



**Odera v Republic (Criminal Appeal E010 of 2021)  
[2024] KEHC 9708 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9708 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E010 OF 2021  
PN GICHOHI, J  
JULY 25, 2024**

**BETWEEN**

**CHARLES ODHIAMBO ODERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against sentence only from the Judgement of Hon.Y.I. Khatambi (PM) delivered on 10th May, 2021 Nakuru Chief Magistrate's Court Criminal Case No. E080 of 2020)*

**JUDGMENT**

1. The genesis of this appeal is that the Appellant herein was arraigned before the trial court on 29<sup>th</sup> December 2020 where he took plea on a charge of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars thereof were that on the 24<sup>th</sup> day of December 2020 at Rongai Sub- County within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ namely penis to a female genital organ namely vagina of M.A a child aged 16 years old which caused penetration.
2. He also faced an alternative count of indecent act contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 24<sup>th</sup> day of December 2020 at Rongai Sub- County within Nakuru County, unlawfully and intentionally committed an indecent act by touching the female genital organ namely vagina of M.A a child aged 16 years with his genital organ namely penis.
3. He denied the charges but upon being supplied with witness statements and documentary evidence, the accused person intimated to court on 8<sup>th</sup> March 2021 that he wished to change his plea. The charges were read to him afresh on 1<sup>st</sup> April 2021 on the main charge and the facts as read to him. A plea of guilty was therefore entered and he was ultimately sentenced on 10<sup>th</sup> May 2021 to serve a sentence of 25 years imprisonment.



4. He was aggrieved by both conviction and sentence; he filed a petition of appeal dated 24<sup>th</sup> May 2021. The grounds were that:-
  1. He pleaded guilty at trial.
  2. He was beaten by police officers to agree to the charges that he did not know.
  3. The Court examines and evaluates the it and see that the prosecution forced him to agree to the charges.
  4. The trial magistrate erred in law and in fact by failing to note that the evidence by the witnesses was contradictory and inconsistent and could not support the conviction.
5. He therefore urged the Court to allow the appeal, quash the conviction , set aside the sentence and that the matter be referred for retrial.

### **Respondent's Submissions**

6. In its Submissions filed 15<sup>th</sup> February 2024 and dated 5<sup>th</sup> December 2023, the Respondent highlighted the chronology of events before the trial court and submitted that when the appellant requested the court to read the charges to him again, the trial court cautioned the Appellant and the penalty he was likely to face but he still pleaded guilty to the charge. That the matter was adjourned to another date for facts reading and the Appellant admitted the facts and a plea of guilty entered.
7. In the circumstances, the Respondent submitted that the plea was unequivocal and in compliance with the procedure laid down by the Court of Appeal in *Adan v Republic* [1973]EA 445.
8. Lastly, the Respondent urged the Court to consider the aggravating circumstances, the prevalence of the offence and therefore not disturb the sentence passed by the trial court.
9. As regard the allegations he was assaulted and forced by police to take plea, the Respondent submitted that the Appellant was in custody when he opted to change plea and was not in any way in contact with the police and in any event, the Appellant did not raise the issue before the trial court.
10. Further, the Respondent submitted that there was no evidence form even the proceedings that the Appellant was constrained or coerced by the prosecution to plead guilty to the charge.
11. The Respondent further submitted that the trial court never evaluated the evidence as the evidence was not disputed. That it was after the Appellant was supplied with statements and documentary evidence that he may have realised that the evidence was overwhelming and therefore opted to plead guilty to the charge. That in the circumstances, the issue of contradiction and inconsistencies could not arise.
12. Upon being served with the submissions, the Appellant filed on 6<sup>th</sup> March 2024 , an Amended Grounds of Appeal under Section 35 of the [Criminal Procedure Code](#) saying he was appealing against Sentence only.
13. The grounds were that:-
  1. The sentence of 25 years was harsh and excessive considering that he was a first offender.
  2. His life has greatly been affected by the sentence considering that he is a young man.
  3. He was the sole bread winner of his family and now suffering due to his incarceration.
  4. He is very remorseful and repentant.



