



**Nyongesa v Republic (Criminal Appeal 79 of 2018)  
[2022] KECA 1263 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1263 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL 79 OF 2018  
HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA  
NOVEMBER 18, 2022**

**BETWEEN**

**GILBERT NYONGESA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence of the High Court of Kenya  
(Githua, J.) dated 29th July, 2016 in Milimani HCCR. Case No. 79 of 2018)*

**JUDGMENT**

1. Gilbert Nyongesa, the appellant, was by way of a charge sheet dated May 16, 2011 arraigned in court to face the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). The particulars of the offence were that on diverse dates between 6<sup>th</sup> and May 7, 2011 at [particulars withheld] village, [particulars withheld] location in Eldoret East district within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of LC, a child aged 5 years. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) whose particulars were that on the same dates and place, the appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of LC a child aged 5 years.
2. The evidence led by the prosecution was that the appellant on May 6, 2011 had been left at his employer's home together with PW3. According to PW3, a child aged about 5 years, on that day, the appellant took her to the kitchen, laid her on bed and defiled her. PW3 recalled that this was the second time that the appellant had defiled her. PW5, another minor testified that whilst in their compound she saw the appellant take PW3 to her grandmother's kitchen where he used to reside, and later, she found PW3 on his bed crying.



3. PW2, the grandmother on her part recalled that on the same day, PW3 swore to her that she will never go to that compound again as Gilbert (referring to the appellant) had done bad things to her. Suspecting that the appellant had defiled her granddaughter, she reported the matter to PW4 at Ainabkoi police station. She was thereafter issued with a P3 form which was filled by Dr Florence Jagugu (PW1). In her evidence, she testified that she examined PW3 on May 7, 2011 and noted that she had abrasions on the labia majora and minora; her hymen was freshly torn but no discharge was noted. She was satisfied that PW3 had been defiled.
4. Put on his defence, the appellant denied committing the crime. His defence was that on the material day he was at Ainabkoi shopping centre and when he went back to his employer's home after grazing cattle, he did not find PW3. He was however arrested on May 13, 2011 by police officers and was informed that he had defiled PW3.
5. Upon evaluation of this evidence, the trial court found him guilty of the main count after being persuaded that the prosecution evidence was sufficient to sustain the conviction. On conviction, he was sentenced to life imprisonment.
6. The appeal before the High Court was heard on May 12, 2016. On evaluating the evidence on record, the court was unable to fault the trial court on its findings on both conviction and sentence. The appeal was accordingly dismissed.
7. Aggrieved by the decision of the High Court, the appellant filed this second and perhaps, last appeal, on the grounds that: he did not understand the language used by the trial court; did not take a fresh plea after the alternative charge was amended; he was sentenced to life imprisonment which sentence was harsh, excessive and unconstitutional; the medical evidence was not properly considered and evaluated; the evidence by the prosecution was marred with contradictions, and that the complainant was referred to as LC whereas in the proceedings she was referred to as LJR.
8. When the appeal came up for hearing before us, the appellant appeared in person while Mr Onkoba, learned prosecution counsel appeared for the respondent. In his written submissions, the appellant urged that he had informed the court that he understood Kiswahili language but the same was not used throughout the proceedings especially when PW1 and PW2 testified; and that he was not accorded the services of an interpreter which was contrary to article 50(2)(m) of the Constitution that provides for fair trial. In the result, he was unable to prepare adequately his defence, yet it was a right that could not be derogated from.
9. He further submitted that the charge sheet on record indicates the alternative charge was amended but he did not take a fresh plea, which is a right enshrined in the Constitution and the same cannot be limited as well. In addition, the appellant submitted that the trial court found him guilty at the stage of no case to answer, yet he had not been put on his defence. On the minimum mandatory sentence, we were urged to find that the trial court did not consider the appellant's mitigation and that the court should have exercised its discretion and given a much lesser sentence. We were referred to the Supreme Court decision in Francis Karioko Muruatetu & Anor vs Republic [2017] eKLR where the guiding principles were laid down with regard to the mandatory sentence in murder cases.
10. The prosecution counsel on his part supported the conviction and sentence and submitted that the main issue in the appeal was how the hearing was conducted and the sentence. The proceedings showed that the trial was conducted in three languages namely; Kiswahili, Keiyo and English. The court recorded the language the appellant would use and the appellant even cross-examined the witnesses in Kiswahili and gave a sworn statement in his defence in Kiswahili. It was his submission that even if the court had failed to state the language understood by the appellant in the record, the same would



not vitiate the veracity of the trial as was held in the case of [\*David Kariuki Kibuku vs Republic \[2017\] eKLR\*](#).

