



REPUBLIC OF KENYA



**MMM v Republic (Criminal Appeal E015 of 2021)  
[2022] KEHC 15012 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 15012 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E015 OF 2021  
SM GITHINJI, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**MMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgement of the PM's Court in Criminal Case No. 14 of 2020 by Hon. T. A Sitati delivered on 16/7/2020 at Lamu in M.C.S.O No. 14 of 2020)*

**JUDGMENT**

1. The Appellant herein was charged in the lower court with two counts.
2. On count one, he was charged with defilement contrary to section 8 (1) as read with 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence as per the charge sheet are that on the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> day of July 2020 at [Particulars Withheld] Village, Lamu West Sub County within Lamu County intentionally and unlawfully caused his penis to penetrate the anus of YM a child aged ten years.
3. In the alternative, he was charged with Committing an Indecent Act Contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence hereof being that on the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> day of July 2020 at [Particulars Withheld] village, Lamu West County within Lamu County committed an indecent Act with a Minor namely YM aged 10 years by touching his anus with his penis.
4. On the second count, the accused person was charged with assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). The particulars of the offence being that on July 9, 2020 at [Particulars Withheld] Village, Lamu West Sub- County within Lamu County, he assaulted one YM thereby causing her actual bodily harm.



5. On 13/7/2020 the charges were read to the accused and explained in Kiswahili to which he responded to as follows;  
Count 1 (Main): Hapana (No)  
Alternative: Ni ukweli (True)  
Count 2: Sio ukweli (Not True)
6. The trial court entered a plea of not guilty on count 1, a plea of guilty on the alternative count and a plea of not guilty on count 2. The matter was then re - listed for 14/7/2020 for facts.
7. The stated facts are that on 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> July 2020, the accused person who is the biological father of YM, a boy aged 10 years, invited him (son) to share a bed with him at night.
8. While sleeping, the accused person turned the volume of the radio to a high tone and inserted his penis to the boy's anus. This happened for the three stated nights.
9. It was stated that after committing the acts, he threatened the son with dire punishment if he told anyone. However, due to pain, the boy told one of the neighbors who alerted the village administration and the boy was taken for medical examination.
10. After the facts were read, the accused person stated that he still pleaded guilty to using his penis to touch the minor's anus. The trial court then convicted him on the alternative charge. Before sentencing, the prosecution indicated that the minor had requested to say something and that the same was in line with section 239 of the *Criminal Procedure Code*. A voire dire was conducted and it was established that the minor appreciated the nature of an oath and burden of truthful speech.
11. He was taken through examination in chief by the prosecution where he gave an account of the happenings regarding the charges against the accused. The accused person however, as I note from the proceedings was not given a chance to cross examine the minor (victim).
12. The court then sentenced the accused person to 20 years imprisonment on the conviction of the alternative charge.
13. Being dissatisfied with the sentence, the accused person brought the instant appeal on the following grounds;
  1. That the learned trial magistrate erred in law and fact by failing to consider that the sentence imposed upon the Appellant was harsh, excessive and unjust.
  2. That the trial magistrate erred in law and fact by failing to consider that the provision providing for a mandatory minimum sentence under section 8 of the *Sexual Offences Act* violates the right to fair trial and hearing.

### **Submissions on Appeal**

14. The appellant's submissions.
15. The appellant submitted that the trial court imposed a hard and unjust sentence on him which was largely based on his plea of guilty. He argued that the trial court did not explain to him the nature and gravity of pleading guilty to the offence.



## Respondent's Submissions

16. The respondent submitted that the appellant pleaded guilty after the plea had been taken in accordance to the law. Further that the appellant's answer was not ambiguous.
17. It was argued that the sentence meted out on the appellant was fair and thus the appeal lacks merit.

