



REPUBLIC OF KENYA



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**Muriuki v Republic (Criminal Appeal E049 of 2022)
[2023] KEHC 20670 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E049 OF 2022
LM NJUGUNA, J
JULY 21, 2023**

BETWEEN

GLADYS NYAWIRA MURIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence by Hon.Wanja in S.O.
No. E006 of 2021 in the PM's Court at Othaya and delivered on 24.10.2022)*

JUDGMENT

1. The appellant Gladys Nyawira Muriuki was charged with the offence of defilement contrary to section 8(1) as read with (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the charge were that on 26.09.2022 at around 1800hrs in Othaya Township within Nyeri County intentionally caused her vagina to be penetrated by the penis of AMM, a child aged 9 years.
3. She also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. Particulars of that charge were that on the 26.09.2022 at around 1800hrs in Othaya Township within Nyeri County intentionally caused her vagina to come into contact with the penis of AMM a child aged 9 years.
4. The appellant was convicted on her own plea of guilty and sentenced to life imprisonment.
5. The court directed that the appeal be canvassed by way of written submissions which order the parties complied with. She has appealed to this court against the sentence.
6. The appellant submitted that even though the burden lay squarely on the appellant to prove that she was of unsound mind, the trial magistrate must have noted something on the appellant herein to prompt the need for mental assessment. That the fact that the mental soundness of the appellant was



in issue, the proceedings that leading to the conviction and sentencing of the appellant herein were tainted. On grounds 2 and 3, the appellant contended that the plea of guilt entered ought to have been unambiguous, clear and unequivocal. That the record notes that the plea was recorded in words like ‘I admit; I pleaded guilty, it is true and I am guilty’ cannot be considered as unequivocal. It was stated that it is critical that in every case where there is an alleged plea of guilt, it is desirable before convicting the accused that every component of the charge is explained to the accused and that the accused is asked to admit or deny such component and which should be recorded in a form which will satisfy the laid down procedures. Reliance in support of this proposition was placed on the cases of *Njuki v Republic* [1990] KLR 334 and *John Hosea Guga v Republic* [2015] eKLR.

7. It was reiterated that although the trial court noted that the appellant herein was explained to, the gravity and/or the consequences of pleading guilty, it was not properly assimilated by the appellant owing to her mental disability; the same was made worse by the fact that the appellant herein was unrepresented. In the same vein, it was stated that the trial court did not appreciate the law by sentencing the appellant the maximum mandatory sentence in a case such as this. In the end, this court was urged to allow the appeal herein
8. The respondent on the other hand submitted on three grounds to wit; whether the mental status of the appellant was taken into consideration during conviction and sentence. The respondent submitted that when the charges were read to the appellant, she pleaded guilty to the same. That the court explained the consequences of pleading guilty but the accused person still maintained her plea of guilt. The respondent thus submitted that the trial court satisfied itself into the mental status of the appellant through the mental assessment report and also by cautioning the appellant about the nature of the offence and its seriousness.
9. On whether the plea was unequivocal, it was submitted that the same was in compliance with section 207 (1) and (2) of the *CPC* and reliance was placed on the case of *Obena v Republic* (1981) wherein it was reiterated that the purpose of the statement of fact is for the court to satisfy itself that the plea was unequivocal. That in the case herein, the same was done and therefore the ground fronted by the appellant as such should fail.
10. On whether the sentence was harsh, it was submitted that the section is couched in mandatory terms and provides for life imprisonment. That in *Petitions 15 and 16 of 2015*, commonly known as *Muruatetu Case*, the Supreme Court was decisive and clear that the guidelines dated 16.07.2021 did not affect the offences under *Sexual Offences Act* 2006 and so mandatory sentence in sexual offences are still legal. In the end, this court was urged to dismiss the appeal herein as the same was destitute of merit.
11. This being the first appellate court it has the duty of re-evaluating the entire evidence and coming up with its own independent findings bearing in mind that it did not have the privilege of examining the witnesses and give allowance for that. See *Okeno v R* 1972 EA
12. The appellant despite having been convicted on her own plea of guilty, was nonetheless aggrieved by both the conviction and sentence meted out against her by the trial court. Her main contention is that she was mentally ill during the offence among other grounds.
13. As earlier noted, the appellant herein was charged and convicted on her own plea of guilty of the offence of defilement contrary Section 8 (2) of *Sexual Offences Act* which states;

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement...” ..



- (3) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced imprisonment for life.”
14. There is no dispute that the appellant pleaded guilty to the charge and the detailed particulars read over to her as per the proceedings of the trial court. The appellant now contend that she was insane at the time of the offence. I have gone through the proceedings and on 30.09.2022 the particulars of the charge were read to appellant in a language she understands and she pleaded guilty. Appellant further stated “ Maelezo ni ya kweli”
15. She has not stated here that she did not understand the language used in court which means she understood the charge read over to her and the particulars well. She pleaded guilty on the main charge and the facts and the plea was unequivocal in every sense.
16. This court further finds that both the charge sheet and the detailed particulars read over to the appellant clearly disclosed the offence of defilement as defined under Section 8 of the Sexual Offences Act, 2006. It disclosed that there was penetration and the victim was aged 9 years at the material time.
17. The Court of Appeal has on several occasions re-stated the law on plea taking. In John Muendo M. v Republic [2013] eKLR, the court had this to say;
- “The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan v Republic* [1973] EA 445 where the Court held:-
- 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 facts relevant to sentence together with the accused’s reply should be recorded.”
18. It is true that in cases where the offence committed carries a heavy penalty like death or life sentence, courts should treat plea taking with caution especially where the accused is unrepresented. In *Abdalla Mohammed v Republic* [2018] eKLR the Korir J expressed that importance by making the following observations;
- “ 15. The importance of the need for the court to be cautious when accepting a plea of guilty from an undefended accused person was stressed by Joel Ngugi, J in *Simon Gitau Kinene v Republic* [2016 eKLR when he stated that:
- “19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where



an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened.

