



REPUBLIC OF KENYA



KENYA LAW
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**Harrison v Republic (Criminal Appeal 104 of 2015)
[2023] KECA 495 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 495 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 104 OF 2015
F SICHALE, LA ACHODE & WK KORIR, JJA
MAY 12, 2023**

BETWEEN

ALEX KIBET HARRISON APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction/sentence of the High Court
(Mushila.J) dated 19th June 2015 IN CR APP NO- 200 OF 2011)*

JUDGMENT

1. This is the second appeal of Alex Kibet Harrison (the appellant), who was charged, tried and convicted in the Magistrate's court for defilement, contrary to section 8(1) as read with section 8(3) of the [Sexual Offence Act](#) (SOA). The particulars of the offence were that on diverse dates between December 1, 2010 and July 31, 2011 in Njoro the appellant unlawfully and intentionally caused his male genital organ to penetrate in to the female genital organ of BCM, a child aged 14 years.
2. The charge and the elements were read to the appellant in Kiswahili language and he responded that they were true, following which, the facts were read to him and again, he replied that they were true. As a result, the learned magistrate Hon B Kituyi (RM) convicted the appellant for the offence of defilement contrary to section 8(1) of the [SOA](#) on his own plea of guilty and sentenced him to 20 years imprisonment in accordance with section 8(3).
3. The appellant appealed against both the conviction and sentence in the High Court on grounds that: he was coerced by the police to plead guilty under the guise that he would be sentenced to probation; he did not understand the language of the court or the seriousness of the offence with which he was charged; he was not informed of the consequences of pleading guilty to the charge; and the trial court did not order for his age assessment before sentencing him.



4. At the hearing of the appeal, the appellant did not submit, he relied on his grounds of appeal. The prosecuting counsel on the other hand conceded the appeal in part stating that indeed there was miscarriage of justice because the record, indicated that the trial court used Kiswahili, a language which the appellant did not understand. The learned Judge considered the appeal before her, found that it had no merit and dismissed it.
5. Undeterred, the appellant approached this Court in the instant appeal which is anchored on three grounds along the lines of the grounds he raised in the High court and which we summarize as follows:
 - i. The appellant did not understand the charge as the proceedings were in English and Kiswahili.
 - ii. The sentence imposed on the appellant was harsh and excessive.
 - iii. The appellant was a minor at the time of arrest and conviction.
6. In the written submissions by which this appeal was disposed, the appellant who was unrepresented urged that the plea taking process went against Article 50 (1) and (2)(b) of the Constitution and the law. That the plea taking process did not accord with the proper process of plea taking as set out in *Adan vs R* (1975) EA 445. Further that there was a breach of the law when the trial court failed to inform the appellant the substance of the charge, in a language he understood as required by Article 49 (i) (a) of the Constitution and that the appellant was not even able to mitigate when called upon to do so.
7. The appellant also urged this Court to review the sentence imposed upon him in light of the Supreme Court decision in *Francis Muruatetu & another vs Republic & Others*; Petition 15 & 16 of 2015. The appellant was of the view that, he should have been given a lenient sentence.
8. In response, learned counsel Ms Mburu filed submissions dated December 7, 2022 on behalf of the respondent. Counsel urged that the proceedings do not point to a person that did not understand the language of the court since he was able to answer to the charges read to him, as well as the facts read to him as can be seen in the record of appeal. Counsel argued that the appellant did not at any point during plea taking, indicate to the court that he did not understand the language used.
9. On the sentence, counsel urged that the appellant was sentenced in accordance with section 8(3) of the SOA and therefore, the sentence is lawful. Further that, the appellant did not offer any mitigation for the court to consider and lastly that the appellant did not at any point raise the issue, or indicate to the court that he was a minor aged sixteen years. As such, there was no way for the trial court to know that the appellant was a juvenile, if at all.
10. This being the second appeal as stated earlier, our mandate is confined to a consideration of matters of law by reason of Section 361 of the Criminal Procedure Code and this Court will not interfere with concurrent findings of facts arrived at in the two courts below, unless they were based on no evidence or that there was a misapprehension of the evidence. In *Karingo vs Republic* [1982] KLR 213 the Court stated:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja vs R (1956) 17 EACA 146)”
11. In that regard, we have considered the record of appeal, the submissions and the law and are of the view that this appeal turns on the single issue as to whether the plea of guilty by the appellant was



unequivocal. Only upon answering this question can we move on to consider whether the appellant was a juvenile when he was charged or whether the sentence meted on him was harsh and excessive.

Article 50 (2)(b) of the Constitution provides that:

“(2) Every accused person has the right to a fair trial, which includes the right- (b) to be informed of the charge, with sufficient detail to answer it.”

12. This Court explained the manner in which a plea of guilty should be recorded and the steps that should follow in *Adan vs Republic* [1973] EA 445 relied on by the appellant in his submissions as follows:

- 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.”

