



REPUBLIC OF KENYA



**Odongo v Republic (Criminal Appeal E062 of 2023)
[2025] KEHC 3762 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E062 OF 2023
DK KEMEL, J
MARCH 26, 2025**

BETWEEN

JACKONEAH ODONGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon. JP
Nandi (SPM) in Bondo Sexual Offence Case No. E036 of 2023)*

JUDGMENT

1. The Appellant herein Jackoneah Odongo was charged with an offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 28th day of November 2023 at about 0030 hours at Bondo Sub County within Siaya County intentionally caused his penis to penetrate the anus of C.O.O a boy aged ten (10) years. The Appellant pleaded guilty to the charge and was thereby convicted and sentenced to serve forty (40) years' imprisonment.
2. The Appellant was aggrieved by the said conviction and sentence. He filed a petition of appeal dated 11/12/2023 wherein he raised the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact by convicting the Appellant who was unrepresented on plea of guilty which was not heightened and not unequivocal as per the decision in Simon Gitau Munene Vs. R [2016] eKLR.
 2. That the learned trial magistrate erred in law and fact by convicting the Appellant on plea of guilty without warning the Appellant of the consequences of such admission of guilt.
 3. That the learned trial magistrate erred in law and fact by failing to observe and enquire if such plea of guilty was due to influence or threats by the police to the Appellant to win their corrupt



deal with the alleged victim's family. The Appellant therefore prays that the appeal be allowed and that the conviction be quashed and the sentence be set aside and that the Appellant be taken for retrial.

3. The appeal was canvassed by way of written submissions. Both parties duly complied.
4. This being a first appeal, the duty of this court is to re-evaluate the evidence presented before the trial court and subject it to an independent analysis and to arrive at an independent conclusion as to whether or not to uphold the decision of the trial court. This court will have to take cognizance to the fact that it neither saw nor heard the witnesses. See *Okeno Vs Republic* [1972] EA 32.
5. It is noted that a trial did not take place in the lower court in that the Appellant pleaded guilty to the charge and was convicted accordingly. The Appellant has contended that the plea was not unequivocal and that the resultant conviction must be quashed.
6. I have given due consideration to the record of appeal plus the submissions filed. I find the issue for determination is whether the plea made by the Appellant was unequivocal.
7. The manner of recording a plea is provided for 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.
 3. Provided that after 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.
8. The manner of recording a plea of guilty was dealt with in the case of *Ombewa Vs. Republic* [1981] eKLR, where the Court of Appeal held that:

“In *Adan Vs. 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 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 the charge together with the accused's reply should be recorded.”

9. In the instant case, proceedings of the trial court were as follows:

“ 5.12.2023

Magistrate: Hon. JP Nandi (SPM)

Prosecution counsel: Makokha

Court Assistant: Owako

Advocate: N/A

Miss Odinga Advocate acting for the victim.

Accused person: Present

Court

Please tell the court which language you understand best and which should be used in these proceedings.

Accused person: Dholuo

Court

You have the right to legal representation of your own choice. You are encouraged to exercise it. You are hereby informed that you are also entitled to apply to the legal aid board for assistance if you so desire.

Accused person

Understood

Court

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

Main Count

Accused person

It is true

Court

Plea of guilty is entered.

Prosecution

The facts are true. On 28/11/2023 at 1400 hrs.....

The accused was then charged accordingly.

Accused

The facts are correct.



Court

Accused convicted on his own plea of guilty.

Prosecution

No previous records for accused.”

A perusal of the foregoing excerpt of the trial court reveals that the language of the trial court is missing. It is not shown whether the court used Dholuo or English or Kiswahili. The record should clearly show the language of the interpretation used both by the accused and the court. There must be evidence of the language of the court which is either English or Kiswahili. This is missing. It does not matter that the accused’s response was in Dholuo language which he understood. The language that the trial court used must be captured.

M/s Mumu learned counsel for the Respondent rightly conceded to the appeal and submitted that in the absence of the language used by the trial court, the plea was therefore not unequivocal. Learned counsel sought reliance in the case of Elijah Wakianda Vs R, Criminal Appeal No. 73 of 2016 where the Court of Appeal comprising of Waki, Nambuye and Kiage JJA held that the language used in taking plea must be indicated and that they remitted the case back to the trial court for a retrial. I am persuaded by the said authority as the same aptly captures the circumstances of the proceedings in the trial court in this matter. The said Court of Appeal went on to hold as follows:

“With respect, we find this disturbing. It seems to us that this is part of a template used by courts, at plea taking. That is why it speaks of charges when there is a single charge and rather odd “in a language he understands” when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of a ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice that for the specific language used to state the elements of the charge. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language.”

10. As the language used by the trial court to engage with the Appellant in the conversation leading to the impugned conviction and sentence is missing, it is obvious that the resultant plea entered by the Appellant was not unequivocal. The same must be interfered with. Both the Respondent and the Appellant have sought for a retrial. It is noted that the Appellant has barely served a fraction of the sentence imposed and thus he has not suffered prejudice and none will be occasioned if the retrial is ordered.
11. In the result, it is my finding that the Appellant’s appeal has merit. The same is allowed. The conviction by the trial court is hereby quashed and the sentence set aside. The Appellant is ordered to be produced before the Chief Magistrate Bondo Law Courts on 26/3/2025 for purposes of retrial.

DATED AND DELIVERED AT SIAYA THIS 26TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:



Jackonear Juma Odongo.....Appellant

Soita.....for Respondent

Mboya.....Court Assistant