14. In what appears as a copy and paste exercise, the Appellant prayed that : conviction be quashed, sentence set aside and he be set at liberty or his sentence be reduced and the remaining sentence be substituted with a non -custodial sentence or probation.
15. In his submissions however, he states that he is expounding on both matters of law and facts on the amended grounds basing his argument on mitigating factors. He submits as follows:-

“The Appellant denied the charges which prompted the prosecution to bring forth 4 prosecution witnesses to prove their case. At close of the prosecution case, the appellant was placed on his defence which he opted to give unsworn statement of defence but never called any witness . However, the trial court found him guilty and sentenced him to serve 25 years imprisonment . The appellant was dissatisfied by this decision and filed a petition against the sentence conviction hence the basis of this humble submission .”
16. On this submission the appellant states that he

“has opted under section 350 (2) (v) of the [Criminal Procedure Code](#) to mitigate on sentence only.”
17. Referring to [Judiciary sentencing guidelines](#), he submits that he is now reformed and urges the Court to reconsider the sentence of 25 years imprisonment . He further states :-

“It is not in dispute that I committed the crime and the minor was only 13 years old but it is important for this court to note that I am now fully reformed and never shall commit such an act anymore.”
18. Lastly, he urges the Court to consider the period spent in custody since 28<sup>th</sup> December 2020 as provided for by Section 333 (2) of the [Criminal Procedure Code](#) . In conclusion, he urges the Court to order that he remaining sentence be served under Community Service Order.

### **Analysis And Determination**

19. This being the first appellate court, it is its duty to evaluate and analyse the evidence before the trial court and come up with its own conclusions. See *Okeno v Republic* [1973] EA 32. What is evident now from the analysis above is that the Appellant abandoned the appeal on conviction.
20. Needless to say, the trial court did not take any evidence. It is the Appellant who requested that the charges be read again to him after being supplied with the witness statements and documentary evidence.
21. If for argument’s sake, the Appellant could be mixed up in this appeal by urging the Court to quash the conviction and set aside the sentence, then this court has to evaluate the process of plea taking before the trial court and ascertain its compliance with the guidelines in [Adan v Republic](#) [1973]EA 445 where the Court of Appeal stated:-

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask



the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

22. This Court has ascertained that right from the first date he was arraigned in court on 29/12/2020 for plea, the charges were read to him in Kiswahili language which he understood and he replied on each of the counts that is the main and alternative count; "*Si kweli*" which in English language means "Not True." A plea of Not Guilty was entered. That was on 29<sup>th</sup> December 2020.
23. It was about two and a half months later which is 8<sup>th</sup> March 2021, which was the date for pre-trial, that the Appellant, after being supplied with the statements and documentary evidence, urged the court that the charges be read to him afresh. That was done and in Kiswahili language and he responded to the main count; "*Kweli*." which is "True" in English language.
24. The court record shows that even as the Appellant was cautioned by the court on consequences of pleading guilty, the Appellant still went ahead and responded that he pleaded guilty. The Record further shows that the Respondent was not ready with facts and urged the court to give them another date. The Appellant had no objection to that and the date was reserved for 1<sup>st</sup> April 2021 for that purpose.
25. As scheduled, the facts were read to the Appellant in Kiswahili language and he responded that the facts were correct. At that point, the Appellant was convicted on his own plea of guilt.
26. This Court is satisfied that the plea was properly taken and the conviction was therefore unequivocal in the circumstances and the conviction was sound.
27. The record shows that the Respondent had no previous records for the Appellant and in mitigation, the Appellant urged the court to consider that he had five children and was the sole bread winner and also takes care of his mother. He sought leniency. A pre-sentence was duly called for and availed and while sentencing, the trial court stated:-

"Nature of the offence duly noted. Mitigation and the contents of pre-sentence report noted. Report not favourable. Above notwithstanding, while noting both the aggravating and mitigating factors of the case, I am inclined to sentence the accused to a imprisonment of a term of 25 years."

28. Section 8 (1) of the *Sexual Offences Act* No. 3 of 2006 provides that: -

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

The penalty for that offence is provided for under Section 8 (3) of the *Act* that :-

"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."



29. Both the Child health Card and the PRC Form produced as exhibit show that the victim was born on 15/05/2007 which means that she was thirteen (13) years old as at the time she was defiled. The charge sheet has some alterations in regard to the date to read 16 years. That must have been an error or defect that does not affect the case at all.
30. There is nothing to show that said sentence is manifestly excessive or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. This Court finds no reason to interfere with the sentence herein. That sentence is appropriate and is upheld.
31. The record shows that the appellant was arrested on 28<sup>th</sup> December 2020 and brought to court on 29/12/2020. He was in custody since the date he was convicted and sentence. The trial court ought to have complied with Section 333 (2) of the *Criminal Procedure Code* when it pronounced the sentence- See *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR.
32. In conclusion this Court makes the following orders:-
1. The entire appeal is dismissed for lack of merit.
  2. The period spent in custody from 28/12/2021 be taken into account while computing the sentence of 25 years imprisonment.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 25<sup>TH</sup> DAY OF JULY , 2024**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:-

Charles Odhiambo Odera -Appellant

Mr. Kihara for Respondent

Ruto- Court Assistant