13. The question we need to answer is whether the procedure set out above was followed. Page 3 of the Record of Appeal indicates that the appellant was arraigned before the Resident Magistrate’s Court at Nakuru on August 10, 2011. That the charge and all its elements were read and explained to him “in a language he understands being Kiswahili” and he responded to both the main count and alternative count as “it’s true”. A plea of guilt was then entered. The facts were then captured. thus:

“It was during the month of December around 5 pm when a child aged 14 years called BC who is a student from [Particulars Withheld] came from school. She found the mother had gone to Meswit market. Hence at home Alex Kibet who was employed by the father of the complainant as a herd’s boy. He put the cows in the shed at the time BC was washing utensils. Then the accused came behind her and grabbed her and put her on the floor. He then removed her clothes and panties by force. The accused then removed his trouser and put his penis in to the vagina of the complainant and started defiling her. She cried out. The accused closed her mouth. He defiled her for 15 minutes. After he was through he ran away towards the Meshote forest. The girl did not tell her mother. This defilement went on from that time until 30th and July 31, 2011. On July 31, 2011 at around 4 pm complainant was alone in the house, accused then came and held her by force again. He then took her to his house, removed her clothes. He lay her on the bed. He removed his own clothes and then defiled her again. The girl was left crying in pain.

On August 1, 2011 around 8 pm, the girl was with the mother EC. She had seen there was a problem and so asked if she was pregnant. She took her to Njoro Health Centre for examination and was examined by a clinical officer. It was confirmed she was 34 weeks pregnant. After that the mother asked her who made her pregnant and she identified the



accused. The mother and father went to Njoro Police Station and reported. They were issued with a P3 Form that was filled. The accused was later arrested by PC Richard Mweni who then charged the accused. The P3 Form, treatment cards and Immunization cards are also in court. It shows the date of birth as May 27, 1997. I would wish to produce them all as Exhibits in court.”

14. The appellant then stated that the “facts are correct” after which the court convicted him on his plea of guilty. Section 207 (2) of the [Criminal Procedure Code](#) provides as follows:

“

“(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.”

15. On whether the appellant understood the language used the superior court held that:

“There is no indication in the proceedings that the appellant did not understand the language used. His response to the charges and the facts did not indicate that he did not understand the court. Although the court has obligation to uphold the right to fair trial, an accused person also has implied duty to inform the court whether or not he is able to understand the proceedings. This duty however does not lessen the obligation of the court to satisfy itself that the accused is able to follow the proceedings.

I am satisfied that the appellant understood the language of the court. In my view the complaint is an afterthought after he realized the gravity of the offence and severity of the sentence meted out to him”

16. We respectfully disagree with the Judge. As we have observed, the record indicates that the charge was read to the appellant “in a language he understands being Kiswahili” but nowhere in the record was the appellant asked by the court to state the language he understood. The appellant was also not given an opportunity to explain or dispute or add anything relevant as required which would have enabled the court to establish whether he was following the proceedings as required.

17. We are guided by the decision in *Mose v R* (2002) 1 EA, 163, where this Court held;

“The procedure for calling upon an accused to plead required that the accused admit to all the ingredients of the offence charged before a plea of guilt could be entered against him. The words “it is true” standing on their own did not constitute an unequivocal plea of guilt. It was desirable that every constituent ingredient of the charge be explained to the accused so that he should be required to admit or deny every constituent.”

18. More importantly, the record reflects that the appellant pleaded guilty to the main charge and also pleaded guilty to the alternative charge. It is therefore not clear for which offence the trial court convicted him when the court recorded that he had been convicted on his own plea of guilty. We also note that the appellant did not offer any mitigation when he was given the chance, and the record is



silent on whether he opted to offer no mitigation, or he was hampered by the language barrier alluded to.

19. From the foregoing, we find and hold first that the appellant may have been disadvantaged by a language barrier during plea taking and secondly that the plea of guilty was not unequivocal.

20. As we have found that the plea of guilty was not unequivocal, we consider it unnecessary to determine whether the sentence meted upon the appellant was harsh or excessive. What follows is to determine whether as a result of the omission, we should acquit the appellant or in the alternative, declare a mistrial and remit the case back to the trial court for rehearing. In *Muiruri vs Republic* (2003) KLR 552 this Court outlined the factors to be considered in determining whether or not to order a retrial as follows:

“Generally, whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

21. The record indicates that the appellant was arraigned before the court on the August 10, 2011 charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offence Act* (SOA). He was convicted on his own plea of guilty and sentenced to 20 years on the same date. It is therefore, approximately 12 years since he was charged and incarcerated for the instant offence.

22. Having found that there were omissions in the original trial and noting that he has served 12 years in prison, we are of the view that the interests of justice will not be served by an order remitting this case back to the trial court for retrial. We therefore, allow this appeal and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

