Joel Alias Nyamweya v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 5088 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5088 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E030 OF 2023

KW KIARIE, J

MAY 15, 2024

BETWEEN

JAMES OMAGWA JOEL ALIAS NYAMWEYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case NO. E091 of 2022 of the Senior Principal Magistrate's Court at Ogembo by Hon. P.C. Biwott–Senior Principal Magistrate)

JUDGMENT

1. James Omagwa Joel alias Nyamweya, the appellant herein, was convicted after pleading guilty to the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 0f 2006.

2. The particulars of the offence are that on diverse dates between the 25th day of September 2022 and the 29th day of September 2022 within Kisii County, intentionally and unlawfully caused his penis to penetrate the vagina of RCNO, a child aged fourteen years.

3. The appellant was sentenced to ten years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. Gogi and Associates Advocates represented him. He raised grounds of appeal as follows:

    a. That the learned trial magistrate erred in law and fact by convicting the appellant on his unequivocal guilty plea.

    b. That the learned trial magistrate erred in law and, in fact, by failing to take necessary steps to ensure that the appellant understood every element of the charge, considering that the appellant was unrepresented during the trial.

c. That the learned trial magistrate failed to be cautious when accepting a guilty plea from an unrepresented, undefended accused person.

d. That the learned trial magistrate erred in law and fact by failing to warn the appellant that the charged offence he was about to plead guilty to carried a possible life prison sentence.

e. That the learned trial magistrate erred in law and fact for failing to ensure that the appellant understood and appreciated the consequences of pleading guilty to the charge

f. That he learned the trial magistrate misdirected himself into convicting and sentencing the appellant on a plea of guilty without asking the appellant the reasons for pleading guilty.

g. That the learned trial magistrate erred in law and, in fact, for failing to note that the appellant did not intend to plead guilty to the charges read to him.

h. That the learned trial magistrate erred in law and failed to realize that threats induced the appellant's plea of guilty.

i. That the learned trial magistrate erred in law and fact for failing to appreciate that the appellant was coerced to offer a plea of guilty on a promise of being granted his liberty.

j. That the learned trial magistrate erred in law and fact for failing to indicate the language in which the plea was taken.

k. That the learned trial magistrate erred in law and fact for meting upon the appellant a harsh and excessive sentence in the circumstances of the case.

4. The state opposed the appeal but did not file submissions.

5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

6. In the leading case of *Joseph Marangu Njau v Republic* [2015] eKLR, the Court of Appeal stated:

> Whereas all the perils a guilty pleader embraces may not much matter in petty offences or in mere infractions which do not present much risk to life or liberty, much is at stake in the offences that attract more penal severe consequences. In the case before us, the balance of the appellant's natural life stood to be spent behind bars upon conviction.

Cognizant of the ever-present dangers of misjustice [*sic*] in guilty pleas, the courts have been vigilant to act upon and to uphold them only when they are clear, express, unambiguous and unequivocal. When a plea of guilty is challenged as not having been entered unequivocally, it becomes a matter of law that permits the superior courts to entertain appeals notwithstanding Section 348 of the *CPC* aforesaid. The predecessor of this Court considered and authoritatively laid down the manner in which pleas of guilty should be recorded and the steps which should be followed, in the decades-old case of *Adan v Republic* [1973] EA 445, as follows;

> " (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 raise 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."

In the instant case, I will endeavour to establish if the plea adhered to the procedure described in *Adan* (*supra*).

7. The appellant was arrested on September 29, 2022, and taken to court for a plea on September 30, 2022. The charge was read to him, but the language in which this was done was not indicated. When called upon to respond, he said it was true. The facts were read to him, and he said they were correct. In his mitigation, he said he was seventeen years old.

8. Though the learned that was used to communicate with the appellant is not indicated, I am satisfied that he understood the charge.

9. The facts that were read to him and that he confirmed correctly supported the charge of defilement. The medical documents that were produced indicated that the complainant was fourteen years old.

10. I, therefore, find that the plea by the appellant was unequivocal.

11. The plea was, therefore, properly taken.

12. For an offence of defilement to be proved, there must be penetration. The medical examination report presented to the court did not support the offence. This is what was recorded:

> Normal external genitalia, labia majora and minora normal. Hymen intact, not freshly torn.

13. The medical evidence did not, therefore, establish that there was penetration. Without proof of penetration, whether wholly or partially, the offence of defilement was not disclosed from the facts that were read. The learned trial magistrate should have entered a plea of not guilty and set the case down for hearing. The appellant's conviction was unsafe.

14. I, therefore, quash the conviction and set aside the sentence. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF MAY 2024

KIARIE WAWERU KIARIE

JUDGE