



**Wanjiru v Republic (Criminal Appeal E074 of 2022)
[2023] KEHC 19293 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E074 OF 2022
GL NZIOKA, J
JUNE 29, 2023**

BETWEEN

SAMWEL NJOROGE WANJIRU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence in criminal case No. E091 of 2022 at the Chief Magistrate’s Court at Naivasha rendered by Hon J. Ndengeri, Senior Resident Magistrate, on 8th December, 2022)

RULING

1. The appellant was arraigned before the Chief Magistrate’s Court at Naivasha charged vide criminal sexual offences case No. E091 of 2022, with the offence of defilement contrary to section 8(1)(2) of *Sexual Offences Act* (herein “the Act”) and an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Act.
2. The particulars of the charge are that, on the 5th day of December 2022, within Gilgil Sub-County in Nakuru County intentionally and unlawfully caused his genital organ (penis) to penetrate the anus of JKN, a child aged 4 years without his consent.
3. The appellant pleaded guilty and was convicted on his own plea of guilty. He was then sentenced to serve thirty (30) years imprisonment.
4. However, the appellant is aggrieved by the decision of the trial court and appeals against both the conviction and the sentence on the grounds as here below reproduced: -
 - a. That, the learned trial magistrate erred in law and fact by sentencing the appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.



- b. That the learned trial magistrate erred in law and fact by failing to find that the plea was not equivocal.
 - c. That, the learned trial magistrate misdirected herself on the principles and procedures of taking plea.
 - d. That, I pray to be supplied with a copy of the lower court proceedings and its judgment.
 - e. That, further grounds shall be adduced at the hearing of this appeal.
 - f. That, I wish to be present during the hearing and determination of this appeal
5. However, the respondent in response to the appeal filed ground of opposition which states as follows: -
- a. That the accused was convicted and sentenced on his own plea of guilty.
 - b. That the age of the complainant was sufficiently proved as provided under the [Sexual Offences Act](#).
 - c. That penetration was proved under the [Sexual Offences Act](#) through the evidence of the doctor examined the complainant and produced P3 form and PRC form.
 - d. That the sentence imposed by the trial court was proper and in line with the [Sexual Offences Act](#). Further, that the considered mitigation and circumstances of the offences and used discretion in sentencing the appellant.
 - e. The petition is misconceived and lacks merit and ought to be dismissed forthwith and the conviction and sentence upheld.
6. The appeal was disposed of by filing of submissions. The appellant filed submission on March 2, 2023, in which he argued that, the plea was unequivocal as the trial court misdirected itself and failed to follow the principles and procedures of plea taking as outlined in the cases of; *Adan vs Republic* (1973) EA 445 and *Kariuki vs Republic* (1984) eKLR.
7. That, it was not recorded whether the trial magistrate asked him the language he understood nor was his response recorded as nearly as possible to his response. Reliance was placed on the case of; *Joseph Bosire Ogao vs Republic* (2010) eKLR where the court dealt with the importance of recording clearly the language the accused understands.
8. He further submitted that the trial magistrate did not caution him before or after the charges were read to him, which went to the root of the prosecution's case. He relied the case of; *Njuki vs Republic* (1990) KLR 334 where the court cited the case of; *Hando s/o Akunaay vs Republic* (1951) 18 EACA 305 on the need to caution the accused while recording plea of guilty.
9. That the trial dealt with the matter in one day which was not adequate time for him to prepare his defence and therefore it was contrary to article 50 (2) (b) and (c) of [the Constitution](#) of Kenya, 2010. Furthermore, the trial court failed to record and consider his mitigation which is part of the trial process under sections 216 and 329 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya and relied on the case of [George Mbaya Ngitbinji v Republic](#) [2019] eKLR where the Court ordered for a sentencing hearing where trial court had failed to do so.



10. However, the respondent in response filed submissions in which it argued that the prosecution had proved its case to the required standard. That the prosecution produced the birth certificate (exhibit 3) that showed the complainant was born on 9th November 2018 and was four (4) years at the time of the offence.
11. Further, on identification it was revealed that the appellant was the complainant's cousin. That, penetration was proved by production of the P3 form and the PRC form that indicated the injuries he had suffered. Reliance was placed on the case of *Mark Oiruri Mose vs R* (2013) eKLR where the Court of Appeal stated that there is no need of proof of spermatozoa and that penetration shall be proved even if it is on the surface.
12. On the sentence of thirty (30) years imprisonment, it is submitted that the trial court exercising its discretion, considered the facts and circumstances of the case before meting out the sentence, as such court should uphold the same.
13. At the conclusion of the arguments by the respective parties and in considering the submissions of the respective parties, I note that, as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, the role of the first appellate court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses. The court observed: that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 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 (Shantilal M. Ruwala V. R [1957] E.A. 570. 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; it must make its own findings and draw its own 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”

14. To revert back to the substance of the matter herein, I note that, the appellant pleaded guilty to the charges and was convicted on his own plea of guilty. In that regard, the provisions of section 348 of *Criminal Procedure Code*, (cap 75) Laws of Kenya, provides that, where an accused person pleads guilty to the charges, no appeal shall be allowed, except as to the extent or legality of the sentence.
15. The main issue herein is whether the plea was unequivocal. I have looked at the record of the trial court and I note the following
 - a. After the substance of the charge(s) were read to the appellant in a language expressed to be a language he understands, it is indicated that, he answered “Ni kweli”. The court then proceeded to have the facts read to the appellant.
 - b. What is glaringly missing and which is critical is that, the court did not indicate on record that, the appellant had entered “a plea of guilty” before the facts were read out, section 207 (1) & (2) of the Criminal Procedure Code states that: -

“(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”.

- c. Furthermore when the facts were read out, the prosecution merely produced the medical documents being PRC and P3 forms as prosecution exhibits 1 and 2 respectively. There is no indication of the findings of the doctor in those two documents. It was critical to read out the finding that would establish and/or support the charge of defilement. It was not sufficient to merely record “PRC form- Exhibit 1, P3 form Exhibit 2.
- d. In the same vein after the facts were read out it was imperative for the court to indicate that, the appellant had been asked to confirm whether the facts were correct in total and he confirmed the same. Once again that was not done.
- e. Furthermore although the court stated that “the charges had been read to the accused and pleaded guilty on both readings” These sentiments by the court at the stage of sentencing are not supported by the record at the time of reading out the charge. Therefore not tenable.
16. In the given circumstances, I find that, the plea herein was not unequivocal, especially bearing in mind the seriousness of the offence as evidenced by the severe sentence imposed for the same.
17. Finally, the sentence provided for the offence of defilement under section 8 (2) of the Act, is life imprisonment the appellant was sentenced to serve thirty (30) years imprisonment. No reasons were given by the trial court as to why it departed from the sentence provided for under the law.
18. Taking into account the entire circumstances of this matter and the fact that, the victim of crime needs to have justice done, the only order that will serve the interest of justice to both parties is to order a re-trial of the matter before a different trial magistrate. I therefore set aside the conviction and sentence herein and order that, the appellant be arraigned before the Chief Magistrate’s Court on July 3, 2023 for plea and further orders
19. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 29TH DAY OF JUNE 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:-

Applicants present virtually

Mr. Atika for the Respondent

Ms Ogutu-Court assistant

