



**Auma v Republic (Criminal Appeal E019 of 2021)  
[2024] KEHC 12613 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12613 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL APPEAL E019 OF 2021  
WM MUSYOKA, J  
OCTOBER 22, 2024**

**BETWEEN**

**NICHOLAS TEKLA AUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from conviction and sentence by Hon. L Ambasi, Chief Magistrate,  
CM, in Busia CMCCRC No. E118 of 2021, of 6th August 2021)*

**JUDGMENT**

1. The respondent, Nicholas Tekla Auma, had been charged before and acquitted by the primary court, of the offence of defilement, contrary to section 8(1)(3) of the *Penal Code*, Cap 63A, Laws of Kenya. The appellant had allegedly called the complainant, MA, to his home, forced her to remove her school uniform, and her underwear, whereupon he inserted his penis in her vagina. MA narrated his ordeal to her mother, and the matter was escalated to the police, leading to the arrest of the appellant, and his arraignment in court. When the charges were read to him, he pleaded guilty, and when the facts were read out to him, he confirmed them to be true. The trial court convicted him on his own plea of guilty, and sentenced him to life imprisonment.
2. The appellant was aggrieved, and brought the instant appeal. His grounds of appeal are not particularly well articulated, but they revolve around his fair trial rights being violated or contravened; being beaten; not being taken to hospital; plea not taken in open court; and not being afforded an opportunity for an intermediary.
3. Directions were given on 7<sup>th</sup> May 2024, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions.
4. The appellant submits that his sentence of life imprisonment was harsh, and his mitigation was not considered. He pleads to be given time to dispute or explain the facts or to add to them. He further



- submits that the plea taking exercise was not properly done, as he was not given relevant facts. He states that upon his being taken into custody, before arraignment, he was not informed that the offence, he was to be charged with, attracted a harsh penalty, upon conviction, and the trial court ought to have warned him of the attendant result of pleading guilty.
5. He further submits that he was not given an opportunity to communicate with his Advocate, nor to choose an Advocate of his own choice or to be assigned one by the State. He argues that although the [Legal Aid Act](#), No. 6 of 2016, Laws of Kenya, had come into force, the trial court did not make an effort to comply with it. He claims that his plea was not taken in open court, but through Skype, and he did not clearly hear and understand the elements of the charge that he faced. He submits that he is entitled to a retrial as the original trial was defective. He further states that the sentence of life imprisonment, imposed on him, was unconstitutional.
  6. He relies on *Ahmedi Ali Dharamsi Sumar vs. Republic* [1964] EA (Sir Daniel Crawshaw, Sir Clement De Lestang & Duffus, JJA), *Jackson Mutunga Matheka vs. Republic* [2015] eKLR (Jaden & Mutende, JJ), *Julius Kitsao Manyeso vs. Republic* [2023] eKLR (Nyamweya, Lesiit & Odunga, JJA), among other decisions.
  7. The respondent cites section 348 of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya, and *Olel vs. Republic* [1989] KLR 444 (Mbaluto, Tanui & Akiwumi, JJ), to submit that where the plea of guilty is unequivocal, an appeal against the conviction would not lie, except on the legality of the sentence. *Alexander Lukoye Malika vs. Republic* [2015] eKLR is cited, for the point that an appeal on a conviction based on a guilty plea, would only be permissible, where the plea was imperfect, ambiguous or unfinished; or where it was as a result of mistake or misapprehension of the facts; or where the charge laid out did not disclose an offence known in law; or on the admitted facts the appellant could not be convicted of the offence charged. Article 50(2)(b) of the Constitution, section 207 of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya, and *Ombena vs. Republic* [1981] KLR 450 [1981] eKLR (Law, Miller & Potter, JJA) are cited, for the argument that the plea-taking exercise was undertaken in full compliance with the relevant law.
  8. On the right to legal representation, *Republic vs. Karisa Chengo & 2 others* [2017] eKLR [2017] KESC 15 (KLR) (Maraga CJ, Mwilu DCJ&VP, Ibrahim, Ojwang, Wanjala, Ndung'u & Lenaola, SCJJ) and Article 50 of the [Constitution](#), are cited, for the concession that the right to legal representation was not explained to the appellant, despite him pleading guilty to the charge. It is submitted that this would be a proper case for a retrial, in the best interests of justice. On legality of the sentence, it is pointed out that the victim of the offence was aged 10 years at the material time, and the charge ought to have been brought under section 8(2), and not section 8(3), of the [Sexual Offences Act](#), although that was a curable anomaly. It is finally submitted that the trial record is clear that the appellant was given a chance to mitigate, and he mitigated. It is submitted that the trial court did not consider that mitigation, although the sentence was lawful, given the age of the victim of the crime, and the mandatory nature of the prescribed sentence.
  9. The respondent has conceded the appeal, and supports a retrial. There would be no point of belabouring the matter. The appellant was not informed of the right to legal representation of his own choice, and of his right to an Advocate paid for by the State, under certain conditions. These are prerequisites under the [Constitution](#) and the [Legal Aid Act](#). There are also issues with the sentence imposed, in view of recent jurisprudence around minimum sentences and life imprisonment.
  10. I shall, accordingly, quash the conviction of the appellant, on August 6, 2021, in Busia CMCCRC No. E118 of 2021, and set aside the sentence of life imprisonment imposed. The appellant shall be retried. To facilitate that, he shall be released forthwith, from prison custody, unless he is otherwise lawfully



held there, and handed over to the police, who shall present him before the Chief Magistrate's Court, at Busia, for retrial. Orders accordingly.

**JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 22<sup>ND</sup> DAY OF OCTOBER 2024.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Mr. Nicholas Tekla Auma, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

