



**Okemwa v Republic (Criminal Appeal E042 of 2024)
[2025] KEHC 18694 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E042 OF 2024
DKN MAGARE, J
DECEMBER 18, 2025**

BETWEEN

ZACHARIAH ASANYA OKEMWA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. P. K Mutai SPM, in Kisii CMCSO No. E101 of 2023, given on 27.12.2023, filed out of time with leave granted vide Misc. Application No. E011 of 2024. The appellant was sentenced to 30 years imprisonment.
2. The Appellant was charged with defilement contrary to incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the Appellant, on 20.12.2023 at 2000 hours at Irianyi sublocation, Kitutu central subcounty, within Kisii county, being a male person, caused his penis to penetrate the vagina of DBZ, a female person, who was, to his knowledge, his daughter, aged 9 years.
3. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The particulars of the offence were that the Appellant, on 20.12.2023 at 2000 hours at Irianyi sublocation, Kitutu central subcounty, within Kisii county, intentionally touched the breasts, anus, and vagina of DBZ, a child aged 9 years, with his penis.



4. The Appellant was arrested on 21.12.2023 but arraigned in court on 27.12.2023. The court recorded the following proceedings:

The substance of the charge(s) and every element of thereof has been stated by the court to the accused person in a language he understands, who being asked whether he admits or denies the truth of the charges(s) replies:

[Preprinted]

Swahili – main charge

Accused: true

Court: plea of guilty entered. Considering the seriousness of the charge, and the gravity of the charges, are read afresh to the accused, who responds

Main charge:

Accused: true

Court plea of guilty entered.

Facts are read after which the court records: the facts are correct;

Court: convicted on his own plea of guilty.

Mitigation: I pray for leniency; their mother is unable to provide for them. I regret the incident.

5. The Appellant was thereafter sentenced to thirty (30) years' imprisonment and commenced serving the sentence. Being dissatisfied with both the conviction and sentence, the Appellant lodged the present appeal. In his Petition of Appeal, the Appellant raised the following grounds:
- a. That the learned trial magistrate erred in both law and fact when convicting the [appellant] while relying on the facts adduced in court that were not provided to the required standard, given that the appellant pleaded guilty to the alleged charges.
 - b. That the trial court judgment was a nullity as the trial court proceeded to convict the appellant without giving a warning on the consequences /repercussions of pleading guilty hence the appellant has a right to a fair trial and impartial trial as enshrined in *the constitution* per article 50(2)(h) i.e. the right to be represented by an advocate.
 - c. That the learned trial magistrate erred in both law and fact with regard to the appellant a fair and impartial trial as guaranteed by article 25 (c) of *the Constitution* as the trial commenced without having the appellant's mental fitness to stand trial or prove to the court that his plea was voluntary.
 - d. The sentence awarded is highly excessively and punitive given that the appellant is aged 70 years, who had not committed the offence. (Excepting the tautology).
6. The respondent field submission stating that the Appellant, having pleaded guilty, is barred from appealing under Section 348 of the Criminal Procedure Code, except to the extent of legality of the sentence. They then went ahead to the legality of the sentence, which they submitted was too lenient and contravened provisions of Section 20(1) of the *Sexual Offences Act*, which provides for a sentence of life imprisonment. The learned prosecutor prayed that the sentence be enhanced to life imprisonment in consonance with the law. the court was urged to dismiss the appeal as not merited.



7. The appellant, on the other hand, submitted that he was not warned before pleading. He submitted that he pleaded guilty without appreciating the consequences. The appellant stated that he had already been tortured and made to plead. He was made to understand that he was to go home after that.
8. He stated that his right to be represented by an advocate was breached, and as such, Article 50(2) of *the Constitution* was violated. He submitted that the trial court did not at any time commit itself to the appellant's plea of guilty. He stated that a plea 'that the charge is true' cannot be unequivocal. Reliance was placed on the case of *Adan v Republic* (1973) EA 445. He sought to have the sentence quashed and to be left free, or to have a retrial ordered.
9. On sentence reliance was placed on the case of *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) (19 March 2001)

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 held as follows:-

On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

11. On a first appeal, the appellant is entitled to a fresh and exhaustive re-evaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of *Okeno v Republic* [1972] EA 32 at 36, the East Africa Court of Appeal stated on the duty of the court on a first appeal:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.

