



**Kiplagat v Republic (Criminal Appeal E054 of 2021)  
[2023] KEHC 240 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 240 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E054 OF 2021  
JWW MONG'ARE, J  
JANUARY 26, 2023**

**BETWEEN**

**MATTHEW KIPLIMO KIPLAGAT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the judgment conviction and sentence of Hon. Kiptoo in Eldoret  
Chief Magistrate's Criminal Case No. E082 of 2021 delivered on 2nd August 2021)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8(1) and 8(3) of the [Sexual Offences Act](#) on his own plea of guilty. The particulars of the offence are that on diverse dates between May and August 2020 within Elgeyo Marakwet caused his penis to penetrate the vagina of BJ, a child aged 14 years.
2. The appellant initially took a plea of not guilty but requested for a change of plea on July 27, 2021. He pleaded guilty and was sentenced to 20 years imprisonment. Being aggrieved by the sentence, he instituted this appeal *vide* a petition of appeal filed on August 9, 2021 premised on the following grounds;
  1. That (I) am a first offender and thus beg for leniency.
  2. That (I) was convicted on my own plea of guilty.
  3. That (I) am remorseful, repentant and reformed since (I) have learnt incarceration in prison.
  4. That (I) am a young student at [Particulars Withheld] Polytechnic pursuing a course in plumbing.



5. That (I) am a young man and (I) pray to be reconstituted in society to serve as a role model and a teacher/mentor to others of similar behaviour.
  6. That may this honourable court be pleased to consider the sentencing policy of 2016 published by the Kenya Judiciary and establish the mitigating circumstances that would lessen the custodial sentence.
  7. That, more grounds to be adduced at the hearing thereof.
- The parties filed submissions on the appeal.

### **Appellant's Case**

3. The appellant submitted that he is a first offender and thus the sentence of 20 years imprisonment was a harsh sentence in the circumstances. He thought the complainant was his agemate and they occasionally used to have sex when she would come to his house. He was only 18 years old at the time of his arrest and he is a student at [Particulars Withheld] Polytechnic pursuing a course in plumbing. He submitted that he is remorseful and urged the court to reduce his sentence.

### **Respondent's Case**

4. Learned counsel for the state submitted that the conviction was based on the appellant's own plea of guilty. He admitted that only two of the three essential ingredients of the offence of defilement were proved; proof of penetration and positive identification of the accused. There was no mention at all of her age. Proof of the complainant's age, which is an essential ingredient of the offence, was not supplied to the court and therefore remains unproven.
5. Learned counsel stated that the omission of proving age besmirches the plea of guilty. He cited the case of *Boniface Onyango v Republic* [2008] eKLR on reasons a plea can be considered equivocal. He also cited the cases of *Fetahali Manji v Republic* [1966] EA 343, *Mwangi v Republic* [1983] KLR 522 and *Muiruri v Republic* [2003] KLR 552 in support of his submissions that there were errors in recording the appellant's plea of guilty. He urged that the matter be sent back for retrial as there were illegalities or defects in the original trial.

### **Analysis & Determination**

6. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. See *Okeno v Republic* [1973] EA 32; *Pandya v R* (1957) EA 336, *Ruwala v R* (1957) EA 570.
7. Upon consideration of the Appeal and the submissions of the parties, the following issues arise for determination;
  - a. Whether the plea was unequivocal
  - b. Whether the appeal is merited

### **Whether the plea was unequivocal**

8. The Appeal is mainly against the sentence but the prosecution has brought the issue of the equivocality of the plea of guilty to the attention of the court. Section 207 of the *Criminal Procedure Code* provides the procedure for recording a plea of guilty. The procedure was further explained by the court in *Adan v Republic* [1973] EA 445 as follows;



- a. 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.
  - b. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
  - c. 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.
  - d. 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.
  - e. 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. In the event that the process of recording the plea is erroneous or flawed, the plea can be interfered with. The Court of Appeal in *Alexander Lukoye Malika v Republic* [2015] eKLR stated as follows;

“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.”

10. The prosecution admitted that only two elements of the offence of defilement were proved. It is trite that for the offence of defilement to be proved the prosecution must establish;
- a. There was penetration
  - b. Positive identification of the accused
  - c. Age of the complainant
11. From a reading of the proceedings, it is clear that the age of the complainant was never conclusively proved to the court thus rendering the plea of guilty defective. The Appellant was clearly not informed that he had a valid defence against the charge under section 8(5) of the *Sexual Offences Act*. Further, under section 8 (1)(3) of the *Sexual Offences Act*, the age of a complainant must be established in order to determine the kind of sentence that should be meted in the event of a conviction. Such evidence should have been produced when the facts were read by the prosecutor.
12. The age of the complainant was not proved. Age is a primary ingredient of the charge under section 8 (1) (3) of the *Sexual Offences Act* was missing and therefore the facts did not fully disclose an offence of defilement under the said Act.
13. I am guided by the decision of Ngugi J in the case of *Paulo Malimi Mbusi v R Kiambu Crim App No 8 of 2016* (unreported) where the learned judge observed that the duty of the court that plea of guilty is unequivocal is heightened where an accused person is unrepresented. In the cited case, the judge stated;

“In those cases [where there is an unrepresented accused charged with 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 a custodial sentence, the obligation of the court to ensure that the accused person understands the consequence of such a plea is heightened.”

14. In the premises, I find that the plea was equivocal as the appellant was not aware that he had a defence despite informing the court that he had believed the complainant was his agemate.

**Whether the appeal is merited**

15. . Whereas the respondent seeks a retrial, it is trite law that one cannot be ordered where there is insufficiency of evidence or to enable the prosecution improve their case. The prosecution has admitted that there was a failure to prove the age of the complainant and as a result, an essential ingredient of the offence was not proved. I have considered the age of the appellant and the circumstances of the case and I find that it would not be in the interest of justice to order a retrial. Further, the same would be in contravention of his right to a fair trial under article 50(2) of *the Constitution*.
16. I find that the appeal is herein merited and set aside conviction by the trial court is and vacate the sentence. The accused is to be set free forthwith unless otherwise lawfully held.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

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**J.W.W. MONGARE**

**JUDGE**

Judgment read in open court in the presence of;

1. Ms. Okok – State Counsel
2. Mr. Kimathi Court Assistant
3. Appellant - Present

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**J.W.W. MONGARE**

**JUDGE**

