



REPUBLIC OF KENYA



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**Wangila v Republic (Criminal Appeal E089 of 2022)
[2024] KEHC 3028 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E089 OF 2022
AC MRIMA, J
MARCH 14, 2024**

BETWEEN

FRED KUNDU WANGILA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon. T. Omono
(Resident Magistrate) in Kitale Chief Magistrate's Court Criminal
Case (S.O.) No. E293 of 2021 delivered on 20th December, 2022)*

JUDGMENT

Background:

1. Fred Kundu Wangila, the Appellant herein was charged in Kitale Chief Magistrates Criminal (S.O) No 293 of 2021 with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*.
2. The particulars of the offence were that on diverse months within August and December 2021 at Misemwa Village, Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate the vagina of AN, a child aged fifteen (15) years old.
3. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* whose particulars were that on diverse months within August and December 2021 at Misemwa Village, Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate the vagina of AN, a child aged fifteen (15) years old.
4. At first the Appellant denied the charge and pleaded not guilty. The Prosecution conducted its case. Midway, the Appellant requested to have the charges read out afresh.



5. The particulars of the offence were read out to him once again and the Appellant responded that they were correct. He pleaded guilty. On that basis the Trial Court convicted him on his own plea of guilty.
6. On mitigation, the Appellant claimed that he was remorseful. He asked to be released to go and take care of the child he sired with AN.
7. Upon considering the Pre-Sentence Report, the fact that the Appellant was a first-time offender and the totality of the circumstances of the offence, including the age difference between the accused and the complainant, the Trial Court sentenced the Appellant to 10 years imprisonment.

The Appeal

8. The Appellant was dissatisfied with the conviction and the sentence. In his amended Petition of Appeal, he cited the following grounds;
 1. The learned trial court erred in both law and in fact by failing to note that the charge sheet was defective and lacked the word unlawfully in the particulars.
 2. That the learned trial magistrate erred in both law and fact by failing to note that the age of the victim was not proved.
 3. That the learned trial magistrate erred on both law and fact by failing to consider provisions of sentencing policy guidelines during sentencing.
9. In his written submissions, the Appellant admitted that he was convicted and sentenced to 10 years imprisonment upon pleading guilty to the charge.
10. It was his case that the age of the victim was not proved to the required standard. He submitted that the victim informed her that she was eighteen years old and as such was aware that she was dealing with an adult.
11. The Appellant relied on the decision in *Hillary Nyongesa v Rep* (2010) eKLR where Hon. Mwilu J., (as she then was) stated that age is such a critical aspect in sexual offences since punishment is determined by the age of the victim.
12. It was submitted that the complainant ought to have called exact documentary evidence to prove her age whether she pleaded guilty or not.
13. The Appellant further submitted that the failure by the Respondent to include the term 'unlawfully' in the charge sheet to justify the offence was a derogation of the requirement by section 134 of the *criminal procedure Code* that makes it necessary for every charge or information to contain sufficient information to the accused person.
14. The decision in Criminal Appeal No. 5 of 2005, *Davis Odhiambo v Republic* was relied upon where the Court acquitted the Appellant for the offence of rape where there was an omission of the word 'unlawfully'.
15. As regards the sentence, the Appellant contended that the Trial Magistrate failed to consider his age and the fact that he is a single parent living with many children without their mother. He urged this Court to re-sentence by virtue of Article 27, 48 and Article 50(2)(q) of the *Constitution* and section 362 of the *Criminal Procedure Code*.
16. He urged the Court to review the sentence.



The Respondent's case:

17. The Prosecution challenged the appeal through written submissions dated 26th June 2023.
18. It was its case that, other than the ground of appeal touching on sentencing, the rest of the grounds ought to be dismissed since they offend section 348 of the [Criminal procedure Code](#).
19. The Respondent submitted that under the said section, no appeal is allowed where an accused person pleaded guilty except as to the extent or legality of the sentence.
20. In submitting that the sentence was proper, the Respondent stated that the Trial Magistrate was guided by [Judiciary Sentencing Policy Guidelines](#) 2016 which ensure that Judicial Officers met out consistent, justified and proportionate sentences under the circumstances of each case.
21. It was its case that the Trial Court was right since it considered the pre-sentence report, accused's mitigation and the circumstances under which the offence was committed.
22. The Respondent urged the Court to uphold the conviction and affirm the sentence.

