



REPUBLIC OF KENYA



KENYA LAW
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**Ojwang v Republic (Criminal Appeal E043 of 2023)
[2024] KEHC 1135 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E043 OF 2023
DO OGEMBO, J
FEBRUARY 8, 2024**

BETWEEN

JOHN ODUOR OJWANG APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Conviction and Sentence in Sexual Offence No.
E032 of 2023, at PM's Court, Bondo, Hon. J.P Nandi, delivered on 13.9.2023)*

JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the Offence were that on diverse dates between 9th to 11th September, 2023 at Mageta Location, Usigu Division within Bondo sub-county Siaya County, he intentionally and unlawfully caused his penis to penetrate the vagina of FDA, a child aged 16 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. That on diverse dates between 9th to 11th September 2023, at [Particulars Withheld] Island, the accused intentionally caused his penis to touch the vagina of FDA, a child aged 16 years.
3. On the said charges being read to the appellant, he pleaded guilty to the same. He similarly confirmed that the facts of the case as read out by the Prosecution were true. A plea of guilty was accordingly entered by the court. And upon taking the mitigation of the accused (appellant) the court proceeded to sentence the Appellant to serve 15 years imprisonment on the main count 1.



4. Feeling aggrieved, the appellant has appealed against the conviction and sentence to this court. The appellant's petition of appeal filed herein and dated 25/9/2023 lists the following grounds of appeal.
 1. That the trial court erred in law and fact by failing to comply with pre requisites under Article 50 (2) and Section 207 (1) and (2) of the Criminal Procedure Code, by failing to;
 - a. Appreciate that the plea of guilty by the appellant did not meet the required standard in light of the fact that he was not represented.
 - b. Explain to the appellant the element of the charge in a language he understood,
 - c. Take extra measures in ensuring that the appellant understood the consequences of his plea.
 - d. Explain and or warn the accused of the nature of the charge and gravity and or consequences of the likely sentence noting the mandatory nature thereof.
 - e. Discharge its duty of protector, guarantor and educator of the process.
 2. That the trial magistrate erred in law by convicting the appellant on plea of guilty yet the appellant raised a defence as noted in the proceedings.
 3. That the trial magistrate failed to explain to the Appellant his right to mitigation this making it impossible for him to understand the nature of explanation he was to give contrary to a right to fair hearing.
 4. That in any event the sentence was manifestly unconstitutional, harsh and excessive in the circumstances of the case.
5. The appellant has urged this court to allow this appeal, the sentence be quashed and or be set aside and he be acquitted. In the alternative, he has pleaded for a retrial.
6. In arguing this appeal, counsel for the appellant has submitted that when appellant was arraigned he indicated that he would use Kiswahili language and that this is not indicated in the proceedings. That he therefore did not understand the elements of the charge as he did not have any representation. That the court ought to have been more cautious as the proceedings do not indicate if the charges were translated to him in Kiswahili (KN –Vs-R (2016) eKLR)
7. It was farther submitted that the court did not explain to the appellant the consequences of the plea (Elija Njihia Wakianda –Vs- R (2016) eKLR.
8. He further went on that the exhibits did not support the charge as the lab results mentioned were not produced. And that the evidence produced did not prove the charge. Counsel summed up that the plea was qualified as the accused indicated that the complainant has refused to go home, which was a contradiction of the facts of the case. And so, the court ought to have entered a plea of not guilty.
9. Ms. Mumo for the State, opposed this appeal on the grounds that the appellant was explained to his rights of Legal representation. And that he responded that he understood Kiswahili, which is sworn in the proceedings. That he also confirmed the fact and noted that the complainant had refused to go



home, which does not negate the plea of guilty. Finally, that evidence of P3 form was produced and the sentence was legal. Counsel urged that this appeal be dismissed.

10. I have considered the submissions made by the 2 sides and the authorities relied on by the counsel for the appellant. In my view, the issue for determination in this appeal is whether the plea of guilty as was entered by the trial court was unequivocal. I have accordingly therefore considered the proceedings of the trial court of 13/9/2023.
11. The proceedings show that on being asked which language he understood, he chose Kiswahili language. His right to legal representation was also explained to him. He then proceeded to enter a plea of guilty. He also thereafter confirmed that the facts of the case as read out by the prosecuting counsel were correct.
12. In mitigation, the record shows the accused stating:

“The complainant refused to go home fearing her father will heat her. I am 20 years old.”
13. For a court to convict an accused on a plea of guilty, the plea must be unequivocal. It must be unequivocal in answer to the charge as well as to the particulars of the charge and the facts and evidence in support of the same as read out by the prosecution. And the mitigation of the accused must not raise a defence to the charge. Any position contrary to this would amount to an unequivocal plea on which the court cannot rely in convicting the accused.
14. The statement by the accused in mitigation as seen above amounts to a defence in as far it gives a justification for the act. In view of this the court ought to have entered a plea of not guilty so that the case would proceed to hearing and the defence raised by the accused be considered. The appellant's submissions herein went on to challenge the velocity of the prosecution's case and whether the evidence produced proved the charge. With respect, this court, in view of the finding above, shall not delve into these submissions as same are matters for determination by the trial court as a court of first instance.
15. The plea of the appellant being unequivocal as opined above, I find merit in this appeal and allow the same. I accordingly quash and set aside the conviction of the appellant herein and order that the appellant's case be retried by the trial court. Appellant to be released forthwith and presented before the trial court. It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 8TH DAY OF FEBRUARY, 2024

D.O. OGEMBO

JUDGE

8.2.2024

Court:

Judgment read out in court in the presence of the accused, Mr. Abidha for accused and Ms. Mumo for the State.

D.O. OGEMBO

JUDGE

8.2.2024

