



REPUBLIC OF KENYA



KENYA LAW
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**Marindany v Republic (Criminal Appeal 27 of 2015)
[2023] KECA 450 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 450 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 27 OF 2015
F SICHALE, LA ACHODE & WK KORIR, JJA
APRIL 14, 2023**

BETWEEN

BERNARD MARINDANY APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the Judgment of the High Court of Kenya
at Nakuru (Ongeri, J.) delivered and dated 23rd July 2012)*

JUDGMENT

1. Bernard Marindany, the appellant, was charged and convicted on his own plea of guilty with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. He was thereafter sentenced to life imprisonment. The particulars of the offence disclosed that on September 8, 2012 at [Particulars Withheld] in Narok South District of the then Rift Valley Province the appellant intentionally caused his penis to penetrate the vagina of SCD, a child aged seven years.
2. The case against the appellant was that on September 8, 2012, the appellant accosted SCD who was on her way home from the posho mill. He then took her inside a maize plantation and defiled her. The complainant's mother who was passing by the scene alongside other villagers was alerted by the commotion from the maize farm. When they approached the source of the disturbance, the appellant took off upon seeing them. The complainant told them that the appellant had defiled her. The complainant was aged approximately 9 years at the time.
3. Being dissatisfied with the conviction and sentence of the trial court, the appellant lodged an appeal to the High Court. His appeal was heard and dismissed by the High Court in a judgment dated July 23, 2015. He is now before this court aggrieved with the judgment of the first appellate court which he seeks to overturn on the grounds that the charge sheet was defective; that his plea was not unequivocal; that his right under article 49(1)(f) of the *Constitution* to be presented to court within twenty-four



hours of his arrest was infringed; that no reasons were given by the first appellate court for denying him a retrial; and, that his mitigation was not taken into account resulting into a harsh and excessive sentence.

4. When this matter came up for virtual hearing before us on December 14, 2012, the appellant appeared in person while the respondent was represented by Ms Mburu. Both parties sought to rely on their written submissions. The appellant submitted that his plea was equivocal. It was his submission that the language used at the time he pleaded guilty is not recorded neither is it indicated who the interpreter was. The appellant submits that it is difficult to ascertain whether he understood the charge and the facts or not. He referred the court to section 207 of the *Criminal Procedure Code* and the case of *Fredrick Kizito v Republic*, CR Appeal No 170 of 2019 as providing the manner of recording a plea and asserts that the procedure was not followed in his case. He also relied on the case of *Adan v Republic* [1973] EA 445 to reiterate the need to ensure that an accused person understands the charge and the facts thereof.
5. On sentence, the appellant submitted that the sentence was harsh and excessive as the trial court failed to take into consideration his mitigation. He also argued that the sentence was passed in its mandatory nature, which in his view, was unconstitutional. To buttress this view, he relied on the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. He consequently urged this Court to allow his appeal against conviction and sentence.
6. In opposition to the appeal, Ms Mburu for the respondent submitted that since the appellant pleaded guilty to the offence, he could only appeal on whether the sentence was lawful and warranted and not the conviction. On the appellant's claim that the charge sheet was defective, counsel submitted that the charge sheet contained an offence known in law and that the omission of the words "intentional" and "unlawful" was not prejudicial to the appellant. Counsel relied on the case of *Peter Ngure Mwangi v Republic* [2014] eKLR to buttress this submission. Counsel submitted that the allegation that the appellant's right to be presented to court within 24 hours of arrest was infringed was not raised with the trial court or the first appellate court. She added that the appellant could in any event pursue his right by filing a constitutional petition at the High Court. Counsel also submitted that although the appellant's mitigation was not taken into consideration, the trial court set out the reasons for the failure to consider the mitigation. She reiterated that the circumstances of this case warranted a life sentence. Additionally, counsel urged that both the subordinate court and the first appellate court properly directed themselves and arrived at decisions founded in law and evidence and therefore a retrial cannot suffice.
7. Finally, on the appellant's assertion that the plea was not unequivocal, counsel for the respondent submitted that the proceedings took place at the same time and on the same appearance by the appellant. She argued that the proceedings were recorded in one sitting and thus there was no need to record a fresh coram when the appellant decided to change plea. On the failure to record the name of the interpreter, counsel submitted that such a failure did not occasion any miscarriage of justice as long as the proceedings were interpreted to the appellant and he understood the charge, and was able to plead. Counsel therefore urged us to dismiss the appeal and uphold the judgment of the High Court.
8. This being a second appeal, the scope of our mandate is as provided for under section 361(1) of the *Criminal Procedure Code*. In essence, we can only entertain appeals on matters of law. Matters of facts are to be preserved and adopted as concurrently concluded by the trial court and the first appellate court. However, there is an exception in instances where the conclusions so made, are based on the wrong application of the law or are not supported by the evidence on record. Additionally, sentence is regarded as a matter of fact and our intervention is only permitted in instances where the sentence was illegal or was enhanced by the first appellate court.



