Kiwewelo v Republic (Criminal Appeal E001 of 2025)
[2025] KEHC 18067 (KLR) (3 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18067 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E001 OF 2025

AN ONGERI, J

DECEMBER 3, 2025

BETWEEN

GASPER MNJAMA KIWEWELO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. E. M. Kadima (PM) in Taveta PMCR Sexual Offence No. E034 of 2024 delivered on 24th December 2024)

JUDGMENT

1. The Appellant pleaded guilty to the charge of rape contrary to Section 3(1)(a)(c)(3) of the *Sexual Offences Act* No. 3 of 2006 and he was sentenced to 20 years imprisonment.

2. The particulars of the charge were that on diverse dates between the month of January to September 2024 at unknown time at [Particulars Withheld] in Taveta Sub County within Taveta Town, the Appellant intentionally caused his penis to penetrate the vagina of SNK without her consent.

3. The facts were as follows:-

> On 13.12.2024 together with the complainant CK went Taveta Police Station and reported that her 24 year old who is mentally challenged and partially blind was being sexually abused by someone who knew without her consent and they were cousins and neighbours. The report was that on diverse dates between January and December the victim used to stay at Gasper house together with his children. And Gasper used to sent his children away and take her to his bedroom and have sex with her against her will. The accused gave her Kshs. 50 in order to influence or coerce her to engage in sex. This went on for several months and the last time it happened was in September, this year before it was discovered the victim told her elder sister on what transpired who in turn reported to the police who were advised to go seek medical intervention. They went to Taveta subcounty hospital where she was seen

and a P3 was filled on 13.12.2024 by Clinician George Ombayo. Her certified that she had no hymen and had engaged in sex for a long time. The p3 form was produced as exhibit number 1.

4. The complainant produced her disability card and her identification card.

5. In mitigation, the Appellant said he committed the offence because of close proximity and association. He said he was sorry and asked for a non-custodial sentence because he has a child that is physically disabled and is school going.

6. The Court sentenced the Appellant to 20 years imprisonment.

7. The Appellant has appealed against the sentence on the following grounds:-

   i. That the Learned trial Magistrate erred in both facts and law in failing to appreciate the fact that the charge as alleged herein is inconsistent with the evidence since the matter complained of was not forced occasioning a prejudice to the Appellant's case.

   ii. That the Learned trial Magistrate erred in both facts and law without knowing that the Appellant was informed on 20th December 2024 to be interrogated by the Probation Officer's Department and before the outcome from the alleged officers, he was just met by this conviction thus occasioned miscarriage of justice of the other hand.

   iii. That the Learned trial Magistrate erred in both facts and law in convicting the Appellant even though I pleaded guilty without bearing in mind that on 20th December 2024 I was informed by the court itself from what they received from the Probation Officers that I be taken to hospital for further medication and before the result of my treatment, I was just sentenced to 20 years imprisonment which is an error as per the law.

   iv. The Learned Magistrate erred in law and fact by not considering that the Appellant did not understand the language of the proceedings which is against the principle of access to justice and fair hearing as espoused under Articles 48 and 50 respectively.

   v. The Learned Magistrate erred in law and fact by not considering that the plea of guilty entered was not unequivocal since "ni kweli" does not mean guilty or not guilty and the Appellant did not understand the consequences of the plea and/or what he said.

   vi. The Learned Magistrate erred in law and fact by sentencing the Appellant to 20 years in prison without considering that the complainant had mental disorder and her evidence was never corroborated.

   vii. The Learned Magistrate erred in law and fact by allowing the doctor's report which showed that the complainant had had sexual activity and had no hymen that shows that she has had multiple sex activity with other people hence the doctor report was wrong to assume that the Appellant s the only person who had sexual relationship with the complainant.

   viii. The Learned Magistrate erred in law and fact by hugely violating the right to fair hearing and access to justice entitled to the Appellant by concluding the whole criminal proceedings in just eleven days given the gravity of the offence. Vide the charge sheet dated 16th December 2024 the Appellant was arrested on 13th December 2024 and sentenced on 24th December 2024 which is eleven days thus explaining why the Appellant was never granted his right to fair hearing.

ix. The Learned Magistrate erred in law and fact by sentencing the Appellant to twenty years without according and/or explaining to the Appellant his right to cross examine the complainant. See Benjamin Mugo Mwangi & Another v Republic (1984) eKLR.

x. The Learned Magistrate erred in law and fact by sentencing the Appellant to twenty years whereas there was no corroboration on the two essential ingredients of the offence charged with i.e. penetration.

xi. The Learned Magistrate erred in law and fact by not considering that the charges were read to two accused persons while the charge sheet only indicated the Appellant as the only accused person and hence the Learned Magistrate did not decipher who pleaded guilty.

xii. The Learned Magistrate's entire judgment and rationale is plainly wrong in principle and law.

8. The parties filed written submissions as follows; The Appellant submitted that his conviction and sentence, following a guilty plea, are fundamentally flawed and must be overturned.

9. The core argument is that the trial proceedings were so irregular and inconsistent that they violated the Appellant's constitutional right to a fair trial, thereby making the plea of guilty invalid.

10. It is asserted that the record of proceedings is critically defective. Notably, the transcript fails to capture the specific charges and facts that were read to the Appellant, merely stating they were presented "in a language that he understands."

11. This omission breaches the mandatory procedure outlined in the Adan v Republic guidelines and Section 207 of the Criminal Procedure Code, which require the accused's own words of admission to be recorded after the essential elements of the charge are explained.

12. The Appellant's response of "ni kweli" ("it is true") is rendered meaningless without a record of what precisely he was affirming.

