



REPUBLIC OF KENYA



**Sabure v Republic (Criminal Appeal E018 of 2023)  
[2024] KEHC 1975 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 1975 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL E018 OF 2023  
HI ONG'UDI, J  
MARCH 1, 2024**

**BETWEEN**

**CYPRIAN ONDITI SABURE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the sentence of Honourable C.A Ocharo - Senior Principal  
Magistrate in Kisii S.O No. E058 of 2022, delivered on 7th October, 2022)*

**JUDGMENT**

1. Cyprian Onditi Sabure 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 being that the appellant on diverse dates between the 29<sup>th</sup> September, 2022 and 5<sup>th</sup> October, 2022 in Kisii South sub-county within Kisii county intentionally caused his penis to penetrate the vagina of TO a child aged 15 years.
2. He faces an alternative count of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The appellant was first arraigned in court on 7<sup>th</sup> October, 2022 when the charge was read to him and he admitted it. The facts were then read out to him and he responded saying they were true. The learned trial magistrate then convicted him. After hearing the prosecution and the appellant on mitigation he sentenced him to thirty (30) years imprisonment.
3. Being dissatisfied the appellant filed this petition of Appeal challenging both the conviction and sentence on the following grounds:
  - i. That the trial magistrate erred in both law and fact when convicting him while relying on the facts adduced in Court which facts were not proved to the required standards of law given that he pleaded guilty to the alleged charges.



- ii. That the judgment of the court was a nullity as the trial proceeded without the court warning him that he had a right to a fair and impartial trial as enshrined in the Constitution as per Article 50 (2) (h) i.e the right to be represented by the advocate.
  - iii. That the appellant was not accorded a fair and impartial trial as guaranteed by Article 25 (c) of the Constitution as the trial commenced without the court having received a report as to 'his mental fitness' to stand trial or prove to the court that his plea of guilty was voluntary.
  - iv. That the sentence awarded is highly excessive and punitive
  - v. That the sentence is illegal given that the complainant was 15 years of age equally the age of the complainant was not established since the birth certificate was not produced to ascertain her age.
4. The appellant's submissions were filed on 15<sup>th</sup> November, 2023. A summary of his submissions is that the plea was not unequivocal. He contends that his admission of the charge was not voluntary and his right to legal representation was violated. He referred to the case of *Adan v Republic* [1975] EA 445 to support his argument.
5. Learned counsel Justus Ocheng for the ODPP filed submissions dated 3<sup>rd</sup> November, 2023. It's his submission that from what transpired in the trial court the plea was properly taken and was therefore unequivocal. He however argued that the minimum sentence being 20 years imprisonment the 30 years sentence was a bit excessive. This is after considering that the appellant pleaded guilty thus saving on the court's time. He urged the court to consider reducing the sentence.

#### **Analysis and determination**

6. I have carefully considered the grounds of appeal, the record, both submissions and the law. I find two main issues falling for determination. These are:
- i. Whether the plea was unequivocal.
  - ii. Whether the sentence was appropriate.

#### **Issue no. (I) Whether the plea was unequivocal**

7. The word unequivocal means "Leaving no doubt; clear; unambiguous; unquestionable" A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more asked to respond to the facts.
8. To confirm whether or not a plea was unequivocal one looks at the record because an appellant seeking sympathy can say anything to woe the court. The court record of 7<sup>th</sup> October, 2022 clearly shows who were present before the court. Present was the Senior Principal Magistrate, prosecution, Court Assistant and the Appellant. There was interpretation of three (3) languages namely English/ Kiswahili/Kisii. After the charge was read to him in a language he understood, in response he stated:
- “*Kweli*”
9. Thereafter the full facts were stated by the prosecutor, to which the appellant responded as follows:
- “Facts are true”



Upon conviction the appellant mitigated saying I did a mistake and I pray to be forgiven.  
I am 32 years old”

10. On whether the appellant was warned of the seriousness of the offence and sentence the record shows:  
“ Accused is warned on the seriousness of the offence and sentence but he still pleads guilty”
11. This warning came as the appellant notified the court of his intention to admit the charge. He was therefore warned of the seriousness of the offence and even the consequences of pleading guilty. He nowhere sought for time to think through especially after the warning. He cannot therefore claim to have been ignorant of the seriousness of and consequences of the offence. There is no evidence of any unfairness exhibited against the appellant. From the seriousness of the offence the appellant was at liberty to engage an advocate. There is no provisions for pro bono lawyers for those charged with sexual offences. From the record I am satisfied that the plea herein was unequivocal and there is no reason for this court to order for a re-trial.

**Issue no (ii) whether the sentence was appropriate.**

12. Section 8(3) of the *Sexual Offences Act* provides for the sentence for an offence under section 8(1) of the *Sexual Offence Act*. It provides as follows:  
“ A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”
13. The appellant was sentenced to 30 years imprisonment. From the facts of the case and which the appellant admitted he did not defile the victim once. It was several times. He even went for this girl from her home and took her to a bar where he defiled her severally. He told the court he was 32 years old then, which is twice the age of the victim.  
I have considered all the facts surrounding this case. The question is whether the trial court acted on wrong principles or overlooked some material factors or took into account irrelevant factors. Further, is the issue as to whether the sentence is illegal or inordinately excessive. See (i) *Shadrack Kipkoech Kogo v Republic* Eldoret Criminal Appeal No, 253 of 2003. (ii) *Wilson Waitegei v Republic* [2021] eKLR.
14. Learned counsel Mr. Ayodo was of the view that the sentence of thirty (30) years was excessive considering that the appellant pleaded guilty and saved on the court’s time.
15. The victim’s conduct was also wanting. Could she have led this man into believing that she was of age even if he did not state it? The prosecutor told the court that he did not have the victims birth certificate. He did not present anything to the court to prove the victim’s age. The treatment notes plus the P3 Form shows the age as presented to the authors by the victim and others. One thing is however clear that the victim was not an adult.
16. Considering all the above and the fact that the Appellant admitted the charge on his first appearance in court. The prosecution does not support the sentence. There is however no error on the record to warrant an order for a re-trial being made as sought by the Appellant
17. In light of the above I confirm the conviction and allow the appeal against sentence.
18. The sentence of thirty (30) years imprisonment imposed by the learned trial magistrate is hereby set aside and substituted with a sentence of seven (7) years imprisonment from the date of conviction.



19. Orders accordingly

**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.**

**H.I.ONG'UDI**

**JUDGE**