12. The legal burden is the burden of proof, which remains constant throughout a trial. According to established principles, it rests upon the prosecution to prove the guilt of an accused person beyond



reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

13. Brennan addressed the standard of proof required in such cases, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 that: -

The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

14. The tragedy, however is that there is record of a plea of guilt. The court's powers have special circumspection section 248 of the criminal procedure code provides as follows:

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.

15. The court then can only satisfy itself that there was a guilty plea, once satisfied, it down its tools. However, should the court find that there were illegalities in plea taking, then the same will be a nullity. The court will take proper step to remove nullity. There have been acres of papers written on what constitutes a guilty plea and what does not. However, the linchpin is the constitutional imperatives in article 50 of *the Constitution*, as follows:

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- (2) Every accused person has the right to a fair trial, which includes the right-
 - (a) to be presumed innocent until the contrary is proved;
 - (b) to be informed of the charge, with sufficient detail to answer it;
 - (c) to have adequate time and facilities to prepare a defence;
 - (d) to a public trial before a court established under this Constitution;
 - (e) to have the trial begin and conclude without unreasonable delay;
 - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;



- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (i) to remain silent, and not to testify during the proceedings;
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
- (k) to adduce and challenge evidence;
- (l) to refuse to give self-incriminating evidence;
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - (i) an offence in Kenya; or
 - (ii) a crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted; ...

16. The cardinal aspect of article 50(20) is the language of the trial. The accused must be reminded of the language he chooses to use, and have an interpreter. An interpreter for an accused person is a constitutional imperative. In this case it is indicated language as Kiswahili/English. There was no election by the accused. Even the court indicates expressly that the answer given was in Kiswahili. However, the court did not indicate the Kiswahili word or words that came out to enable an appellate court understand the unequivocality of the plea.
17. The courts have insisted on the language used to be understood by the accused and to know who translated. I have perused the charge sheet that was in English. Who translated or interpreted for the appellant? From the original words, describing plea, they are pre-printed. The language the accused understands is not given and who interpreted is not indicated. When the court in this appeal made a similar request on the language understood, the appellant chose Ekegusii. He had considerable difficulties even when there was a lull in translation. Why is the exact words and language necessary? This is because most languages, especially Anglo-Germanic and Arabic offshoots have what linguists call nuances, and lexical ambiguities. Unless it is known that the appellant understood what was true, the court cannot find the plea to be unequivocal.
18. Secondly, it is noted that the appellant was not warned at all. He pleaded, and a plea of guilty was entered before the court, lamenting that the offence is a serious one. He asked that the charge be reread. By the time that order was made, a plea of guilty had been entered. There is no record of any warning and the tenor thereof to the appellant. It is also not lost on the court that the appellant had spent 7 days in custody, that is between 21.12.2022 and 27.12.2022, when the plea was taken.
19. It was important that the court ascertain the state of the appellant before the plea. There were no *raisons d'être* for harrying. The appellant, if convicted, still had a lifetime to cool his heels in prison custody. There were no misdemeanors that had little or no impact on the accused person. the question of the



meaning of ‘it is true’ was addressed by G. Nzioka J in the case of Tuki v Republic (Criminal Appeal E058 of 2022) [2023] KEHC 21630 (KLR) (31 July 2023) (Judgment), where she stated as follows:

In the instant matter, the trial court record indicates that the charge was read to the appellant in the Kiswahili language, and he responded “it is true”. The understanding of this court is that, the appellant could not have answered that; “it is true” if he did not understand the charge as read out to him. It is on record that after he stated the charge was true, the prosecutor is recorded as having told the trial court that; “the facts as per the charge sheet” and produced breathalyzer certificate as prosecution exhibit number 1. The court then proceeded to record that; “accused convicted on his own plea of guilty”. At this point it is clear that the trial court missed a critical step in plea taking process that is, to inquire from the appellant whether the facts were true as read and/or in total. Further considering the particulars of the charge as stated, I hold the view that they are not adequate in detail; in that, it is not clear as to what happened after the appellant after the appellant exceeded the limit of authorized alcohol intact. That is, whether he was arrested and arraigned. Furthermore, it is clear from the sentence provided for under the law and meted out herein, that the offence is serious and therefore, full facts should have been read out. Mere indication that the facts are as per the charge sheet is inadequate and did not meet the threshold required.

20. In the case of Bernard Kimani Gacheru V Republic [2002] KECA 94 (KLR), the court of appeal [CHUNGA, C.J, SHAH & BOSIRE, JJ.A.] guided as follows:

For example, in the High Court case of WANJEMA VSR. 1971 E.A 493 , more particularly, on page 494 letters (D) to (E) this is what that court said:-

"A sentence must, in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned, a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand.

An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference with it on each of these grounds. No account was taken as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr. App. R. 165 and Godfrey (1967), 51 Cr. App. R. 449 (This admits of no doubt because the magistrate awarded the maximum sentence to this first offender; which of itself is unusual.) Matter extraneous to the trial was acted upon for the magistrate bore in mind that he had "issued a warning only last week that dangerous drivers will be dealt with severely by the court."

Section 207(1) and (2) of the Criminal Procedure Code, and the holding in the case of Adan v Republic [1973] EA 445, is clear on what unequivocal plea of guilty amounts to. It is where in a plea of guilty; -

5. If there is no change of plea a conviction is recorded and a statement of the facts relevant to sentence together with the accused's reply are recorded.
4. If the accused does not agree with the facts or raises any question of his guilt his reply is recorded and change of plea entered;
3. The facts are stated by the Prosecutor and the accused is given an opportunity to dispute or explain the facts or to add any relevant facts:



2. Where the accused's own words in response to the charge are recorded and amount to admission, leading to a recording of a plea of guilty.
 1. The charge and all the essential ingredients of the offence are explained to the accused in his language or in a language he understands;
21. In a binding precedent of the court of appeal [PN Waki, Rn Nambuye & Po Kiage, JJA] in the case of *Wakianda v Republic*[2016] KECA 181 (KLR), stated as follows:

The record of the trial court read “Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili:

“It is true.”

That was part of a template used by courts at plea taking. That was why it spoke of “charge(s)” when there was a single charge and the rather odd “in a language he understands”, when it was more normal and logical to simply state the language used. That smacked of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered was one of not guilty followed by a trial with all its attendant safeguards, it assumed a critical dimension when the plea was one of guilty and led to conviction.

It was good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understood, and recording his answer before either using the language he mentioned or ensuring a translator was present to convey the proceedings to him in the chosen language. The elements of the offence were not complete if the sentence, especially if it was a severe and mandatory sentence, was not brought to the attention of the accused person.

One ought to know the consequences of his virtual waiver of his trial rights that *the Constitution* guaranteed him. That did not occur in the instant case and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding was not to be a mere umpire aloofly observing the proceedings. He was the protector, guarantor and educator of the process ensuring that an unrepresented accused person was not lost at sea in the maze of the often-intimidating judicial process.

22. By fundamental law of the land, he is entitled to have his case conducted in a language that he understands if he is present in court. In the case of *Bishar Abdi v Republic* [2010] KECA 388 (KLR), the court of appeal [R.S.C. OMOLO, E. O. O’KUBASU and J. W. ONYANGO OTIENO] were of the considered opinion that:

These provisions, do in our minds direct that an accused person in a criminal case is by fundamental law of the land entitled to have his case, if he is present in court, conducted in a language that he understands. The superior court was of the view that as it appeared from the record that the appellant cross-examined witnesses who gave evidence in Kiswahili, he could not complain as by so cross-examining the witnesses, he exercised his right as, for that court, the importance of the requirements for suitable language interpretation was that they enabled an accused person to hear and be heard as part of the trial process. With respect, that was a misdirection. In our view, it amounted to glossing over the omission by the trial court to ensure compliance with an important constitutional requirement. As this Court



stated in the recent case of John Irungu vs Republic Criminal Appeal No. 303 of 2005 (UR) where a similar situation obtained:

“Thus, in law, at the trial of an accused person, the court must ensure not only that the charge is explained to the accused in a language the accused understands but the court is further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot, in our view, be waived on belief that the accused understands the language of the court particularly when the accused has stated, like the appellant did state in the case before us. , that he was not good in English or Kiswahili. Further, as we have stated, in this case, a competent court had ordered that interpreter be availed at the trial of the appellant. Court orders must be obeyed and more so by the same court that makes them. We have no reason on record as to why the trial court renege on its order to have a Gikuyu interpreter for the accused at his trial.”

23. The question on the un-equivocality of a guilty plea is not a new one. The high court, [A.A.KNELLER and S.K.SACHDEVA] in the case of Lusiti, Charles v Republic Criminal Appeal 319 of 1971; [1977] KEHC 15 KLR); [1976-80] 1 KLR 58 posited as hereunder regarding an unequivocal plea.