11. With regard to the appellant taking a fresh plea to the amended alternative charge, we were referred to section 382 of the [\*Criminal Procedure Act\*](#) which provides that a finding of the court based on an error, omission or irregularity cannot be reversed or altered if the same did not occasion a failure of justice. The appellant was found guilty on the main count whose ingredients include penetration, age of the victim and identity of the perpetrator, which were all proved by the prosecution in this case. The failure by the appellant to take a fresh plea did not, therefore, occasion any prejudice to the appellant and even if there was, then it was curable by dint of section 382 of the Criminal Procedure Code.
12. We were reminded to exercise our discretion judiciously in reviewing the sentence and that we should only interfere with it if it is shown that it was too harsh or too lenient. Further, that the minor was aged 5 years old at the time of the offence, and that the appellant had not demonstrated any remorse. However, should we be minded to interfere with the sentence, counsel urged us to impose a sentence of 40 years' imprisonment.
13. This being a second appeal, our mandate is limited to interrogation of issues of law only as provided for in section 361 of the Criminal Procedure Code, and as succinctly set out in [\*Karani vs Republic \[2010\] eKLR\*](#) wherein this court expressed:

' this is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they are plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.'
14. In [\*Chemagong vs Republic \[1984\] KLR 611\*](#), this court held that it will not normally interfere with concurrent findings of facts by two courts below unless such findings were based on no evidence, or a misapprehension of the evidence or the courts below showed to have acted on wrong principles in making of those findings. See also [\*Gacheru vs Republic \[2005\] KLR 688\*](#).
15. We have considered the record of appeal, the submissions by both parties and the authorities relied on. The issues of law that arise for our determination are whether: the proceedings were conducted in the language that the appellant understood; the appellant was required to take a fresh plea after the alternative charge was amended; whether the appellant's conviction and sentence was proper; and whether the sentence imposed was harsh, excessive and unconstitutional.
16. The appellant argues that the proceedings were conducted in a language which he did not understand, thus limiting his preparation of his defence and which was a violation of his right to a fair trial under article 50(2) of the [\*Constitution\*](#). From the record, the appellant was arraigned in court on May 16, 2011; the court inquired from the appellant which language he understood and in which the proceedings should be conducted, and the record shows that he replied that he understood Kiswahili, which was noted by the trial court. The main charge and the alternative charge were read to him in Kiswahili, and to which he pleaded not guilty. On August 16, 2011, the appellant told the court again that he understood Kiswahili, when the hearing commenced and he cross-examined the doctor (PW1). PW3 appeared in court on August 26, 2011 for further hearing and the appellant cross-examined her in Kiswahili language. The police officer testified on September 19, 2011 as PW4 and the appellant cross-examined him in Kiswahili language. PW2 was sworn in Keiyo language and the record shows that



interpretation was in Kiswahili. The appellant cross-examined her in Kiswahili. Section 198(1) of the Criminal Procedure Code provides that:

' whenever any evidence is given in a language not understood by the accused, and he is present in person, it should be interpreted to him in open court in a language which he understands.'

17. We are inclined to believe that for the appellant to have cross-examined the witnesses in Kiswahili, the Keiyo testimony was translated to him in Kiswahili, and the appellant understood the proceedings. More so when he even gave his statement of defence in Kiswahili. Thus, the appellant's right to fair hearing was not compromised or limited at all having regard to article 50(2)(m) and 50(3) of the Constitution.
18. On the second ground of appeal, the appellant submitted that he did not take a fresh plea when the alternative charge was amended. On May 16, 2011, the trial magistrate entered a plea of not guilty to the main charge and the alternative charge. He further ordered as follows: 'the prosecution is ordered to amend the particulars of offence in the alternative charge by including the part of the accused person that came into contact with the complainant's genitalia organ. Secondly, the prosecutor to delete the word 'conducts' to substitute it with the word 'contact'.
19. The record does not show if at all the appellant took a fresh plea as provided for by section 214(1)(i) of the Criminal Procedure Code following the amendment of the alternative count. Did this omission however cause an injustice to the appellant as submitted? section 214(1) of the Criminal Procedure Code provides that at any stage before the close of the prosecution case, the court may order for an amendment to a defective charge and the accused is to plead to the altered charge. The record shows the appellant did not object to the amendment of the alternative charge nor did he raise the issue in the High Court. He is raising the issue in this court for the first time. Obviously, we frown upon this approach. However, it is a matter we have jurisdiction to entertain it. Much as the appellant did not plead to the amended charge we nonetheless accept the respondent's submissions that such failure did not occasion any injustice to the appellant. In David Mutune Nzingo vs Republic [2014] eKLR, this court considered the purpose of the process of plea taking as enshrined under section 207 of the Criminal Procedure Code. It held as follows:

