



**NKN v Republic (Criminal Appeal E005 of 2022)  
[2024] KEHC 4650 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL APPEAL E005 OF 2022**

**F GIKONYO, J  
APRIL 15, 2024**

**BETWEEN**

**NKN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence of Hon. P.L. Shinyada (S.R.M)  
in Narok CM SOA Case No. E025 of 2022 on 09.05.2022)*

**JUDGMENT**

1. The appellant filed this appeal against the appellant's conviction, and sentence of 20 years imprisonment imposed on 09.05.2022 for the defilement of the complainant- a boy aged 14 years.
2. The appellant filed a memorandum of appeal dated 10.05.2022 and filed on the same date. He filed his amended grounds of appeal under section 350(2)(v) of the Criminal Procedure Code citing the following grounds of appeal;
  - i. That the learned trial magistrate erred in law and fact when he awarded the appellant's eviction and sentence of 20 years imprisonment but failed to note that the plea was not unequivocal the language used was not clear. No caution was given to the accused before he pleaded guilty thus the appellant was prejudiced.
  - ii. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant under the [sexual offences act](#) but failed to note that by the time of the commission of the offence, the appellant was aged 17 years and therefore a minor, the trial court erred by not taking into account the children's act no. 29 of 2022. Thus, the sentence was a nullity.



- iii. That the learned trial magistrate erred in law by awarding a conviction and a sentence of life imprisonment but failed to appreciate the appellant's rights under 50(2) (g) of the Constitution were violated.

### **Directions of the court**

3. The appeal was canvassed by way of written submissions. Both parties have filed.

### **Appellant's submissions.**

4. The appellant submitted that the plea was unequivocal. The appellant relied on the case of Aden Vs Republic [1973] EA 445, Kariuki Vs Republic [1984] eKLR 809, Sections 207 and 281 of the Criminal Procedure Code, Bava V Republic, Henry O. Edwin V R [2015] eKLR, Joseph Marangu Njau V R [2015] eKLR
5. The appellant submitted that the language used is not clear. that it is not on record what language the appellant understood. The omission is fatal to the prosecution's case. The appellant relied on the cases of Joseph Bosire Ogao Vs Republic [2010] eKLR,
6. The appellant submitted that the proceedings show that caution given to the appellant was done after the appellant had taken the plea. The appellant relied on Article 50 of the Constitution, Nyeri High Court Criminal Appeal No. 82 of 2015
7. The appellant submitted that the prosecution merely produced the medical evidence being documents P3 forms, PRC Form (P Exh2), certificate of birth ( P Exh 1), treatment notes ( P Exh 3), and a copy of ( P Exh 4). There is no indication of the findings of the doctor in the said documents. That it was critical to read out the findings that would establish or support the charge of defilement. The appellant relied on the case of Samwel Njoroge Wanjiru vs Republic appeal no. e074 of 2022, sections 77,107,108, and 109 of the Evidence Act.
8. The appellant submitted that the trial court failed to note that he was a first offender though he did offer a mitigation. The appellant was to be sentenced to the least severe sentence on this ground alone. The appellant was not represented thus the trial magistrate had a duty to explain to the accused the importance of mitigation. The appellant relied on Arissol V Regina [1957] EA 447, 449, Section 216 and 329 of the Criminal Procedure Code, the judiciary sentencing policy guidelines (2016), and George Githinji Mbaya v Republic.
9. The appellant submitted that on 09.05.2022 when he appeared before the trial court he was a minor aged 17 years old. The trial court did not sentence the appellant as if he was a minor. The appellant relied on section 8(7) of the Sexual Offences Act, articles 260 and 53 of the constitution, section 166(1) (2)(3), 229, 219, 221(3), 222-228 and 299 of the Children's Act, Dennis Abuya V R [2010] eKLR, Julius Kipsang Lanhgate V Republic (2020) eKLR, Republic V Attorney General and Another Ex Parte Ng'eny.
10. The appellant submitted that his rights under article 50(2) (g) of the constitution were violated. he was not informed of his right to choose and be represented by an advocate. The appellant relied on Chacha Mwita V Republic [2020] eKLR.
11. The appellant urged this court to analyze all the evidence in the record and find that the appellant's conviction and sentence were not founded on sound and fair evidence. The appellant prayed for the conviction to be quashed and the sentence set aside.



### **The respondent's submissions.**

12. The respondent submitted that the charges were read out to the appellant in a language he understood and he stated it was true. The language used was Kalenjin. The respondent relied on John Muendo M Vs Republic [2013] eKLR
13. The respondent submitted that the appellant did not furnish the court with any document to prove that he was indeed 16 years old at the time of the offence as stated by him and as such the ground cannot suffice.
14. The respondent submitted that when the appellant was asked to mitigate he said he did not have any issues to raise in mitigation
15. The respondent submitted that the trial court took into consideration that the appellant was a first offender. The respondent relied on section 8(3) of the *sexual offences act*.
16. The respondent urged this court to dismiss the appeal in its entirety and uphold the conviction and the sentence as it is within the law. the respondent relied on section 348 of the Criminal Procedure Code.

