Bashir v Republic (Criminal Appeal E115 of 2022) [2025] KEHC 4316 (KLR) (Crim) (2 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E115 OF 2022

CJ KENDAGOR, J

APRIL 2, 2025

BETWEEN

SALIM YUSUF BASHIR .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from conviction and sentence in Makadara MCSO No. 303 of 2019, delivered on 23rd May, 2022 by Hon. A. Mwangi, Principal Magistrate)

JUDGMENT

1. Salim Yusuf Bashir, the Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on diverse dates between the month of April, 2021 and May, 2022 in Starehe sub county within Nairobi County intentionally caused his penis to penetrate the vagina of JKN, a child aged 9 years. The Appellant faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between the month of April, 2021 and May, 2022 in Starehe sub county within Nairobi County intentionally touched the vagina and anus of JKN, a child aged 9 years with his penis.

3. When the charge was read to him on 20th May, 2022, he pleaded guilty to the main charge, and a plea of guilty was entered. The Appellant was convicted and sentenced to life imprisonment.

4. Dissatisfied with the decision of the trial Court, the Appellant filed this appeal setting out the following grounds of appeal;

   i. That the charge sheet is defective.

ii. That the learned magistrate erred in law and fact by convicting and sentencing him despite glaring contradictions and inconsistencies.

iii. That, the learned magistrate erred in law and fact by convicting and sentencing him yet there were incurable illegalities and irregularities.

iv. That the confession was fraudulently obtained from him.

v. That the learned magistrate erred in law and fact by sentencing and convicting him yet key ingredients of the offence were not proved.

vi. That this case is a clear frame-up.

vii. That, the sentence is harsh, excessive and illegal.

5. The Appellant prays that his conviction be quashed, that his sentence be set aside, and that he be set at liberty.

6. The Appeal was canvassed by way of written submissions. Only the Appellant filed submissions.

7. On the first ground, the Appellant submitted that he should have been charged with the offence of incest by male contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. Secondly, that the medical report talks of two people whereas the magistrate is in agreement that they took advantage of them. On the second ground, the Appellant stated that the charge sheet had the initials of the minor as JKN while the documents in Court have the name ZK and JKM. He raised an issue with the medical report produced in Court which showed that there were no injuries.

8. On the third issue, he challenged the exhibits produced in Court. That exhibits are admitted in evidence if tabled and marked in Court. He stated that in this case, the procedure was not followed.

9. He stated that the charges were read to him in a language that he does not understand. He only understands Kitaita language which was not used. That a number of irregularities exist, including the initials used in the charge sheet compared to the ones used in court; the age of the minor was not proved, what was produced was an immunization card of a different person.

10. On the fourth issue, he submitted that the prosecutor advised him to admit the offence, and then the victim's mother would withdraw the case. He alleges that he played along to prevent the family's dirty linen from being exposed.

11. On the fifth ground, he submitted that the ingredients of defilement were not proved. He asserted that penetration was not proved and that the age of the minor was not also proved.

12. On the sixth ground, he submitted that the victim's mother framed him because she wanted him to register his property in her name.

13. On the seventh ground, he submitted that the sentence is harsh and is against the sentencing policy and prison motto of rehabilitation and that the trial magistrate did not consider his mitigation before sentencing him.

14. The issues for determination are as follows;

i. Whether the plea of guilty was unequivocal;

ii. Whether the conviction was safe;

iii. Whether the sentence was appropriate.

15. I have perused the lower Court file. The Appellant was convicted and sentenced on his own plea of guilty. Section 348 of the *Criminal Procedure Code* bars appeals from subordinate Courts where an accused is convicted upon his own plea of guilty except on the extent and legality of sentence by providing that: -

> " No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."

16. On the question of whether the Appellant's plea was unequivocal, for a plea to be considered unequivocal sufficient for conviction, the convicting court must ensure that certain conditions exist concurrently at the time of conviction.

