



REPUBLIC OF KENYA



**Malan v Republic (Criminal Appeal E047 of 2022)
[2023] KEHC 21979 (KLR) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E047 OF 2022
GL NZIOKA, J
AUGUST 16, 2023**

BETWEEN

CETRICK KIBUYI MALAN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence in Criminal Case
S/O No. E051 of 2021 in the Chief Magistrate's Court at Naivasha
delivered on 5th July, 2021, by Hon K. Bidali, Chief Magistrate)*

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court at Naivasha charged vide criminal case S/O No E051 of 2021 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) (herein "the Act").
2. The particulars of the charge are that on the night of June 27, 2021 in Naivasha Sub-County within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ of one namely vagina of MA a girl aged 15 years old.
3. He was also charged with an offence of committing an indecent act with a child contrary to section 11(1) of the Act, in the alternative count.
4. The particulars thereof are that, on the night of June 27, 2021 in Naivasha Sub-County within Nakuru County, he intentionally and unlawfully did cause indecent act to MA a girl aged 15 years old by having his penis come in contact with her vagina.
5. The appellant pleaded guilty to the main charge and was convicted on his own plea of guilty and sentenced to seven twenty (20) years imprisonment.



6. The brief facts of the case are that on June 27, 2021 the complainant left her home to go to the appellant's house. The appellant was her boyfriend. She did not come back and as her mother was looking for her she learnt from one Margaret that the complainant had been seen at Hell's Gate watching the Rally.
7. The next day the incident was reported to the Director of Criminal Investigation (DCI) at Kasarani Police, by her mother who gave out the appellant's telephone number 07xxxxx109. On June 29, 2021 the phone was tracked at Lake Nakuru and the appellant was arrested. He led the arresting officer to a lodging where the complainant was found.
8. The complainant was taken for treatment and the PRC and P3 forms filled (P exh 1 and 2) produced and so was the complainant's birth certificate (P exh 3) which shows she was born on May 15, 2006. The accused was then charged accordingly.
9. However, the appellant has appealed against the decision of the trial court vide grounds of appeal which states as follows:
 - a. That the learned trial magistrate did not note that the plea was not unequivocal.
 - b. That, the learned magistrate misdirected himself on the principles and procedure of plea taking.
 - c. That, the learned trial magistrate failed to note that the appellant did not understand the charges facing him.
 - d. That, the learned trial magistrate erred in law and fact by sentencing the appellant to a sentence that is manifestly harsh, excessive and oppressive in the circumstances.
 - e. That, I pray to be supplied with a copy of the original trial court's proceedings and its judgment.
 - f. That, further grounds shall be adduced at the hearing of this appeal.
 - g. That, I wish to be present during the hearing and determination of this appeal.
10. Subsequently, the appellant filed amended grounds of appeal allegedly pursuant to section 350(2) (v) of the [Criminal Procedure Code](#) which states
 - 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 misdirected himself on the principles and procedure of taking plea.
 - c. That, the learned trial magistrate erred in law and fact by failing to inform the appellant on his right to representation thus contravening Article 50(g)(h) and Article 4(3)(d) of the [International Covenant on Civil and Political Right \(ICCPR\)](#)



