



REPUBLIC OF KENYA



**Mdamu v Republic (Criminal Appeal E019 of 2023)
[2024] KEHC 2429 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E019 OF 2023
GMA DULU, J
MARCH 7, 2024**

BETWEEN

PETER MATHIAS MDAMU APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E012 of 2022 at Wundanyi Law Courts delivered on 27th July 2022 by Hon. D. Wangeci (PM))

JUDGMENT

1. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of offence being that on 8th June 2022 at around 17:00hours at Chawia Location of Mwatate Sub County within Taita Taveta County, intentionally caused his penis to penetrate the vagina of M.Z a child aged 8 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#), the particulars of which being that on the same date and place touched the vagina of M.Z with his penis, a child of 8 years.
3. The appellant was recorded as having pleaded guilty to the main charge. He was thus convicted of defilement and sentenced to life imprisonment.
4. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal relying on the following grounds:-
 1. That the learned Magistrate erred by failing to sagaciously draw an inference that the appellant's plea of guilty was not unequivocal and as such he was greatly prejudiced.



2. The mental status of the appellant could not sufficiently appreciate the trial proceedings and the ramifications of his plea and that it meant a waiver of his right to a fair trial and any other rights that accrue to him as an accused person.
3. The sentence imposed was harsh and excessive since it was applied without considering the antecedents of the appellant or the facts and circumstances of the case.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This is case wherein the appellant was convicted on his own plea of guilty, but he has come to this court on appeal challenging both conviction and sentence.
7. Under Section 348 of the Criminal Procedure Code (Cap.75) convicted persons are prohibited from appealing against conviction, where they have been convicted on their own plea of guilty. However, in my view this provision of the statute law applies only in cases where the plea of guilty is unequivocal.
8. The manner of recording a plea of guilty by courts is governed by the provisions of Section 207(1) and (2) of the Criminal Procedure Code. The Section suggests that the requirement for the prosecution to summarise the facts constituting the offence is discretionary and depends on the permission of the court.
9. Courts have however severally addressed the need of courts to ensure that a recorded plea of guilty is not challengeable, or ambiguous. There are several cases in which the steps required for taking a proper plea of guilty have been given, such as the case of Adan =Versus= Republic (1973) EA 445 and the later case of KN =Versus= Republic (2016) eKLR.
10. In the present case, when the appellant was first read the main charge of defilement – he stated in Kiswahili – “ni open zipu tu ni mtoto kuonana tu.” This in English language translates to – “it was opening the zip only. She is a child. It was just for seeing.”
11. On stating as above, the trial Magistrate ordered that he be taken to Port Reitz hospital for mental assessment and he was so taken and examined and certified fit to plead.
12. When he came back to court and the main charge was read to him again, he admitted the charge. However, in my view from the totality of the record, the appellant did not unequivocally plead guilty to defilement for reasons I will hereafter explain.
13. The first reason is that in the facts summarised by the prosecutor, there was no mention of sexual or penile penetration in this case where the appellant had already said that he merely opened the zip of the young girl.
14. Secondly, the prosecutor failed to describe what the doctor recorded in the medical report (P3) form regarding sexual penetration.
15. Thirdly, on my perusal of the medical report (P3) form, I notice that the initial entry was hymen intact. However, there is a curious addition with an arrow of the word “not”. That entry is suspect for three (3) reasons.
16. First, in the whole medical report form it is the only entry of its kind as all other entries are clear and with no additions. It was also not initialized or signed for.
17. Secondly, it is the only entry where the letter ‘t’ is entered as a capital letter.



18. Thirdly, it is the only entry that departs from the spacing of words in the whole medical examination form. This entry thus clearly appears to have been a later entry not in the original medical report.
19. From the above facts and circumstances therefore, it cannot be said that the appellant unequivocally pleaded guilty to the main charge of defilement. The conviction and sentence herein cannot thus stand.
20. Do I order a retrial or fresh plea? In my view, the facts and circumstances of this case do not merit a retrial or fresh plea, as the appellant was charged with an alternative count of committing an indecent act with a child, and his plea and the facts given by the prosecutor established that lesser offence.
21. I will thus substitute a conviction for the lesser offence of committing an indecent act with a child and sentence the appellant accordingly.
22. Consequently and for the above reasons, I quash the conviction for defilement and set aside the sentence of life imprisonment. Instead, I enter a conviction against the appellant for committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. I set aside the life imprisonment sentence imposed, and order that the appellant will instead serve ten (10) years imprisonment from 17th June 2022 when he was arrested. Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF MARCH 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant

Ms. Moke for State

