



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mwangi v Republic (Criminal Appeal E017 of 2023)  
[2023] KEHC 24262 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24262 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E017 OF 2023  
FN MUCHEMI, J  
OCTOBER 25, 2023**

**BETWEEN**

**DAVID KAMAU MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the conviction and sentence in the Principal Magistrate Court in Baricho by Honourable S. M. Nyaga (SRM), in Criminal Sexual Offence Case No. 46 of 2020 on 23rd November 2021)*

**JUDGMENT**

**Brief Facts**

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Baricho where he was charged with two counts of the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No 3 of 2006. He was further charged on two alternative charges of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. The appellant pleaded guilty to the two main counts and was sentenced to life imprisonment on count 1 while the sentence on the 2<sup>nd</sup> count was held in abeyance.
2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 5 grounds of appeal which can be summarised as follows:-
  - a. The learned trial magistrate erred in law and in facts by finding that the appellant was fit to take plea instead of ordering for a second psychiatric assessment, yet the trial magistrate had noted that the appellant did not understand the charges;



- b. The learned trial magistrate erred in law and in fact by proceeding with the case for hearing yet the appellant did not take plea after the psychiatric test was done and he was considered fit to plead;
  - c. The learned trial magistrate erred in law and in fact by not giving a clear warning and explaining to the appellant the consequences of changing plea as required by law;
  - d. The learned trial magistrate erred in law and in fact by failing to ask the appellant what language he understood and thus there was a mixture of languages used during the trial;
  - e. The sentence meted out against the appellant is harsh and excessive.
3. Parties disposed of the appeal by written submissions.

### **The Appellant's Submissions**

4. The appellant submits that he was not fit to take plea despite the fact that there was a medical report indicating that he was mentally okay. He further states that he was unable to cross examine the witnesses and follow the proceedings and therefore the trial magistrate ought to have ordered for a second psychiatric assessment. The appellant further submits that plea was taken yet the case proceeded for hearing. He argues that on 23/11/2020, the trial magistrate ordered for a psychiatric report after noting that he could not understand the charges. The appellant further submits that when the report declaring him mentally fit to plea was availed, the charges were not read to him again and the case proceeded for hearing.
5. The appellant submits that the plea was read in Kiswahili on 18/11/2022 and on 17/11/2021 an interpretation was done in English/Kiswahili thus denying him his constitutional right which requires that the trial be conducted in a language that he understands. The appellant further states that the trial learned magistrate did not warn him of the consequence of changing plea and the sentence the offence carried as required by law.
6. The appellant states that the sentence meted out against him was harsh and excessive and did not take into consideration the sentencing policy guidelines.

### **The Respondent's Submissions**

7. The respondent submits that the appellant was informed of the seriousness and the penalty of the offence yet he still maintained that he was the perpetrator. The respondent further relies on Article 50(2)(b) of *the Constitution* and Section 207(1) of the *Criminal Procedure Code* and submits that the charges were read to the appellant and the substance of the charges and every element thereof stated by the court in Kiswahili and the appellant replied:-
  - a. Count I – its true
  - b. Count II- its true.
8. The respondent states that then the court entered a plea of guilty. The respondent further submits that the narration and interpretation of facts was read to the appellant on 15<sup>th</sup> September 2021 and he reiterated that he committed the offence. Further on 17<sup>th</sup> November 2021, the interpretation was read to the appellant in Kikuyu and he replied:
  - a. Count I – its true
  - b. Count II – its true.



9. The respondent submits that the appellant agreed with the facts and evidence of the prosecution that the trial court adopted that ensured he understood fully the charges he was pleading to. The respondent further submits that there was no change of the plea and conviction was recorded.
10. On mitigation, the respondent argues that that the appellant stated that his wife ran away and that is how he ended up sodomizing children at the home where he used to work. The respondent thus relies on Section 348 of the [Criminal Procedure Code](#) and submits that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on the plea by the subordinate court save as to the legality of the sentence.

### **Issues for determination**

11. The appellant has cited 5 grounds of appeal which can be compressed into four main issues:-
  - a. Whether the appellant was fit to plead;
  - b. Whether the charge was read to the appellant in a language he understood;
  - c. Whether the trial court failed to warn him of the consequences of the charges;
  - d. Whether the sentence is harsh and excessive.

### **The Law**

12. This being a first appeal, this court is guided by the principles set out in the case of [David Njuguna Wairimu v Republic](#) [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

13. Similarly in the case of [Okeno v Republic](#) [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ([Pandya v Republic](#) (1957) EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. ([Shantilal M. Ruwala v R](#) (1957) EA 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 finding and 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, see [Peters v Sunday Post](#) [1958]EA 424.” This was also set out in the case of [Kiilu & another v Republic](#) [2005] KLR 174.



### **Whether the appellant was fit to plead.**

14. The appellant was convicted on his own plea of guilty of two counts of defilement and sentenced to serve life sentence for one of the charges as the sentence in count II was held in abeyance. The record shows that the appellant was arraigned in court on 18/11/2020 whereby the charge was read to him and he replied in Kiswahili:-
  - a. Count I – Its true
  - b. Count II- Its true.
15. The appellant was then informed of the seriousness and the penalty of the offence and he still maintained that he committed the offence. On 23/11/2020, when the facts were read to the appellant, he stated that he did not commit the offence and then stated that he committed the offence. The court noted that the appellant did not seem to understand the charge and ordered for a mental assessment test to be conducted. The appellant was found fit to stand trial after he undertook a mental assessment test on 9/2/2021 after undergoing treatment. The court slated the matter for mention for pre-trial directions and the matter proceeded for hearing.
16. On 17/11/2021, directions were taken under Section 200 of the Criminal Procedure Code and the appellant stated that he committed the offences. The court further noted that the appellant confirmed on the effects of his admission of the offence and scheduled the matter for mention for reading of the charge a fresh to the appellant. on 22/11/2021, the charges were read to the appellant and the accused stated:-
  - a. Count I – It is true
  - b. Count II- It is true
17. The facts were read to the appellant on 23/11/2021 and he replied:-
  - a. Count I – It is true
  - b. Count II- It is true
18. The court then entered a plea of guilty on both counts. The appellant was declared fit to stand trial after a mental assessment was conducted and the case proceeded for hearing. Thereafter, the trial court read the charge to the appellant afresh and he maintained that he was guilty of both counts. Furthermore, the mental assessment report indicates that he admitted to defiling the minor because his wife had left him. The appellant in mitigation, told the court the same story of his wife leaving him and that is why he was defiling the minors. From the conversation between the appellant and the court it is evident that he understood the charges read and explained to him during plea.

### **Whether the charge was read to the appellant in a language that he understood.**

19. The Court of Appeal in Elijah Njibia Wakianda v Republic [2016] eKLR stated:-

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 plea of guilty present 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 courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same was entered consciously, freely and in clear and unambiguous terms.

20. The court further observed:-

With respect, we find this disturbing. It seems to us that this part of a template used by courts at plea taking. That is why it speaks of “charge(s)” when there was a single charge and rather odd “in a language he understands” when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring that a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of offence are not complete if the sentence, especially if it is severe and a mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his viral 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.

21. The charge was read to the appellant on 18/11/2020 and he replied in Kiswahili that he was guilty on both counts. On 17/11/2021, directions were taken under Section 200 of the Criminal Procedure Code in English and interpreted to Kiswahili and the appellant stated that he committed the offences. The court slated the matter for mention on 22/11/2021 for reading of the charge afresh to the appellant. On 22/11/2021, the charges were read in English and interpreted in Kiswahili and further read in Kikuyu and the appellant stated that he committed the offences. On 23/11/2021, the charges were read to the appellant in Kikuyu and he pleaded guilty. It is therefore evident that the appellant understood the charges as they were read to him in Kiswahili and Kikuyu languages. Furthermore, all through the trial the appellant understood that the charges against him were those of defilement and he admitted on every occasion that he committed the offences.

22. I come to the conclusion that the charges were read to the accused in the languages he understood well, that is Kikuyu and Kiswahili. This was after he was declared fit to plead.