In Adan v The Republic [1973] EA 445, the Court of Appeal for East Africa considered the manner in which pleas of guilty should be recorded and the steps which should be followed. It laid down the following guidelines: (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language which 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 the facts or raises any question of his guilt his reply must be recorded and change of plea entered; and (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. In the present appeal, the prosecutor did not outline the facts until a later date and the appellant was not asked to admit or deny those facts. It is true that by virtue of the Statute Law (Miscellaneous Amendments) Act 1974, a new proviso has been added to section 207(2) of the Criminal Procedure Code which reads as follows:

Provided that after such conviction and before passing sentence or making an order the Court may permit or require the complainant to outline to the Court the facts upon which the charge is founded. However, in our view this proviso does not lessen the need to ensure that an accused person wishes to plead guilty unequivocally. On the contrary, it enhances the necessity of being certain that an accused person wishes to admit without any qualification each and every essential ingredient of the charge, especially if he is not asked to admit or deny the facts outlined by the prosecutor.

24. Perfunctory compliance with the language issue does not take away entrenched rights of fair trial. There has to be a deliberate and calculated steps to ensure that the court first establishes the language an accused understands. Secondly, it ascertains that there is an interpreter who understands the language, together with linguistic nuances. thirds, the plea must be indicated as much as possible in the language it was rendered before, indicating the English translation on the record. Thirdly, all steps must be taken as far as humanly possible, to ensure the plea is free from influence. In cases where the consequences are dire, there must be a warning to the accused of the possible penalty, and, where sentences are mandatory, that must be indicated.



25. Care must be taken, where an accused has been in prolonged incarceration, that is, more than 24 hours, to ensure that the plea is not obtained through torture or fatigue. Where more than one language is used, the court must indicate which language it is. This is different from the accused's choice of language, which must be explicit. In an appeal, for example, the court is proceeding in English, which will be translated to Ekegusii by a named interpreter. Just indicating English/Ekegusii is not enough. In the case of *David Nyongesa Okhwatenge V Republic* [2010] KEHC 2059 (KLR), the court posited as follows:

It is clear that the record does not indicate the language used to read and explain the charge to the Appellant. The indication of “English/Kiswahili” is ambiguous and does not show which of the two languages between Kiswahili and English the court used. There is no record of whether the court inquired from the Appellant what language he understood. Such an inquiry would have assisted the court to determine the language of reading and explaining the charge.

26. In dealing with situations like the one the appellant found himself in, this court had guided as we did back in 2018, what ought to happen. in the *causa cerebra*, of *Abdallah Mohammed v Republic* [2018] KEHC 5028 (KLR), the court stated as follows:

14. In a case where an accused person who is undefended pleads guilty to a charge, the court has a duty to ensure that the plea is unequivocal. As pointed out, the Appellant had no legal representation and the trial court ought to have taken steps to ensure that the Appellant understood every element of the charge and the facts read out to him. He also ought to have been warned, and that warning captured on record, that the offence he was about to plead to carried a prison sentence of not less than fifteen years. In my view, extra caution includes the question as to whether or not the facts as read out are true and whether the accused person would wish to make any comment. In fact an accused person should be asked what he means by saying that the charge read to him is true. His explanation should then be captured on the record so as to form part of his plea. From the record, it is apparent that the Appellant was just but a lad aged 21 years and the trial court ought to have gone the extra mile to ensure he understood the consequences of entering a plea of guilty.
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. In *Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016* (unreported) this is what I said and I find it relevant here:

In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court



was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.”

27. Where an accused person comes to court, the court is the master of its courtroom. steps must be taken to ensure that there is no overreach. This is more so for the accused who have been in police custody. In *Omar Guyo Omar v Republic* [2021] KEHC 755 (KLR), the court stated as follows:

It is not an overstatement to hold that a plea of guilty in which an accused person has not been supplied with the witness statements on the nature of the complaint, or explained the minimal guarantees on fair trial rights, impliedly is considered as a trial in which he has been condemned unheard. He loses his or her autonomy to the state over the consequential orders which flow from a plea of guilty. It is necessary for the trial Court to investigate the level of preparedness of an accused person to plead to the charge. The accused should be given a chance to exploit the determinants of the principles of a fair trial as elucidated in *Juma & other v Attorney General* {2003} eKLR:

“It is elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary’s witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the Law and evidence.”

