over me, the victim is my daughter. I am remorseful.

Court: Plea of guilty is hereby confirmed. Accused is confirmed as convicted on his plea of guilty. The court shall give the Probation Officer more time as requested to compile and present the pre-sentencing report.

Accused: It is ok I have understood.

Court: Mention 9.3.2023 for sentencing.....

C. Ombija S.R.M.

9. 3.2023

Before Hon. C. Ombija S.R.M.

DPP - Sitati

C.A. - Mwita

Accused – Present

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COURT: Accused is sentenced to life imprisonment.....

C. Ombija S.R.M.

9. 3.2023

13. The above extract of the trial court's proceedings reveals that the said court correctly complied with the laid down process of taking plea as prescribed by Section 207 of the CPC. I note that not only was the charge read out to the Appellant several times, but that the same was read out in Kiswahili language which he understood. In addition to reading out the charge more than once, the trial court also repeatedly warned the Appellant of the likely consequences of a guilty plea. I further note that the Appellant confirmed that the facts of the charge were correct and that he maintained the guilty plea



by stating that the facts were correct. The Appellant went further to ask the trial court for forgiveness. The trial court took further steps, during the subsequent mention date, to once again explain the consequences of the guilty plea to the Appellant when the plea was once again read out to him and he confirmed that the facts of the charge were correct.

14. I am satisfied that the plea was properly recorded and was therefore unequivocal. I note that the facts of the case were also clear and straightforward. The Appellant confirmed that he understood and agreed with every element of the charge. It is my finding that the Appellant's conviction, on his own plea of guilty, was proper as the plea was unequivocal. I therefore uphold the said conviction.

ii. Whether the sentence was legal and appropriate

15. Section 20 (1) of the [Sexual Offences Act](#) stipulates as follows: -

20. Incest by male persons

- (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

16. It is trite that sentence falls at the discretion of the trial court and that an appellate court should not interfere with the exercise of such discretion unless it is shown that the trial court acted on some wrong principle or overlooked some material factor. This is the position that was taken in *Nelson vs. Republic* [1970] E.A. 599, where the court relied on the decision in *Ogalo s/o Owuora vs. Republic* (1954) 21 EACA 270 and held as follows:-

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershevsity* (1912) C.CA 28 T.LR 364.”

17. I have considered the nature of this case and the fact that the Appellant acknowledged that the victim was his 4-year-old daughter. My finding is that the Appellant's actions were not only abhorrent but also abominable thereby warranting a punitive sentence commensurate to the gravity of the offence. The Appellant not only robbed the victim of her innocence at a very tender age, but also abused the sacred duty and position of trust bestowed upon him as a parent. The Appellant turned against his own daughter instead of protecting her. He turned out to be the villain who wantonly devoured the victim's purity and innocence in a very callous manner. I find that such conduct must receive the highest form of denunciation from this Court and the society at large.
18. My above findings and views notwithstanding, I am still minded of the duty of this court to balance the rights of an accused person against those of the victim and give consideration to any mitigating factors



against aggravating factors in line with the Judiciary Sentencing Policy Guidelines. This Court pays homage to the decision by the Court of Appeal in Manyeso vs. *Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment) which was also cited by the Appellant herein where life sentence was declared unconstitutional and set aside for a sentence of 40 years' imprisonment. In the said case, it was held thus: -

“.....we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

19. Guided by the above cited decision, I find that even though life sentence is prescribed by the Act as a mandatory sentence, it has since been held to be unconstitutional owing to its indeterminate nature.
20. For the reasons that I have stated in this judgment, I find that the instant appeal is merited, albeit only partly, to the extent of sentence. I however uphold the conviction by the trial court but set aside the sentence of life imprisonment which I hereby substitute with a sentence of 30 years' imprisonment. The sentence shall run from the date of the Appellant's arrest being 25th January 2023 in line with the provisions of Section 333 (2) of the Criminal Procedure Code.
21. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 18TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE

