



**Lusaji v Republic (Criminal Appeal 389 of 2019)
[2024] KECA 260 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 260 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 389 OF 2019
F SICHALE, FA OCHIENG & WK KORIR, JJA
MARCH 8, 2024**

BETWEEN

COLLINS AKALA LUSAJI APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (G.K. Kimondo, J.) delivered and dated 25th October 2013 in HCCRA No. 141 of 2010)

JUDGMENT

1. This is a second appeal by Collins Akala Lusaji, the appellant.
His first encounter with the judicial system in respect to this matter was when he was charged before the Kapsabet Principal Magistrate’s Court with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. He also faced an alternative charge of committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. Relevant to this appeal is the main charge whose particulars stated that on 15th May 2010 in Nandi North District within the then Rift Valley Province, the appellant unlawfully and intentionally caused his penis to penetrate the anus of R.K, a male child aged 9 years.
2. At the beginning of the trial, the appellant denied the charges and a plea of not guilty was entered. The hearing of the matter commenced shortly thereafter. However, after PW3 had concluded his testimony, the appellant asked to change his plea. Upon the charges being read to him once more, he pleaded guilty to the main count and admitted that the facts were as stated by PW1 in his testimony. The appellant was subsequently convicted on his own plea of guilty and sentenced to life imprisonment.
3. The appellant was dissatisfied with the judgment of the trial Court and preferred an appeal to the High Court. In a judgment dated 25th October 2013, Kimondo J. dismissed the appellant’s first appeal prompting him to lodge the present appeal. In the memorandum of appeal, the appellant raises the



following grounds: that his rights under section 198(1) of the Criminal Procedure Code were violated; that he was not warned of the dangers of pleading guilty; and, that the trial Court and the first appellate Court displayed manifest bias against him.

4. In a nutshell, the prosecution's case against the appellant was that he was an employee at the complainant's home. On 15th March 2010 while the appellant was sleeping with the complainant in the kitchen, the appellant penetrated the complainant's anus. The details of the incident were that on the material night, the appellant who was hardly two days old at his place of work successfully persuaded the complainant to abandon the comfort of the main house and sleep with him on a cow hide in the kitchen. In the darkness of the night and with the rain pounding the roof of the house, the appellant pinned the complainant's head to the floor in order to stop him from screaming. The appellant then defiled the complainant after which he warned him not to report the incident to anyone lest he killed him. However, in the morning the complainant who was nursing injuries reported the incident to his elder brother who in turn passed the information to their mother (PW2). Upon examination, PW2 confirmed that the complainant was indeed injured. She also saw a whitish discharge from the bruised anus. The incident was reported at Kabiyet Police Station. The complainant was thereafter escorted to Kabiyet Health Centre from where he was referred to Kapsabet District Hospital for further treatment. The medical officers confirmed that the complainant had indeed been defiled and a P3 form was filled, and was later produced at the trial as an exhibit.
5. This matter came up for hearing on the virtual platform on 7th November 2023. The appellant was present in person while the respondent was represented by learned counsel Ms Kamau. Both sides opted to rely on their written submissions but made brief oral highlights of the same.
6. The submissions for the appellant were filed in Court on 6th November 2023. In his written submissions and the oral highlights made at the hearing, the appellant limited himself to the issue of sentence. He mitigated that he was a first offender, remorseful, reformed and had engaged in rehabilitative programs in prison. The appellant additionally stated that he has a child while his father has since died hence he is the one tasked with taking care of his child. He also averred that he is ailing from ulcers and urged the Court to heed his plea for liberty. The appellant relied on *Daniel Gichimu & Another v. Republic* [2018] eKLR to urge us to find that we have the discretion to interfere with the sentence. The appellant relied on *Francis Opondo v. Republic* [2017] eKLR to highlight the principles of sentencing. In the end, the appellant urged the Court to find that the time he has spent in prison is sufficient punishment.
7. As for learned counsel Ms Kamau, she relied on her written submissions dated 21st December 2022. Counsel responded to the appeal in its entirety. In opposition to the appellant's assertion that section 198(1) of the Criminal Procedure Code was not complied with, counsel submitted that the appellant understood the charges and the proceedings of the Court as they were conducted in both English and Kiswahili. Counsel submitted that the appellant understood Kiswahili language and that is why the proceedings were being translated from English to Kiswahili. Counsel relied on the decision in *George Mbugua Thiongo v. Republic* [2013] eKLR to submit that criminal proceedings should be conducted in a language that the accused person understands.
8. As regard the appellant's contention that he ought to have been warned of the consequences of pleading guilty to the charge, counsel submitted that despite not being warned of the consequences of pleading guilty to the charge, the appellant had adequate time to appreciate the consequences of pleading guilty. In support of this argument, counsel pointed out that the appellant pleaded guilty after the prosecution had called three witnesses. Reliance was placed on the decision in *Elijah Njihia Wakianda v. Republic* [2016] eKLR in support of the submission.