### Whether the trial court failed to warn him of the consequences of the charges;

23. The importance of the need for the court to be cautious when accepting a plea of guilty from an undefended accused person was stressed by Joel Ngugi J (as he then was) in *Simon Gitau Kinene v Republic* [2016] eKLR when he stated that:-

Finally, the courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an accused person is unrepresented, the duty of the court to ensure the plea of guilty is unequivocal is heightened. In *Paul Malimi Mbusi v R*, Kiambu Crim. App. No 8 of 2016 (unreported) this is what I said and I find it relevant here:-

In those cases [where there is an unrepresented accused charged with a 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 consequences of such a plea is heightened. Here, the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the court was about to convict and sentence the accused person for, it behoved the court to warn the accused person of the consequences of a guilty plea.

The appellant was facing a serious charge that carried a minimum sentence of life imprisonment. It is the duty of a court taking plea in such serious offence to warn the accused of the expected sentence in case he pleaded guilty to the charge.

24. Similarly in *Bernard Injendi v Republic* [2017] eKLR where the appellant was charged with defilement, Sitati J (as she then was) considered the issue and held that:-

Finally, the learned trial magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case (above) the Court of Appeal quoted from *Boit v Republic* [2002] 1KLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words “as nearly as possible in his own words”.

I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea.

25. The appellant herein was unrepresented when he took plea before the magistrate on 18/11/2020. On perusal of the record, I have noted that the charge was read to the appellant and the court informed him of the seriousness and penalty for the offence yet the appellant maintained that he committed the offence. However, on 22/11/2021, the charge was read afresh to the appellant, but the trial court did not warn the appellant that the offence attracted a penalty of life sentence. It was the duty of the trial court to ensure that the appellant understood all the ingredients of the charge and the resultant sentence once he pleaded guilty. Therefore, the failure to warn the appellant amounted to a breach of the appellant’s constitutional rights as enshrined in article 50(2) of *the Constitution*.



26. In this regard, it is my considered view that the plea entered against the appellant was unequivocal. There was a breach of the appellant's right to fair hearing for failure to warn him of the consequence of pleading guilty to serious charges that carried a minimum sentence of life imprisonment. It is notable that the appellant was facing serious charges of defilement of two minors that attracted heavy sentences.

**Whether the court should order a retrial.**

27. The general principle in regard to retrials is that a retrial should only be ordered where it is unlikely to cause injustice to the accused. This principle was enunciated in the case of *Obedi Kilonzo Kevevo v Republic* (2015) eKLR where the Court of Appeal held:-

Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of *Muiruri v Republic* (2003) KLR 552, the court considered a similar situation and held as follows *inter alia*:-

Generally, whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

In the criminal justice system, the law requires that the right of the appellant must be weighed against the victim's right. In this case the appellant has been in confinement for three years. Balancing the two competing interests, we believe justice demands that the case be re-heard in the subordinate court.

28. The trial of the appellant was a mistrial in that the same was not conducted in accordance with the law. The appellant was in custody pending trial for about one year. Since he filed this appeal, it is another one year spent in prison pending hearing and determination of this appeal. The period of two (2) years is not a short one and must be considered in deciding whether a retrial shall be ordered. It is also important to consider that at the time the appellant committed the offence, he was not mentally fit and had to be remanded pending a certificate of mental fitness. This raises doubt as whether, if retrial was to be ordered he is likely to be convicted of the offence. Ordering a trial would no doubt cause further incarceration of the appellant awaiting trial. The appellant's right must be weighed against the rights of the victims. It is noted that the victims were minors and were the children of the appellant. However, the court is not certain that a retrial will address the rights of the victim or even those of the appellant.
29. I have carefully weighed all the factors in this case as well as the effects of ordering a retrial. I am of the considered view that a retrial will not serve the interests of justice. Neither will it serve the rights of the appellant or the victims. For these reasons I hereby decline to order retrial.
30. Due to the mistrial in this appeal, I hereby quash the conviction and set aside the sentence. The appellant is hereby acquitted of the two counts of defilement. He is hereby set at liberty unless otherwise lawfully held.
31. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**



## **JUDGE**

Judgement delivered through video link this 25<sup>th</sup> day of October , 2023