17. In the case of *Michael Adrian Chaki v. R. Criminal Appeal No. 399 of 2017* (unreported), the Tanzania Court of Appeal stated that there cannot be an unequivocal plea on which a valid conviction may be founded unless the following conditions are conjunctively met:-

    a. "The appellant must be arraigned on a proper charge. That is to say, the offence, section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;

    b. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.

    c. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.

    d. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.

    e. The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be dear.

    f. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged."

18. In the case of Alexander Lukoye Malika v. Republic [2015] eKLR, the Court identified the scenarios in which a conviction based on a guilty plea can be challenged 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."

19. I will now examine the trial Court's proceedings to determine if the above conditions were satisfied. The charge sheet meticulously outlines the specific offence, citing the relevant section of the law under which the charge is being processed. It provides comprehensive particulars, including the Appellant's name, initials for the name of the child involved, the precise dates when the alleged offence occurred,

the exact location where the incident took place, and a clear description of the unlawful actions that constitute the charge. From the reading of the charge, there is clarity on the nature of the allegations against the Appellant. It is not a defective charge sheet simply because the Appellant believes that the charge should have been incest rather than defilement.

20. The lower Court record reveals that there was a pre-typed section designated for the coram, as well as on the interpretation of English/Kiswahili. However, it is there is no indication that any inquiry was made regarding the Appellant's comprehension of either language or preferred language. Additionally, the Appellant's recorded response is noted as 'True' in English. This Court cannot ascertain the exact words used by the Appellant when entering the plea.

21. The Appellant has stated that he understands the Taita language but not English or Kiswahili. The lack of inquiry and clarity regarding his language comprehension is particularly significant, as this uncertainty presents a serious challenge in assessing the validity of his plea in this case. Without proper understanding, it cannot be said that the Appellant is aware of his rights or the consequences of his responses.

22. The facts of the case were read over on a different date and the language used is still not specified. The facts as read give the initials of the child who was defiled as JKN. The production of exhibits was procedural, and I found no faults in how the prosecutor marked and presented them.

23. However, on examination of the exhibits produced, I note that the P3 Form, Post Rape Care Form, medical report from Mathare and Eastleigh Prpject Sexual Violence Recovery Centre give different names for the minor as ZK. The only document that tallied with the initials in the charge sheet was the immunization card belonging to JKN. The names listed in full on the immunization card and those in the medical documents are entirely different. They cannot be considered the same child, as the names are not even similar and in the absence of any explanation made during the taking of the plea. While the file suggests that there were two cases in which the appellant was charged, namely the present one E147 of 2022 and E149 of 2022, there is a reference to the child in the other case as N during the presentation of the facts, rather than ZK or JKN.

24. The documents presented to the trial Court in support of the offence of defilement do not match with the proceedings and charge sheet. The medical documents were submitted as evidence to establish the commission of the offence. The documents presented to the court did not substantiate the specific charge against the appellant. This undermines the foundation of the prosecution's case regarding the elements of the charge they aimed to prove.

25. Taking into consideration the reasons articulated above in the assessment of the evidence presented during the plea-taking process and the subsequent proceedings, this appeal clearly merits success. Accordingly I quash the conviction and set aside the sentence.

26. The law stipulates that a Court may order a retrial only when it is deemed necessary to uphold the interests of justice. Additionally, it must be ensured that no prejudice or unfair disadvantage is imposed on the accused as a result of this decision.

27. In Pius Olima & another v Republic [1993] eKLR, the Court of Appeal stated as follows on the issue:

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar v Republic, (1964) EA 481; Manji v The Republic, (1966) EA 343; Mujimba v Uganda, (1969); and Merali and Others v Republic, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with

which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

28. In this case, the plea-taking was flawed, and the plea of guilty was equivocal. However, the appellant was facing a serious offence of defiling a child of 9 years of age. The offence is said to have been committed between April, 2021 to May, 2022. The time that has passed is not excessive. In my view, the interests of justice would call for a retrial. I do not see any prejudice to be occasioned to the Appellant if a retrial is so ordered. In the premises, I order that the Appellant be retried of the offence before another magistrate of competent jurisdiction.

29. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 2ND DAY OF APRIL, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant present

Mr. Omondi, ODPP for Respondent