### **Analysis And Determination.**

#### **Court's duty**

17. As a first appellate court, this court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32
18. This court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. This court finds the main issues for determination are;
  - i. Whether the plea was unequivocal.
  - ii. Whether the sentence was manifestly harsh and excessive
19. Where a plea is unequivocal, no appeal against conviction shall be allowed, except on the extent or legality of the sentence (Section 348 of the Criminal Procedure Code (cap 75), and Olel v Republic [1989] KLR 444)
20. Section 348 of the Criminal Procedure Code provides:

“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.”
21. Was the plea unequivocal?
22. For a plea to be unequivocal, it must be free from any coercion, threat, promise, or inducement, and be the informed decision of the accused. Hence, the requirements of the law in section 207 of CPC, and the manner of taking a plea set out in Adan vs. Republic (1973) EA 445 to wit: -
  - 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 the facts relevant to sentence together with the accused's reply should be recorded.
23. The court should also caution the accused of the consequences of 'the plea of guilty' to ensure the accused understands the nature of, and that the plea entered is informed decision of the accused.
24. These requirements as well as those in section 207 of the CPC, and the steps for taking a plea set out in Adan vs. Republic, are real safeguards of fair trial for the accused who pleads guilty.

### **Applying the test**

25. The appellant was arraigned before the Senior Resident Magistrate's Court at Narok on 09.05.2022. The record shows that the substance of the charge(s) and every element thereof was stated by the court to the appellant in the language that he understood; Kalenjii. On being asked whether he admits or denies the truth of the charge(s) he replied 'it is true I defiled the complainant Amose Keteri'
26. Immediately upon his plea of guilt, the trial court administered a caution and explained the consequences of his plea and the likely sentence to be imposed. And, the court asked him again if he still admits the charge. The appellant repeated his plea of guilt to the charges. The caution was in the language he understood-Kalenjii.
27. The prosecutor then stated the facts thus:
- “The facts are that on 3/04/2022. The victim AK together with her brothers were herding their father's sheep. At around 11.00 hours the accused called the victim and he followed him to a nearby bush. The accused pushed the victim to the accused and ordered him not to scream or he would cut him up. The accused removed his trousers and that of the victim. The accused pushed his penis into the victim's anus. He then released the victim. He (the victim) went to report to his father and explained the ordeal. He explained to his dad that he felt pain. He tried fighting off the accused in vain. The victim Amos is a thirteen-year-old boy. The victim was taken to hospital narok county referral hospital on 4/4/2022. A copy of the victim's birth certificate no. a03xxxxx is in court. Produced as exh 1. pre rape care form dated 4/4/2022 as exh 2. The victim was also admitted on 3/4/2022. Produced a copy of discharge summary as p exh 3.
28. The appellant is then recorded as having stated “the facts are correct as narrated by the prosecution” after which the court convicted him on his own plea of guilty.
29. Perusal of the record shows that Section 207 of the Criminal Procedure Code, as well as the step set out in the case of Adan vs. Republic (supra), was satisfied in the taking of the plea, and consequent conviction. The accused person admitted the truth of the charge, which was recorded as nearly as possible in the words used by the accused. And, the trial court accordingly convicted the accused.
30. Thus, the plea of guilty was unequivocal.



## Of sentence

31. 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.
32. It was alleged that on 03.04.2022 at Rhotian area Narok Township in Narok Central sub-county within Narok county, Intentionally caused his penis to penetrate the anus of A.K. a child aged 13 years.
33. The trial court applied Section 8 (3) of the *Sexual Offences Act* to sentence. The section provides:  
8(3) 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.”
34. Appropriate sentence depends on the facts and circumstances of each case, and inter alia, the court must consider the gravity of the crime, motive for the crime, nature of the offence, manner of commission of the crime, and other attendant circumstances. (State of M.P. vs Bablu Natt {2009}2S.C.C 272 Para 13)
35. See also Alister Anthony Pareira vs State of Maharashtra, [ 2012] 2 S.C.C 648 Para 69 that: -  
“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances”
36. The appellant claims that he was 17 years when he committed the offence and ought to have been sentenced in accordance with the *Children Act*. In law, children offenders are dealt with in accordance with the *Children Act*. Be that as it may, the question here is whether the appellant was a minor. The DPP has stated that the appellant did not produce any document during trial to show that he was a minor. This may be true. Nonetheless, state organs and agencies have the responsibility of protecting and safeguarding rights of a child. Therefore, as a matter of standard procedure, during investigations, the police should ordinarily find out whether the suspect is a minor. This information may be obtained from the suspect. And, documents such as national identity card would also help to show that the suspect is an adult. The court should also be keen on establishing whether a suspect is a minor.
37. Be that as it may, there is nothing to show that the appellant was a child at the time of the commission of the offence. Nevertheless, he is a young man; he says that he is 19 years. The trial court noted the seriousness of the offence and the mandatory nature of the sentence. This court notes the circumstances in which the offence was committed, would require a deterrence sentence. But, yet, giving him an opportunity to be reintegrated back to the society and become a productive citizen. The sentence imposed is therefore, harsh. Accordingly, this court sets aside the 20 years’ imprisonment and sentences him to 15 years in jail. The sentence shall commence from the date he was first arraigned in court.

## Conclusion and orders

38. The appeal partially succeeds on sentence.
39. Orders accordingly.



**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THE 15<sup>TH</sup> DAY OF APRIL, 2024.**

**HON. F. GIKONYO M.**

**JUDGE**

In the presence of: -

1. Appellant
2. Ms. Rakama for DPP
3. Otolu C/A