9. 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 both parties. This appeal raises the following issues for determination: whether the charge sheet was defective; whether the plea was unequivocal; and, whether the sentence complied with the law.

10. The appellant contended that the charge sheet was defective. In his memorandum of appeal, he asserted that the defect arose from the fact that in drafting the particulars of the offence, the words “intentionally” and ‘unlawfully’ were omitted. He, however, did not submit on this ground. The respondent on its part argued that the words “intentionally” and ‘unlawfully’ were not necessary in drafting the particulars of the charge as the act of having sexual intercourse with a minor by itself amounted to the offence of defilement. On this issue, we agree with the position adopted by the respondent that the mere act of having carnal knowledge of a person under the age of majority constitutes the offence of defilement established in section 8(1) of the *Sexual Offences Act*. It therefore suffices to point out that the omission of the words “intentionally” and ‘unlawfully’ is not fatal to a charge of defilement. This position has been upheld by this court previously in, among other cases, *Kaaka Masara Margeti v Republic* [2020] eKLR where it was stated that:

“Similarly, we reject the ground that the charge sheet was defective because the words “intentionally” or “unlawful” were not included. The act of defilement in itself is unlawful. The words do not constitute any of the elements of the offence of defilement as was explained in the case of *Josephat Wanjala Olbai v Republic*, Eldoret Criminal Appeal No 92 of 2015, which stated:

“[25] The offence of defilement is unlawful and the absence of the words “intentional” and “unlawful” in the particulars of the charge do not render the charge defective.

The words ‘intentional’ and ‘unlawful’ are not ingredients of the offence of defilement under section 8(1) of the *Sexual Offences Act*. Defilement itself is unlawful. Those words are only elements of a charge of rape and attempted rape under section 3(1) and section 4 of the *Sexual Offences Act* respectively.”

11. The next issue for our determination is whether the appellant’s plea of guilty was unequivocal. It is the appellant’s contention that the plea was equivocal for reasons that the date of the plea was not indicated on the record and that the record is ambiguous on the language used to take the plea. He also contends that the record shows no coram. In response, counsel for the respondent submitted that the proceedings were recorded in one sitting and thus there was no need to record a fresh coram. She further submitted that the failure to record the name of the interpreter did not occasion any miscarriage of justice as long as the proceedings were interpreted to the appellant, he understood the charge and was able to plead.

12. Before delving into the issue of the alleged equivocality of the plea, we reiterate and remind 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. In an instance such as the one before us, all we are required to do is to review the record with a view to ascertaining whether the plea was unequivocal or not. If, on the face of the record, we are satisfied that the plea was unequivocal, the next step is to down our tools in respect to the appeal against conviction. The procedure for taking plea is legislated in section 207 (1) and (2) of the *Criminal Procedure Code* as follows:

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.



- (2) 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.” (Emphasis ours)

13. Further, this court in *Ombena v Republic* [1981] eKLR cited with approval the procedure for the recording of a plea of guilty as established in *Adan v Republic* [1973] EA 445 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.”