9. Rejecting the appellant’s assertion that the trial was defective as it was not established that he was mentally fit to stand trial, counsel relied on the case of *Titus Ngamau Musila Katitu v. Republic* [2020] eKLR and section 11 of the Penal Code to submit that every person is presumed to be of sound mind until the contrary is proved. Counsel asserted that the appellant’s submission that his mental capacity was questionable was just but an afterthought. In conclusion, counsel urged the Court to dismiss the appeal in its entirety.
10. This being a second appeal, the scope of our mandate is as provided under section 361(1) of the Criminal Procedure Code. Strictly speaking, we can only entertain an appeal if it is premised on matters of law. As for matters of fact, we can only interfere in instances where the conclusions made are based on the wrong application of the law or are not supported by the evidence on record. Additionally, severity of sentence is regarded as a matter of fact. It is only where the subordinate court had no power to impose the sentence or where the sentence was enhanced by the first appellate court that this Court can entertain an appeal in regard to sentence.
11. While appreciating the scope of our mandate as expounded above, we have given due consideration to the record of appeal, the memorandum of appeal and the rival submissions of the parties. In our view, the only issues for determination are whether the appellant’s plea was unequivocal and whether any matter of law arises in regard to the sentence imposed upon him.
12. Before delving into the substance of the appeal, we reiterate and remind ourselves that section 348 of the Criminal Procedure Code bars appeals from the subordinate court where an accused was convicted upon a plea of guilty except as to the extent or legality of the sentence. The provision states that:

“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.”
13. Notwithstanding the cited provision, an appellate court is still required to review the record in order to ascertain if the plea was unequivocal or not. If, on the face of the record, the appellate court is satisfied that the plea was unequivocal, the court then downs its tools in as far as the appeal against conviction is concerned. Thus, in *Losherian v. Republic* [2023] KECA 477 (KLR) it was stated that:

“... Before we delve into this issue, we find it prudent to reiterate that Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. However, the provision does not bar the first appellate court from reviewing the record with a view to ascertaining whether the plea was unequivocal or not. Upon being satisfied that the plea was unequivocal, the first appellate court is then required to down its tools in as far as the appeal against conviction is concerned. Similar views were expressed by this Court in *Alexander Likoye Malika vs. Republic* [2015] eKLR...”
14. It must be appreciated that, as was held in *Elijah Njihia Wakianda v. Republic* [supra], a plea of guilty is a total submission by the accused as he or she forgoes some of his or her trial rights. This is what the Court stated:

“Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts,



would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms.”

15. The procedure for taking plea is provided for under section 207 of the Criminal Procedure Code. The nitty-gritty of plea taking is found in sub-section (2) which states as follows:

“If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

16. The Court in *Ombena v. Republic* [1981] eKLR cited with approval the procedure established by the Court in *Adan v. Republic* [1973] EA 445 for the recording of a plea of guilty as follows:

“In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full— “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 the facts relevant to sentence together with the accused’s reply should be recorded.””

17. In the present appeal, the appellant’s main contention is that the trial court did not warn him of the gravity of the consequences of pleading guilty to the charge he faced. On the issue of the need to warn an accused person where the sentence involves a custodial term, the Court in *Losherian v. Republic* (supra) held that:

“We further wish to reiterate that where an accused is unrepresented and he or she pleads guilty to a charge which attracts a custodial sentence, the court is under obligation to ensure that the accused person understands the consequences of such a plea. The record must show that the accused voluntarily entered the plea of guilty in respect of an offence created by the law and that the facts as read out actually confirm the commission of an offence. A plea of guilty is not an issue to be taken lightly...”