11. Be that as it were, the appeal was opposed by the respondent vide undated grounds of opposition filed on January 26, 2023 in which the respondent argues: -
 - a. That, the appellant was convicted on his own plea of guilty and subsequently sentenced.
 - b. That the appellant was duly cautioned of the serious nature of the offence and the sentence likely to be imposed once he pleaded guilty.
 - c. That the sentence that was meted out by the trial court was lenient having taken into account his mitigation and his record as a first time offender, he was awarded a minimum sentence.
 - d. That the appellant's appeal lacks merit and should accordingly be dismissed
12. The appeal was disposed of vide filing of submissions. The appellant filed two sets of submission on 9th February and March 6, 2023, the latter being a reiteration of the former. He submitted that his plea was unequivocal as the trial court in its oversight role failed to ensure that his rights to a fair trial under Article 50 (2) of the [*Constitution of Kenya, 2010*](#) were adhered to.
13. That, the trial court failed to ensure he was provided with witness statements and any other evidence the prosecution intended to rely on, thus he was not aware of the nature of the complaint against him and was condemned unheard. Further, the trial court failed to caution him of the likely sentence to meted out on conviction.
14. Furthermore, considering the seriousness of the offence against him and sentence to be imposed, the trial court failed to inform him of his right to be represented by an advocate of his own or provided for by the Government as stipulated under Article 50 (2)(g)(h) of the [*Constitution*](#) and Article 14(3)(d) of the [*International Covenant on Civil and Political Rights*](#) (ICCPR).
15. The appellant submitted that the sentence was harsh and excessive and faulted the trial court for not taking into consideration his mitigation. That, the trial court failed to interpret the law in a manner that favours a fundamental right under Article 20(3) of the [*Constitution*](#) by imposing the mandatory minimum sentence under the Act, which has been declared unconstitutional for offending the provisions of Article 25 (c) and 50 (2) (p) of the [*Constitution of Kenya, 2010*](#).
16. The appellant relied on the case of [*Mwangi vs Republic*](#) (criminal appeal No 84 of 2015) (2022) KECA 1106 (7th October 2022) (Judgment) eKLR where the court substituted the sentence of twenty (20) years imprisonment with a sentence of fifteen (15) years imprisonment.
17. He also placed reliance on the case of [*Okello vs Republic*](#) (criminal appeal No 189 of 2015) (2022) (judgment) KECA 1034 (KLR) (23rd September 2022) where the Court of Appeal sitting in Kisumu reduced a sentence of twenty (20) years imprisonment to ten (10) years imprisonment.
18. However, the respondent, vide submissions filed alongside the grounds of opposition submitted that in the case of; [*Adan vs Republic*](#) (1973) EA 445, the Court of Appeal outlined the procedure of plea taking and stated that the essential ingredients of the offence should be explained to the accused in a language he understands, that the accused own words should be recorded if it an admission, the prosecution should read the facts to the accused who should be given an opportunity to dispute, explain or add any relevant facts, and where there is no change of plea a conviction should be recorded.
19. That, in the present case the charge and all the elements of the offence were read out to the appellant in English language that the appellant understood, and the appellant pleaded guilty. That, the trial court



proceeded to caution him that the offence attracts a minimum sentence of twenty (20) years however, the appellant pleaded guilty. Even when given an opportunity to mitigate, the appellant never retracted his plea of guilty nor did he change his mind while waiting for sentencing that was imposed on a later date.

20. Further, section 348 of the *Criminal Procedure Code* provides that an appeal on conviction where an accused pleads guilty is untenable except to the extent or legality of the sentence.
21. The respondent stated that section 8 (3) of the Act provides for a mandatory minimum sentence of twenty (20) years and the trial court has no discretion to impose a shorter sentence than the one prescribed.
22. Having considered the appeal in the light of material placed before the court and submissions tendered I find that the main issues that have arisen for determination are whether the plea was unequivocal and/or the plea taking process was complied with and whether the sentence meted out was harsh and/or excessive in the circumstances of the case.
23. In this case it is noteworthy that, the appellant pleaded guilty. The provisions of section 348 of *Criminal Procedure Code*, (Cap 75) Laws of Kenya, provides that, where an accused person pleads guilty to the charge, no appeal shall be allowed, except as to the extent or legality of the sentence.
24. However, a plea of guilty can be challenged where it is not unequivocal as held in the case of; *Alexander Lukoye Malika v Republic* [2015] eKLR where the Court of Appeal thus stated: -

“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.”
25. In the instant matter, the trial court records indicates that, the charge was read to the appellant in a language he understands in English and he responded: “it is true”. He was cautioned over the sentence provided under the law for the offence and he maintained that he was pleading guilty. A plea of guilty was recorded.
26. It also suffices to note, the appellant stated in his mitigation, that, he was a 3rd year student studying Computer Science at Egerton University, therefore there was no issue of language barrier or lack of understanding of the charge.
27. In addition, the facts were read out and are clear as recorded and indeed, the appellant once again confirmed the facts were correct as read out and maintained that, he had sex with the complainant. What eluded him all through, was failure to appreciate that, it is an offence to have sex with a minor and the consent of a minor is immaterial. He seems to have been pre-occupied with the understanding and/or self justification that, the complainant having been his girlfriend, having sex with her was in order.
28. Be that as it may, I find that the plea as taken was unequivocal. There was no breach of procedure and the appeal on conviction fails.



29. As regard sentence, the provision of section 8(3) of the Act states: -

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

30. The appellant was given the minimum sentence under the law, therefore the court cannot interfere with the same. The appeal is dismissed in its entirety.

31. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF AUGUST 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant in person

Mr Atika for the respondent

Ms Ogutu: Court Assistant