19. In the case before me, there is no medical evidence on the appellant's state of mind at the time she took plea, and there is nothing from the Court record to show that she may have been of unsound mind. I say so for the reason that the mental assessment carried out only noted that the appellant had a mild intellectual disability and from my understanding, Mild Intellectual Disability refers to deficits in intellectual functions and not to the aspect of not appreciating the legal guilt in doing and/or not doing a specific act. As such, the report does not show that the appellant herein suffered from unsoundness of mind at the time she committed the offence. [See Section 11 of the [Penal Code](#) and *Mariri v Republic* [1985] KLR 710 and *Muswi s/o Musele v Republic* [1956]EAC622].
20. From the report by the psychiatrist, it is noted that the appellant herein was able to remember the events as they happened on that day where she reported to have had sexual contact with the complainant herein. Of importance to note is the fact that the alleged offence occurred on 26.09.2022 while the assessment was carried out on 17.10.2022. From the above therefore, I am inclined to believe that the appellant herein indeed appreciated the case that was before her and that is why she sought for forgiveness before the court by stating that she did not know that whatever she did was wrong.
21. Having pleaded guilty to the charge, I find that Section 348 of [Criminal Procedure Code](#) precludes her from appealing on conviction and from what I have noted above, the plea as taken was unequivocal.
22. On sentence the appellant submitted that the sentence of life imprisonment was manifestly excessive. Though the offence is serious, having been committed to a 9 year old victim, I find the sentence of life excessive in the circumstances.
23. Therefore, this court considered the same in light of [Phillip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General](#), Odunga J (as he then was) and wherein it was stated that:
 - 88 A study of the offences under the said Act reveals that the Act prescribes minimum mandatory sentences in several sections.
 89. In determining the relevance and constitutionality or otherwise of such sentences, and statutes in general, it is my view that the current constitutional dispensation particularly article 27 of [the Constitution](#) ought to be taken into account. Clause 7 of the [Transitional and Consequential Provisions](#) thereof provide as follows:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring in into conformity with this constitution.
90. It is clear that minimum mandatory sentences *prima facie* do not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances. I am however, alive to the provisions of section 4(1) and(2) of the [Probation of offenders Act](#), Cap 64 Laws of Kenya which provides as follows:

In my view the opinion of the Supreme Court with respect to the mandatory sentences apply with equal force to minimum or no-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines it is appreciated that:



Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for offenders.

24. He proceeded that:

“It may be argued that these decisions of the Court of Appeal ought not to be followed on the ground that they are *per incuriam* in light of the clarification in [Muruatetu 2](#). However, it is my view that the Supreme Court in [Muruatetu 2](#) did not address itself to the constitutionality of mandatory minimum sentences. It simply clarified that [Muruatetu 1](#) only dealt with murder. I agree with that clarification. However, the Supreme Court left it open to the High Court to hear any petition that may be brought challenging *inter alia* mandatory minimum sentences and make a determination one way or another. The Supreme Court did not hold that the High Court ought not to apply the reasoning in [Muruatetu 1](#).”

25. Mativo J (as he then was) was of the same view and further reiterated an observation this court equally adopts, that there are no doubts the good intentions of the drafters of the [Sexual Offences Act](#) in taking steps to curb the menace of sexual offences and the trauma it causes to the victims of the said offence and that the perpetrators of the said offences must be condemned by all means; but in the same breadth, the sentences to be imposed must meet the constitutional dictates.

26. In light of the above, this court underscores the need that indeed the mandatory sentences are not unconstitutional in the sense that they may still be imposed but in deciding what sentences to impose, the courts must ensure that whatever sentence is imposed upholds the spirit of [the constitution](#) and further, regard to the surrounding circumstances fully taken into consideration. The Court of Appeal in the case of [Dismas Wafula v Republic](#) [2019] eKLR stated:

“In appropriate case therefore, the court freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demands. On the other hand, the court cannot be restrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

[Also See Court of Appeal in [Eliud Waweru Wambui v Republic](#) [2019] eKLR].

27. It is trite that the rights of an accused person to a fair trial as provided for under article 50(2) of [the Constitution](#), is absolute and cannot be limited under Article 25 (c) of [the constitution](#).

28. It is trite that a decision arrived at by a court of law should be justified and further perceived justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand. After all a mandatory minimum sentence carries the same characteristics and effect regardless of the offence created by the provision.

29. A further reflection of the above leads this court to arrive at the view that sentence discretion is a vital element of our law of sentencing and at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court. I say so for the reason that the discretion ensures that courts impose a just and appropriate sentence in regard to the circumstances of the case before it. [See [A Guide to Sentencing](#)



in South Africa 1st ed 1992 and *Edwin Wachira and 9 Others v Republic* Constitutional Petition No. 97 of 2021].

30. Having regard therefore to the above and a further guidance by the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi v Republic*, Criminal Appeal No. 84 of 2015 at Nyeri, where the appellant was charged with the offence of defilement contrary to section 8(1) as read together with Section 3 of the SOA, the Court substituted the 20 year sentence with a 15 year sentence to run from the time the trial court imposed its sentence.
31. In the case herein, the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment.
32. In the given circumstances therefore, I hereby set aside the life imprisonment and substitute the same with 30 years imprisonment to run from the time the trial court imposed its sentence.
33. It is so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State

