



**Kanaya v Republic (Criminal Appeal E043 of 2024)
[2024] KEHC 14335 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E043 OF 2024
RE ABURILI, J
NOVEMBER 12, 2024**

BETWEEN

HASSAN HASAVA KANAYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Sentence imposed by Hon. G.C. Serem Resident Magistrate vide
Kisumu CMC Sexual Offences Case No. E010 of 2024 delivered on the 27th May 2024)*

JUDGMENT

1. This appeal arises from the Sentence imposed by Hon. G.C. Serem Resident Magistrate vide Kisumu CMCC Sexual Offences Case No. E010 of 2024 delivered on the 27th May 2024.
2. The Appellant Hassan Hasava Kanaya was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He pleaded guilty to the charge and was subsequently sentenced to 30 years' imprisonment. The child victim of the offence was aged 4 years old and the offence took place on 17th May 2024 in Kisumu Central sub-county, Kisumu County.
3. Aggrieved by the sentence imposed, the appellant filed this appeal dated 6th June 2024 raising five grounds of appeal as detailed below:
 - a. That the learned magistrate erred in law and in fact in my plea of guilty as it was a sincere act of remorseful deserving a commensurate lenient sentence.
 - b. That the learned trial magistrate erred in law and in fact by recording and imposing a sentence in a trial which did not meet the constitutional threshold of fair trial under Article 50 (2) (g) (h) (i) of *the constitution*.



- c. That the learned trial magistrate erred in law and in fact in handing the appellant a harsh and excessive sentence by not considering his mitigation.
 - d. That the learned trial magistrate erred in law and in fact in failing to consider that the appellant was a first offender, remorseful and as such for a non-custodial and/or a more lenient sentence.
 - e. That more grounds to be adduced after the perusal of the trial court records.
4. In his oral submissions, the appellant submitted that he was framed on account that the police who arrested him told him to admit the offence so that he would be released. He submitted that he wanted a re-trial.
 5. The state through Mr. Marete submitted that despite the appellant pleading guilty to the charge, the prosecution never produced a P3 form, the PRC forms, proof of the minor's age that was alleged to be 4 years and as such, it was in the interest of justice that a retrial be ordered.
 6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. See *Okeno v Republic* [1977] E.A.L.R. 32.
 7. However, where an accused person has pleaded guilty to the charge, he cannot appeal against conviction and on facts. In other words, he can only appeal against the sentence imposed. In the instant case, the appellant pleaded guilty to the charge and was convicted on his own plea. The only issue that this court ought to determine is whether the plea was unequivocal and whether or not in the circumstances of this case, the sentence that was meted out was lawful and/or warranted.
 8. In the case of *Olel v Republic* [1989] KLR 444, it was held that:

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (Cap 75) does not merely limit the right of appeal in such cases but bars it completely.”
 9. It follows that the appellant is, by virtue of this section, barred from challenging the conviction and his only recourse was to challenge the extent or legality of the sentence imposed on him by the trial court.
 10. That bar, in my view only operates where the plea is unequivocal. Accordingly, that bar does not prevent this court from inquiring as to whether a prima facie plea of guilty was unequivocal or not.
 11. Similarly, the bar does not bar the court from making an inquiry as to whether the facts constituted any offence. Where the plea is unequivocal, I adopt C. Mwita, J's holding in *John Shikoli Atsunzi v Republic* [2016] eKLR that, that would make the conviction unlawful thus justifying the court in addressing itself on the issue of conviction.
 12. In *Alexander Lukoye Malika v Republic* [2015] eKLR the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no



offence known to law. Also, where upon admitted facts the Appellant could not in law have been convicted of the offence charged.”

13. In the instant case, the appellant pleaded that he was told that if pleaded guilty, he would be released which violated his right to a fair trial as enshrined in *the Constitution* under Article 50 (2) (g) (h) (i). On their part, the State submitted that although the appellant pleaded guilty, the prosecution failed to, in essence, produce the requisite documents to prove his guilt i.e., the P3 form, PRC forms or indeed prove the victims age and thus a retrial ought to be ordered in the interest of justice.
14. What is the course available to the Court in such circumstances therefore? In other words, should the Court order a retrial? The Court of Appeal in the case of Ahmed Sumar v R [1964] EALR 483 offered the following guidance:

“...in general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; ...”
15. The Court of Appeal in the case of Samuel Wahini Ngugi v R [2012] eKLR reiterated the aforementioned holding.
16. In this case, the appellant was sentenced to serve a period of 30 years. The prosecution admitted that they did not avail any evidence to prove the charges against the appellant. In those circumstances, the appropriate order would be to order for a retrial and not setting the appellant free considering the seriousness of the charge brought against him. I also note that this is a relatively recent case and there is a relative ease in tracing the witnesses and the evidence collected by the prosecution.
17. Accordingly, the appeal is allowed, the appellant’s conviction is hereby set aside and his sentence quashed. I direct that the matter be heard de novo before a different magistrate.
18. The appellant convict to be presented before the Chief Magistrate’s Court at Kisumu for a fresh plea taking on 18th November, 2024.
19. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