' The requirement under section 207 of the Criminal Procedure Code for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held. If there was no express denial but a refusal to plead, the trial would still proceed as if a plea of not guilty was entered.'
20. The appellant fully participated in the proceedings. The amendment of the word to read 'contact' and not 'conducts' did not materially and substantially affect the intent and particulars of the alternative charge and therefore no prejudice was occasioned to him. Moreover, he was convicted on the main count and not the alternative charge. Finally, the omission is easily curable under section 382 of the Criminal Procedure Code.
21. This court whilst dealing with a similar situation in the case of David Irungu Murage & Anthony Kariuki Karuri vs Republic Criminal Appeal No 184 of 2004, observed:

The issue then that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not



occasion a failure of justice and that whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code.'

22. We are satisfied that non-compliance with section 214 of the Criminal Procedure Code did not occasion any injustice to the appellant.
23. The appellant submitted that the trial court convicted him at the stage of no case to answer, yet the case had not been concluded as he had not tendered his defence. After the prosecution had closed its case, the court had a duty to decide whether the appellant had a case to answer. This is what the trial court did in compliance with requirements of section 211 of the Criminal Procedure Code.
24. The mere fact that the appellant was placed on his defence after closure of the prosecution case does not amount to a conviction at that stage. We accordingly find no fault in the manner the trial court went about putting the appellant on his defence.
25. The appellant was charged under section 8(1) and 8(2) of the *Sexual Offences Act*, and in-order to find someone guilty of this offence, three ingredients of penetration, apparent age of the victim and the identity of the perpetrator have to be proved as held by this court in *George Opondo Olunga vs Republic [2016] eKLR*.
26. Section 2 of the *Sexual Offences Act* defines penetration as follows:

' the partial or complete insertion of the genital organs of a person into the genital organs of another person'.
27. The complainant in her testimony detailed how she was penetrated by the appellant. Her evidence was collaborated by PW1 who testified that there was evidence of penetration when on examination she found abrasions on both labia majora and minora, the hymen was freshly torn though there was no discharge noted.
28. With regard to the age of the complainant, her grandmother (PW2) testified that she was 5 years old. The clinic health card tendered in evidence indicated that the complainant was born on August 25, 2006, thus, she was 5 years old at the time of the offence.
29. Further, the complainant properly identified the appellant as the person who defiled her and that he was a herdsman in the neighborhood. He was well known to her and the offence was committed in broad daylight. The identification evidence was corroborated in material aspects by PW2, who knew the appellant as a herdsboy employed by a neighbour one, PK. The evidence of PW5, a minor who saw the appellant take the complainant into the kitchen also bolstered the evidence of identification. The appellant did not also dispute the fact that he was well known to PW3. Thus, the identification of the appellant as the perpetrator of the crime cannot be in doubt.
30. The appellant urged us to review and reduce the sentence imposed on him. The appellant was convicted on the main count of defilement. The appellant defiled a child aged 5 years at the time of the offence. The appellant's act was heinous and though he had mitigated upon conviction, the law then provided and still does for a life imprisonment as a mode of punishment. The *Supreme Court in Francis Karioko Muruatetu vs Republic [2017] eKLR* outlawed the mandatory nature of the death sentence and thus opened a way for re-thinking of the mandatory and minimum sentences. However, the Supreme Court has since clarified that the Muruatetu case only applies to murder cases and not other offences. This was *Francis Karioko Muruatetu vs Republic [2022] eKLR*.
31. We have considered the circumstances of this case and we are convinced that the appellant was rightfully convicted and the sentence imposed was legal. In the result, the appeal fails and is accordingly dismissed.



DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F SICHALE

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JUDGE OF APPEAL

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