28. The court above noted that the heavy emphasis on trial Courts processing pleas of guilty in microwave time has the disadvantage of compromising the right to a fair trial. This is more to do with the complexity of the Kenyan Legal system, which is deemed inaccessible across all spheres for self-represented persons. This is the concern Lord Denning raised on the right to legal representation in *Pett v Greyhound Racing Association* {1968} 2 ALL ER - 545

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”

29. In another recent case, *E. K. O. Ogola J* addressed himself in the case of *Godfrey Lidaywa v Republic* [2019] KEHC 4451 (KLR) as follows:

8. The main contention by the Appellant is that his plea of guilty was never un-equivocal, and that the consequences of the plea of guilty were not explained to him by the court. It is trite that before a plea of guilty can be entered upon a guilty plea by the accused person, the court must be satisfied that each and every element of the charge is read to the accused in a language which the accused clearly understands. Further the court must explain to the accused person



the consequences of the guilty plea so that the accused knows exactly what to expect. The issue in this appeal is whether or not the honourable trial Magistrate did that.

30. Having seen the trial herein was done in a microwave way and summarized without language being chosen and indicated, this affected the equivocality of the plea of guilty. Having found that the plea was a nullity, the court has no option but to set it aside.
31. Before moving into the question of what next, the court must address a vexing question that keeps recurring. This is legal representation. Courts have held that the same is not compulsory. The court must distinguish between two fundamental principles that cannot be lost in the debate. An accused has a right to representation. this can be through his means or through legal aid. This does not take away the right to be informed of the right. Unlike lawyers who wake up expecting to be taken to court, the citizenry is interested in courts only when they have cases. Informing the accused of the right is thus essential and must be recorded.
32. Secondly, in certain classes of suspects, being informed and being provided with advocates is imperative.
33. Before I consider the grounds of appeal, I think it is proper to consider the provisions of Section 348 of the Criminal Procedure Code which precludes an appeal where an accused person has pleaded guilty, Section 348 Criminal Procedure Code provides as follows:

“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”. 19. In the case of *Ole v Republic* (1989) KLR 444 (C.A. 417/1987) the Court of Appeal held: “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.”

34. In the circumstances it is unclear what the accused meant by true. The language used was not disclosed. It is not lost on the court that the language he now understands in this court is Ekegusii. The conviction is set aside.
35. The next question is whether to order a retrial. The offence is a serious one attracting life imprisonment. The appellant has hardly been in prison for two years. The witnesses, one of whom is a daughter will be available to testify. I will order a retrial. The appellant will in the meantime remanded in prison custody until plea before a court other than P.K Mutai. The court shall advise him of the right to council and actual provide him with legal counsel to represent him before plea.
36. In the case of *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecutions & another (Interested Parties)* [2021] KEHC 4855 (KLR), the court stated as follows:

14. That being the record the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of *the Constitution*. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. Since *the Constitution* does not define the word ‘choose’ I will make reference to the Tenth Edition of the Black’s Law Dictionary on how the said word is defined. The said Dictionary does not expressly define the word ‘choose or choice’ but refers one to ‘Freedom of Choice’ (See page 294 thereof). At page 779 the Dictionary defines ‘freedom’ as follows:

- i. The quality, state, or condition of being free or liberated, esp. the right to do what one wants without being controlled or restricted by anyone.



15. The Dictionary further defines ‘Freedom of Choice’ as ‘the liberty embodied in the exercise of one’s right’. The Second Edition of the Law Dictionary has the following to say about the ‘Freedom of Choice’: Unfettered right to do what one wants when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one’s self or another.
16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one’s choice as embodied in Article 50(2)(g) of *the Constitution* therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one’s choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.
17. The right under Article 50(2)(g) of *the Constitution* must be distinguished from the right under Article 50(2)(h) of *the Constitution* given that in many instances the rights under Article 50(2)(g) and (h) of *the Constitution* are dealt with contemporaneously. The right under Article 50(2)(h) of *the Constitution* on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of *the Constitution* on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one’s choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of *the Constitution* deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of *the Constitution* is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of *the Constitution*.
18. Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In *Pett vs. Greyhound Racing Association (1968) 2 All ER 545* Lord Denning presented himself thus:

It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.
37. The appellant was facing up to life imprisonment. His rights were likely to be substantially affected. He ought to not only be informed but also provided with an advocate at the state’s expense. It does not matter that an accused person is suspected of having carried out a heinous crime. Such an accused is still the darling of the law. This was the finding of the court in *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecutions & another (Interested Parties) [supra]*, where the court stated, inter alia, as follows on the right to legal representation in Kenya:
 - a. Legal representation is a qualified constitutional right;
 - b. Any eligible person is at liberty to apply for legal representation under the Aid Act;



- c. A Court before whom an unrepresented accused person is arraigned is under a constitutional duty to promptly inform the accused person of the right to choose and be represented by an Advocate;
 - d. The Court is under a further constitutional duty to promptly inform the unrepresented accused person of the right to have an Advocate assigned to that accused person by the State and at State expense if substantial injustice would otherwise result and the manner in which the accused person may access the right;
 - e. Unrepresented accused persons charged with the offence of murder and children in conflict with the law continue to be entitled to legal representation at State's expense; and,
 - f. For the right to legal representation to be firmly embedded in Kenya, it is incumbent upon the Courts to ensure that the right is promptly and sufficiently explained to the unrepresented accused persons and that any necessary assistance is accorded to such accused persons towards seeking the representation.
38. Turning back to the case at hand, none of the above was done. The plea was taken by an accused, possibly facing a life sentence, without being informed of the right to an advocate first. It was apparent that the accused person had a right to have an Advocate assigned to that person by the State and at State expense, since substantial injustice would otherwise result, and to the manner in which the accused person may access that right. Even where he does not qualify to have an advocate, which is not the case herein, he still must be informed of that right.
39. The net effect is that the trial, as conducted, resulted in breaches of the Appellant's constitutional protection of an accused person. Consequently, the conviction founded on the equivocal plea of guilty is hereby set aside.
40. The question that must be dealt with is whether to acquit or send for retrial. The errors were from the court, not the prosecutor. A simple question, even about calling for a pre-sentence report, was not addressed. On the flipside, the victim impact statement was not called for. Whose justice was the plea serving?
41. The charge under which the appellant is charged attract very severe sentences as follows:
- (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of no less than ten years:
- Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.
42. Despite everything else, the appellant has not gone through the system. The offence is a serious one. The appellant had only been in custody for two years. He has a lifetime ahead. There is no possibility of witnesses being unavailable for a retrial. In *Ivan v Republic* [2025] KEHC 16973 (KLR), Noel I. Adagi J, reaffirmed the principles governing the ordering of a retrial as set out in *Fetahali Manyi v Republic* (1964) EA 481. In that her decision, the Court emphasized that the setting aside of a conviction does not automatically justify an order for retrial, even where the error that vitiated the sentence is attributable to the trial court rather than to the prosecution. Instead, each case must be determined on its own peculiar facts and circumstances. The Court underscored that a retrial should only be ordered



where the interests of justice so demand. Conversely, a retrial ought not to be directed where it is likely to occasion injustice or undue prejudice to the accused person. The guiding consideration, therefore, is the balancing of the interests of justice against the potential hardship to the accused, bearing in mind the overall fairness of the criminal process.

43. In the circumstances of this case, there is no justification for declining to order a retrial. Defilement cases are largely document-driven, and the relevant documentary evidence remains in the custody of the Office of the Director of Public Prosecutions. The Appellant shall therefore be presented before the trial court for a fresh hearing before a court of competent jurisdiction other than hon. P.K. Mutai for hearing and determination of the case. the accused must then be informed of his right to counsel and an advocate appointed from him. in case he cannot afford one.
44. Lastly, on the question of sentence. The court will not discuss the same. However, the Supreme Court settled this. The court does not wish to go into the facts and sentence to avoid embarrassment during a retrial.

Determination

45. In the circumstances, I make the following orders: -
- a. The Appeal is allowed on both conviction and sentence in the judgment of the trial court, Hon. P. K Mutai SPM, in Kisii CMCSO No. E101 of 2023, given on 27.12.2023
 - b. The matter is remitted to the lower court for a re-trial.
 - c. The Appellant shall therefore be presented before the trial court for a fresh plea before a court of competent jurisdiction other than Hon. P.K. Mutai for hearing and determination of the case.
 - d. The accused must then be informed of his right to counsel and an advocate appointed for him at the state expense, in case he cannot afford one.
 - e. Meanwhile, the appellant remains in prison custody until appearance in the lower court on 5th January, 2026.
 - f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF DECEMBER THE YEAR OF OUR LORD 2025. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr Koima for the State

Appellant in person

Court Assistant – Michael

Interpreter – Mr. Kembero