14. It is on this basis that we examine the record to ascertain whether the plea entered was unequivocal. At page 2 of the record of appeal, it is shown that the appellant took plea on September 13, 2012. The language used by the court is indicated as English/Swahili. The coram is also indicated where one Winnie was the Court Clerk. Ordinarily, it is always the Court Clerk or the Court Assistant (as presently known) who serves as the interpreter of the court proceedings. The obvious exception to this rule is always where the court assistant is not fluent in the preferred language of an accused. This appears to have been the situation in this case. When the charge was read over to the appellant for the second time, the record indicates that one Zeddy, a court official, was in attendance. At this point, it is recorded that the charge was read over and explained to the appellant in Kisipigis language. It defeats logic to perceive that the trial court could have taken so much care with the reading of the charge but failed to place the same amount of care when the facts were read out. Indeed, the appellant was explicit that he had sex with the complainant not once, but twice. After the facts were read out by the prosecutor, the appellant is on record as having stated that the facts were true. In our view, the plea as recorded met the threshold set in *Adan* (*supra*). The appellant left no doubt as to the fact that he understood the charge and accepted that he had defiled the child. The plea was thus unambiguous and the first appellate court cannot be faulted for rejecting the appellant’s claim that the plea was equivocal.



15. The next issue for our determination is whether the sentence was legal. The appellant contends that the sentence passed was harsh and that the trial court failed to consider his mitigation. He also contends that the sentence passed was mandatory and thereby denied him the right to a fair trial. Counsel for the respondent on her part submitted that the trial court set out the reasons for rejecting the appellant's mitigation. She argued that the circumstances of this case warranted a life sentence. She also urged us not to disturb the sentence as the same was a concurrent finding by the two courts below.
16. We are cognizant that our mandate precludes entertaining matters of sentence unless the same was illegal or was enhanced by the first appellate court. We note that the trial court sentenced the appellant to life imprisonment on account that the same was the minimum sentence provided by the law. Even though the trial court indicated that it appreciated the appellant's mitigation and the aggravating circumstances, the sentence seemed not to have been informed by the court's own discretion allowing it to consider both mitigating and aggravating circumstances.
17. However, although we cannot blame the trial court for passing the life sentence as that is what the law provided for, we are of the view that the present jurisprudence calls for our intervention in this case. We say so cognizant of the fact that the decisions emanating from this court have, in the recent past, continued to frown upon the imposition of mandatory minimum sentences where the record does not disclose the exercise of discretion by the sentencing court. The overriding concern in respect to minimum mandatory sentences is that they amount to infringement of the judicial function thereby taking away the discretion bestowed upon the courts to ensure they protect the right to fair trial and dignity among accused persons by meting out sentences commensurate to the circumstances of each case as opposed to a universal sentence in disregard of peculiar circumstances that each case comes with. See *Joshua Gichuki Mwangi v Republic*, Nyeri CA Criminal Appeal No 84 of 2015 and *Martin Wekesa Simiyu v Republic*, Eldoret CA Criminal Appeal No 112 of 2019.
18. In the circumstances, we then must weigh the mitigating and aggravating factors in this case before we arrive at a proportionate and appropriate sentence. The mitigating circumstances include the fact that the appellant pleaded guilty, he was remorseful, and the P3 form does not show any grievous harm to the complainant during the commission of the offence. On the other hand, the aggravating circumstances are the tender age of the minor and the fact that the learned magistrate noted the rampant nature of the offence in the region at the time of the occurrence of the offence. Section 8(2) of the *Sexual Offences Act* prescribes life imprisonment for defilement of a child aged eleven years or less. Considering both the aggravating and mitigating factors as well as the stated age of the appellant as 26 years at the time of the commission of the offence, we find a 30 years jail term reasonable in circumstances.
19. The upshot of the foregoing discussion is that the appeal against conviction has no merit and is hereby dismissed. The appeal against sentence has merit and is hereby allowed.

Consequently, The sentence of life imprisonment is hereby set aside and the appellant is sentenced to 30 years imprisonment. The sentence shall run from the date of conviction by the trial court.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF APRIL, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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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