13. Further fatal inconsistencies are highlighted in the record. The proceedings reference two accused persons, while the charge sheet names only the Appellant, creating confusion over who actually pleaded and to what.

14. There is also a glaring chronological impossibility, as the first court session is recorded as occurring on 16th December 2022, yet the police report referenced in the facts is dated 13th December 2024.

15. Additionally, the charge sheet lists two counts, but the proceedings only mention a plea being taken on the second count, with no indication of how the first count was disposed of.

16. These accumulated irregularities—the incomplete record, the ambiguous references to multiple accused, and the implausible timeline—lead to the submission that the Appellant could not have entered an informed and unequivocal plea.

17. Consequently, the foundation for the conviction is unsound. On sentence, it is argued that the 20-year term is excessive and unlawful, particularly for the second count under Section 11 of the *Sexual Offences Act*, which carries a lesser maximum penalty, and again, it is unclear which offence the sentence pertains to.

18. In essence, the Appellant submits that the proceedings were so marred by procedural failures that they denied him access to justice and a fair hearing under Articles 48 and 50 of *the Constitution*.

19. He therefore prays for the appeal to be allowed, and for the conviction and sentence to be set aside.

20. The Respondent, representing the State, submitted that the appellant's appeal against his conviction and sentence for rape should be dismissed for lacking merit.

21. The State's position is grounded in the legal principle under Section 348 of the Criminal Procedure Code, which bars appeals from a conviction based on a guilty plea, except concerning the extent or legality of the sentence.

22. In this case, the appellant unequivocally pleaded guilty after the trial court explained the severity of the sentence, and he subsequently mitigated.

23. The State contends that the appellant's belated claims of not understanding the court language, not being warned of the consequences, and being unwell were not raised during the trial proceedings and are without foundation, noting the court had previously ordered medical attention for him.

24. Furthermore, the State argues that the imposed sentence of 20 years' imprisonment is fair and proportionate, considering the gravity of the offence.

25. The submission emphasizes the appellant's breach of a duty of trust and care as a relative of the mentally challenged victim, who suffered significant physical and emotional trauma.

26. Consequently, the State urges the court to uphold the original sentence and dismiss the appeal in its entirety.

27. The issues for determination in this appeal are as follows;

    i. Whether the Appellant's plea of guilt was unequivocal and lawfully entered.

    ii. Whether the proceedings before the trial court were so defective as to warrant setting aside the conviction.

    iii. Whether the sentence of 20 years imprisonment should be interfered with.

28. Having carefully evaluated the Record of Appeal, the grounds, and submissions, this court finds that on the issue as to whether the plea was valid, the Appellant's contention that his plea was not unequivocal is not borne out by the record.

29. The trial court's record indicates the charge and facts were read to him in a language he understood, to which he replied, "Ni Kweli."

30. While the ideal practice is to record the exact facts as admitted, as outlined in Adan v Republic [1973] EA 445, a deviation from this perfect record does not automatically invalidate a conviction where the plea is otherwise clear.

31. The Appellant, an adult, did not raise any issue regarding language comprehension or indicate any confusion during the plea-taking process.

32. His subsequent mitigation, where he admitted committing the offence "because of close proximity and association" and expressed remorse, unequivocally confirms his understanding and admission of guilt.

33. A plea is not rendered equivocal simply because an accused person later expresses dissatisfaction with the sentence; the test is the state of the record at the time the plea is entered.

34. This court is therefore satisfied that the Appellant knowingly and voluntarily pleaded guilty to the offence.

35. Concerning the alleged procedural irregularities, while the record exhibits some administrative imperfections, such as the reference to a second accused person, they are not of such a magnitude as to vitiate the entire trial or occasion a miscarriage of justice.

36. The charge sheet before this court names only the Appellant, and the proceedings clearly relate to him.

37. The essence of the trial, which is the plea and sentencing, focused solely on him. The right to a fair trial under Article 50 of *the Constitution* is substantive, not merely formalistic.

38. The defects cited do not go to the root of the trial, as the Appellant was aware of the charge, admitted to it, and was given an opportunity to mitigate.

39. In the circumstances, the irregularities are curable under Section 382 of the Criminal Procedure Code, as no failure of justice has been demonstrated.

40. However, on the issue of sentence, this court finds grounds for intervention.

41. The Appellant pleaded guilty, thereby saving the vulnerable complainant the trauma of testifying.

42. He expressed genuine remorse before the trial court. Furthermore, while the offence is abhorrent and involved a gross breach of trust against a person with mental challenges, the sentence imposed requires review in light of the totality of the circumstances and the principle of proportionality.

43. The Appellant is a first offender with a family, including a child with disabilities for whom he expressed concern.

44. A sentence of 20 years, while lawful, is on the higher end of the spectrum for a first offender who pleaded guilty.

45. Sentencing discretion must be exercised judiciously, balancing the gravity of the offence with the mitigating factors and the objective of rehabilitation.

46. Considering the mitigating factors, particularly the guilty plea and the Appellant's family circumstances, this court finds that a sentence of 20 years is excessive.

47. A sentence of ten (10) years imprisonment would be sufficient to meet the demands of retribution, deterrence, and protection of society, while also acknowledging the Appellant's decision to admit his wrongdoing.

48. Consequently, the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the sentence of twenty (20) years imprisonment imposed by the trial court is hereby set aside and substituted with a sentence of ten (10) years imprisonment.

49. The sentence shall run from the date of the Appellant's initial conviction on 24th December 2024, pursuant to Section 333(2) of the Criminal Procedure Code.

50. Orders To Issue Accordingly

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF DECEMBER 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

.....for the Appellant

.....for the Respondent