Analysis:

23. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See [Okono v Republic](#) [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in [Ajode v. Republic](#) [2004] KLR 81.
24. Having carefully appreciated the rival positions herein, it is my assessment that the main issue for determination is, in the first instance, whether the Appellants plea of guilty was unequivocal as to yield a proper conviction and sentence.
25. I will, therefore, look at the process.
26. The process of plea taking is one that must be guarded jealously with strict adherence to procedure lest an accused person loses their liberty summarily.
27. In Criminal Appeal 365 of 2011, [John Muendo Musau v Republic](#) [2013] eKLR, the Court of Appeal, in reference to the decision in [Adan v Republic](#) discussed the process of plea taking as follows;
 - (5) On this argument, we wish to state that we have outlined the procedure followed before the trial court at the time of taking the plea. 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.”

28. This Court also appreciates, and as was observed by the Court of Appeal in *Ndede v Republic* [1991] KLR 567 that the bar to an appeal against a conviction is not absolute. There are circumstances that make a Court depart from the finding of the Trial Court's conviction based on guilty plea. The learned Judges observed as follows;

This court held that the court is not be bound to accept the accused persons admission of truth of the charge of conviction as there may be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused person to court from the date of arrest. In the appeal before us, we reiterate our satisfaction that the plea of guilty was unequivocal.

29. I have carefully gone through the record.

30. On 28th December 2021, the accused person was read out in Kiswahili language the substance of the charge. He pleaded not guilty.

31. He was released on bond and after absconding Court on numerous occasions, warrants of arrest were issued. He eventually attended Court on 11th October 2022.

32. On his own volition he intimated that he wished to change plea. The Court accordingly warned him of the consequences of a guilty plea but the Accused responded as follows; '*Twendelee na kesi*'

33. On the foregoing, the Court proceeded on a not guilty plea. It took the evidence of PW1, Eliud Wanyonyi and that of PW 2, Jackline Namalwa.

34. On 1st December 2022, the Appellant stated that he wished to have the charges read out to him afresh. They were read out in Kiswahili. He responded categorically that it is true. A plea of guilty was recorded.

35. The particulars were then read out for which he stated that they were correct.

36. It is on that basis that the Trial Court convicted the Appellant on his own plea.

37. The Appellant's plea was unequivocal. The process before the trial Court was procedural and lawful. The Appellant was not coerced or misled into pleading guilty. He knew what he was doing and despite being warned of the repercussions, he proceeded to plead guilty.

38. In the circumstances, the conviction was proper. This Court will not entertain the invitation by the Appellant to alter the Trial Court's finding.



39. I now turn to the legality and extent of the sentence. Section 348 of the *Criminal Procedure Code* provides as follows;

348. 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 or legality of the sentence.

40. The foregoing provision must be understood alongside Section 26(2) of the *Penal Code*. It provides as follows;

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.

41. The circumstances under which an Appellate Court would interfere with the Trial Court's sentence was discussed by the Court in Criminal Appeal 365 of 2011, *John Muendo Musau v Republic* [2013] eKLR. It was observed;

On the sentence, section 26 (2) of the *Penal Code* provides that where the prescribed sentence is imprisonment for life or any other period, the trial court has the discretion to pass a sentence of imprisonment for a shorter period. Situations where an appellate court would interfere with the discretion of a trial court on the issue of sentence have in the past been clearly defined by this Court. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. Those circumstances were well illustrated in the case of *Nelson v Republic* [1970] EA. 599, following *Ogalo Son of Owuora v Republic* (1954) 21 EACA 270 as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shersbewsity* (1912) CCA 28 TLR 364.”

42. Before handing down the sentence, the trial Court considered the Pre-sentence Report, the Appellant's mitigation, the circumstances under which he committed the offence.

43. Importantly, the Trial Court considered the age difference between the Appellant and the victim.

44. Notably, the Appellant is an elderly man. He is 56 years old. The victim, at the time of commission of the offence, was at the tender age of 15 years old.

45. The Trial Court, upon considering the totality of the foregoing remarked that the Appellant breached his duty of trust by entertaining a sexual relationship with a young girl whom he ought to have protected from such exploitation.

46. The Court then considered the Sentencing Policy and accordingly sentenced the Appellant to 10 years imprisonment.



47. It is my considered position that the Trial Court did not err in sentencing the Appellant to 10 years imprisonment, a lenient jail term in the circumstances of the case and having regard to the age difference.
48. Having regard to the principles enunciated in the case of *Ogalo Son of Owuora v Republic* (1954) 21 EACA 270, I find no fault in the sentencing and will not interfere with it.
49. In conclusion, the appeal is without merit and is hereby dismissed in its entirety.
50. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF MARCH, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Fred Kundu Wangila, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

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