## Analysis and Determination

18. I have considered at the appeal, submissions and the proceedings from the lower court. The following issues arise for determination;
  1. Whether the consequences of a guilty plea were explained to the appellant given the nature of the charge.
  2. Whether an alternative count can be dealt with in pendency of the main count.
  3. Whether the Victim's statement should have been subjected to cross examination.
19. It is trite that before a plea of guilty can be entered upon a guilty plea by an accused person, the court must be satisfied that each and every element of the charge is read to the accused in a language which the accused clearly understands. Further, in serious offences the court must explain to the accused person the consequences of the guilty plea so that the accused knows exactly what to expect.
20. The Court of Appeal has on several occasions re-stated the law on plea taking. In *John Muendo M v Republic* [2013] eKLR, the court had this to say;

The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan v Republic* [1973] EA 445 where the Court held: -

  - (i) 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.
  - (ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
  - (iii) 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.
  - (iv) 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.
  - (v) 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."
21. In cases where the offence committed carries a heavy penalty like death or life sentence, courts should treat plea taking with caution especially where the accused is unrepresented. In *Abdalla Mohammed v Republic* [2018] eKLR Korir J expressed the importance of the same by making the following observations;
  15. 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 in *Simon Gitau Kinene v Republic* [2016] eKLR when he stated that:



19. Finally, 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 *Paulo 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 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 behooved the Court to warn the Accused Person of the consequences of a guilty plea.”

22. I have gone through the proceedings of the trial court. The charges were read and the matter was re-listed for facts. During plea taking and reading of facts, it is not indicated that the consequences of a guilty plea were explained to the accused person thus he was not aware of the consequences of pleading guilty to the charge. I now turn to the issue of the Alternative Charge. What is an alternative charge? This is a charge preferred against the accused person in the alternative to the main charge/count. In preferring a main count and an alternative count, the state is simply telling the court and the accused person that they will adduce evidence in relation to the main count, and in case they fail to prove it beyond reasonable doubt, the court can consider whether the evidence is sufficient to warrant a conviction on the alternative count, and convict the accused on it.
23. It therefore follows that at conviction, both the main and alternative counts cannot subsist together. Only one of them subsists. In my view an alternative count is like a spare tyre of a motor vehicle that is only in use when there is a problem with one of the running tyres. Unless there is a problem with the main count, the court has no business looking into the alternative count.
24. In *Moses Alusa Imbitsa v R* Criminal Revision No 27 of 2016 E. C Mwita J observed that; The court can only turn to the alternative count if it dismisses the main count.
25. In the instant case, the Appellant pleaded not guilty to the main count but pleaded guilty to the alternative charge. The trial court convicted him on the alternative charge. In this unique circumstances, the prosecution ought to have either withdrawn or abandoned the main charge and proceeded with the alternative as the main charge. The conviction and sentence on an alternative charge in subsistence of a main count is unprocedural and ought to be set aside. In my view it amounts to a miscarriage of justice, giving rise to a mistrial.
26. Further, from the proceedings of the lower court, the facts as read to the accused after pleading guilty to the alternative charge, were facts disclosing the offence in the main count. The read facts disclose that the Appellant “inserted his penis to the boy’s anus.” This amounts to penetration and defines the difference between the offence of defilement and indecent act, contrary to section 11 (1) of the *Sexual Offences Act*. I do not understand why and how the trial court missed this point as the Appellant himself noted of it and informed the court in response that he was pleading guilty to the offence of touching with his penis the boy’s anus. This simply means that the facts as stated to the accused did not disclose an offence as charged.



27. After conviction on the alternative count, nothing was indicated of the still subsisting main count and the offence in count two, of assault. Prosecution should have withdrawn them or the court should have given directions regarding the second count. The issue was left hanging.
28. Before the accused was sentenced, the victim made a statement in which the state directed his examination in chief. This statement was taken after a *voire dire* and after the trial court was satisfied that the victim appreciated the nature of an oath. It was of nature of evidence. The rules of natural justice grant an accused the right to test the evidence by the prosecution by subjecting it to cross examination. Such essential right was not accorded to the appellant.
29. Given the foregoing considerations, it is in the interest of justice that this case be ordered for retrial. I therefore, do direct that a retrial be conducted before a different magistrate at the Senior Principal Magistrate's Court at Lamu. To the said extent, the appeal succeeds
30. The appellant be produced on 18<sup>th</sup> day October, 2022 to plead afresh to the new charges.  
It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21<sup>st</sup> DAY OF SEPTEMBER, 2022.**

.....

**S.M.GITHINJI**

**JUDGE**

