



**Kanyaru v Republic (Criminal Appeal E012 of 2022)
[2023] KEHC 20465 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20465 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E012 OF 2022
MS SHARIFF, J
JUNE 19, 2023**

BETWEEN

PETER KIRIMI KANYARU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal arising from the conviction and sentence by Hon P.N. Maina (S.P.M) in original Marimanti SPMC Sexual Offence Case No. 23/2020 delivered on 11/06/2020)

JUDGMENT

1. The appellant was arraigned in the subordinate court to answer to a charge of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. The particulars were that on diverse dates between 24th and December 26, 2019 in Tharaka South sub county within Tharaka Nithi county, he intentionally caused his penis to penetrate the vagina of AM, a child aged 15 years. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act.
2. When the appellant was arraigned in court, he pleaded guilty and a plea of guilty was then entered against him and he was sentenced to 20 years imprisonment.
3. The appellant was aggrieved and filed the instant appeal raising the following grounds;
 - a. The trial magistrate erred by convicting on charges leveled against him but not proved beyond reasonable doubt.
 - b. The learned trial magistrate erred failing to critically evaluate the evidence by the prosecution witnesses to detect a glaring personal vendetta set to frame up the appellant.
 - c. The learned trial magistrate erred by failing to take into account that the appellant pleaded guilty after being deceived by the police after his arrest.



- d. The learned trial magistrate erred by convicting on contradictory evidence adduced by the prosecution.
4. The appeal was disposed of by way of written submissions. Both parties complied. The appellant in his submissions filed on October 27, 2022 and his supplementary submissions filed on December 13, 2022 contends that the magistrate did not explain to him the consequences of pleading guilty. That upon arrest, he was severely beaten, intimidated and warned of dire consequences if he denied the charges. He submitted that the charges were instigated by the area chief and the victim's parents over a land dispute.
5. He further submits that the trial magistrate did not accord him a chance to address the court and that his mental ability was not assessed. He faults the trial for the failure by the prosecution to produce the victim. He relies on the authority in *Elijah Njibia Wakianda vs Republic* (2016) eKLR.
6. He further argues that his plea was equivocal and that there is a discrepancy in the police occurrence book.
7. The respondent relied on section 348 of the *Criminal Procedure Code*, the decision in *Alexander Lukoye Malika v Republic* (2017) eKLR and *Adan v Republic* (1973) EA 446 for the proposition that once an appellant has pleaded guilty, he is precluded from challenging his conviction on appeal unless the appeal challenges the extent or legality of the sentence.
8. On the issue of whether the offence was proved, the respondent submits that the prosecution produced a P3 form and the complainant's birth certificate and the facts relevant to the offence were also read out. The respondent relied *PKR v Republic* (2021) eKLR.
9. Lastly, on whether the plea of guilty was irregularly procured, the respondent contends that the record does not show that the appellant was intimidated or beaten at the police cells. The decision in *Charles Nyaga Mwiti v Republic* (2020) eKLR has been cited.

Analysis and determination.

10. This is an appeal by an appellant who pleaded guilty and as such, the provisions of section 348 of the *Criminal Procedure Code* come into the fore. The section reads;

“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”
11. In this case, I have examined the record which shows that he plea was taken in Kiswahili and the prosecutor then adduced facts of the matter. Thereafter, the appellant was called upon to plead to the facts and his reply was that the facts were correct. The court then proceeded to convict him on his own plea of guilty.
12. The appellant was called upon to tender his mitigation. He stated that he was aged 20 years and single. He stated that he had spoken to the victim's mother about his intended marriage to the victim whereupon the mother allegedly told him to await her to conclude her KCPE examinations. He stated that upon her completing her examinations, he took a crate of soda and Kshs 5,000/= to the mother and then took the victim as his wife. He stated he was rather shocked that they had turned against him. He stated that he knew the victim to be young but still wanted to marry her and had in fact, as aforesaid commenced the cultural procedures leading to marriage.
13. Thereafter, the trial court sentenced him to 20 years imprisonment.



14. The appellant thus faults the trial court on grounds that the plea was equivocal as he had been beaten and intimidated by the police officers while he was at the police cells and that he was coerced to plead guilty.
15. On whether the plea was unequivocal is to be catered from the circumstances of the case. in *Adan v Republic* (supra), the court gave the following important guidelines in determining whether a plea is equivocal or not. The court 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.

16. Upon re-evaluation of the lower court's record, I am satisfied that the procedure adopted by the trial magistrate was in accord with the established procedure.
17. On the issue of whether the appellant was coerced into pleading guilty by the police, I find guidance in the authority in *David Mbewa Ndede v Republic* criminal appeal No 1 of 1989 (unreported) where the Court of Appeal stated;

“We would add that where as happened in this case at the time of the taking of plea there appears to 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 to court from the date of arrest etc then an explanation of the circumstance must form an integral part of the facts to be stated by the prosecution to the court. The court should then put that explanation to the accused and inquire of him if it affects his plea.”

18. Whereas this court has re-evaluated, re-analyzed and scrutinized the record, it has not encountered any factual evidence that would premise a finding of use of violence, coercion, threats or undue influence upon the appellant by police officers. The appellant was quite alert to what was taking place and his mitigation clearly reveals that he was alive to the charges facing him. He seemed to understand the court proceedings very well including the nature of the charges. Had there been an element of coercion, the appellant could have raised it at the time of tendering his mitigation.
19. On the issue of sentencing, whereas I do take cognizance of the trial court's discretion to sentence a convict, I find that the trial court failed to consider the age of the appellant and the circumstances of the case.



20. The Director of Public Prosecution ought to be proffering charges against parents of the likes of the victim's mother who acquiesce to early marriages of their minor daughters and thus contravene the provisions of article 53 (1) (d) and (e) of the Constitution of Kenya 2010 which provide that :-

“ Every child has a right-

- (d) to be protected from abuse, neglect, harmful cultural practices, all form of violence, inhuman treatment and punishment, and hazardous or exploitative labour
- (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married or nor”

21. In the end, I find that the appeal is partly merited and I do hereby uphold the conviction but set aside the sentence which I hereby substitute with a custodial term of 5 years to be computed from the appellant's day of arrest.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT CHUKA THIS 19TH DAY OF JUNE 2023.

MWANAISHA. S. SHARIFF

JUDGE