18. The same position was taken in *Elijah Njihia Wakianda v. Republic* [supra] where it was stated that:
- “We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him.”
19. It follows that the need to warn an accused person on the consequences of pleading guilty has continuously been held to form part of the right to fair trial. It remains a procedural safeguard of an accused’s right to fair trial. In the present appeal we note that the record does not show that the appellant was warned of the gravity of the sentence of the offence of defilement of a child under 11 years. We also note that the appellant was unrepresented. However, the circumstances of this case are peculiar. In this case, the appellant pleaded guilty to the main charge and alternative charge when he first appeared in court on 19th May 2010. Of course, this was erroneous as he could only plead guilty to either of the charges. When the matter came up for facts on 7th June 2010, the appellant, after asking for the charge to be read to him once more, changed his plea from guilty to not guilty. Thereafter the case came up for mention several times before three witnesses testified on 10th September 2010. At the conclusion of the testimony of the third witness, the appellant expressly indicated that he wanted to plead guilty to the charge. The charges were once more read to him and he unequivocally pleaded guilty to the main count.
20. Considering the aforementioned chronology of events, it is our considered view that the appellant had sufficient time to think about the case that faced him before asking to plead guilty. In this case, it is reasonable to conclude that the appellant appreciated the gravity of the charges that faced him as well as the sentence that would ensue were he to be found guilty. This was a perfect case where the failure to warn an appellant would be excused notwithstanding that the appellant was unrepresented.
21. The upshot of the foregoing is that having reviewed the record, we find that the plea was unequivocal. To borrow from the words of the Court in *Adan v. R* [1973] EA 445, it was a “meticulously executed admission of guilt by an accused person.”
22. The remaining issue for our determination is the question of the sentence. We are aware that our jurisdiction on matters sentence covers not the severity of the sentence but is limited to its legality. The appellant was first sentenced on 10th September 2010 and his appeal to the High Court was dismissed on 25th October 2013. The life sentence handed down by the trial Court was affirmed by the first appellate Court. The jurisprudence with regard to the minimum sentences under the Sexual Offences Act as at the time of both judgments was that they were mandatory. However, the recent past has witnessed a jurisprudential shift regarding the constitutionality of mandatory sentences and in particular life imprisonment. Our statement is premised on the decisions in *Julius Kitsao Munyeso v. Republic*, CR Appeal No. 12 of 2021 (Mombasa); *Evans Nyamira Ayako v. Republic*, CR Appeal No. 22 of 2018 (Kisumu); *Martin Wekesa Simiyu v. Republic*, CR Appeal No 112 of 2019 (Nakuru); *Christopher Ochieng v. Republic* [2018] eKLR; and *Joshua Gichuki Mwangi v. Republic*, Nyeri Criminal Appeal No. 84 of 2015.
23. It is on the basis of the foregoing jurisprudential development that we find that the appellant’s appeal against sentence raises an issue of law. Bearing the foregoing in mind, we note that the aggravating factors in this case are that the appellant defiled a 9- year-old boy against the order of nature and in doing so breached the trust placed upon him by his employer. On the other hand, we note that the appellant pleaded guilty to the offence which is a mitigating factor and a true expression of remorse.



He was, according to the prosecution, a first offender. Weighing the aggravating factors against the mitigating factors, we find a sentence of 30 years imprisonment to be appropriate.

24. The upshot of the foregoing is that the appeal against conviction lacks merit and is hereby dismissed. The appeal against sentence partially succeeds. The sentence of life imprisonment is therefore set aside and substituted with a sentence of 30 years' imprisonment. From the record, the appellant remained in custody throughout the trial. As such, and in conformity with the proviso to section 333(2) of the Criminal Procedure Code, the appellant's sentence will run from 19th May 2010 being the date he was first presented to the trial Court to take plea.

25. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF MARCH, 2024

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

