Baya v Republic (Criminal Appeal E013 of 2024)
[2025] KEHC 8176 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 8176 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E013 OF 2024

JN NJAGI, J

MAY 28, 2025

BETWEEN

JUMA THOYA BAYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. E. Kadima, SRM, in Garsen Senior Principal Magistrate's Court Sexual Offence Case No. E006 of 2021 delivered on 8/3/2021)

JUDGMENT

1. The Appellant herein was convicted on his own plea of guilty of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 24th day of February 2021 at [Particulars Withheld] Tana Delta Sub-County within Tana River County, he intentionally caused his penis to penetrate the anus of MRK (herein referred to as the complainant), a child aged 12 years.

2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal which is based on the grounds, inter alia that;

    1. The trial Court erred in law and fact by failing to appreciate that the appellant's plea of guilty was not unequivocal causing him prejudice;

    2. The trial court erred in law and fact by failing to note that he was unrepresented; and

    3. The trial court erred in failing to appreciate the appellant was not cautioned on the consequences of pleading guilty to the charge and the sentence such a charge would attract.

Submissions

3. The appeal was canvassed by way of written submissions.

4. The appellant submitted that the record of the trial court indicates that the language of the court was English/Kiswahili but that during plea taking, he was not asked which language he understands in order for him to take a proper plea. He contends that the record does not show that there was interpretation into a language that he understood. He relied on the procedure on plea taking as set out in the cases of case of Ombena vs Republic (1981) eKLR and Adan v Republic [1973] EA 445 to submit that the plea was not properly taken. He further cited the case of Elijah Njihia Wakianda v Republic (2016) eKLR where it was held that:

> ....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.

5. The appellant submitted he was not defended by an advocate during plea taking. That it was the duty of the trial court to make him understand the charge that he was facing and what it entailed in pleading guilty to such a serious charge. He submitted that the record does not disclose that he was informed of the consequences of pleading guilty to the charge and the likely sentence to be imposed by the court. Therefore, that the plea cannot be said to have been unequivocal. The appellant in this respect relied on the case of Simon Gitau Kinene v Republic (2016) eKLR where the court emphasized the importance of warning an accused person of the consequences of pleading guilty to a charge. Also cited on the same proposition is the case of JMN v Republic (2021) eKLR.

6. The appellant urged the court to allow the appeal.

7. The Respondent opposed the appeal. They submitted that the plea was properly taken and a birth certificate was produced showing that the victim was aged 14 years. That the appellant was warned of the severity of the sentence and pleaded guilty to the facts on his own plea of guilty. It was submitted that the plea was unequivocal.

8. The respondent submitted that section 8(3) of the *Sexual Offences Act* under which the appellant was charged provides for an imprisonment term of not less than 20 years. That in this case, the appellant pleaded guilty to the offence and was sentenced to 20 years imprisonment. It was submitted that the sentence was proper and that the court ought not to interfere with it since the trial court observed that the appellant exhibited lack of remorse for his actions. The respondent urged the court to dismiss the appeal.

Analysis and determination

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that: -

> " On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor."

10. I have considered the grounds of appeal, the record of the trial court and the rival submissions by the appellant and the respondent. The issues for determination in the appeal are whether the plea of guilty entered was unequivocal and whether the sentence imposed is harsh and excessive.

11. The appellant challenges the manner the plea was taken by the trial court and contends that the plea was unequivocal.

12. The procedure in plea taking in subordinate courts is laid down under Section 207 (1), (2) and (3) of the *Criminal Procedure Code* which Section provides as follows: -

> " 207.
>
> (1) The substance of the charge shall be stated to the appellant 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 appellant 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.
>
> (3) If the appellant person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided."

13. The manner of taking pleas was explained in the case of Adan v Republic [1973] EA 445 where the Court of Appeal laid down the steps which should be followed in taking pleas as follows:

1. the charge and all the essential ingredients of the offence should be explained to the appellant in his language or in a language he understands;
2. the appellant's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
3. the prosecution should then immediately state the facts and the appellant should be given an opportunity to dispute or explain the facts or to add any relevant facts;
4. if the appellant does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
5. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the appellant's reply should be recorded."

14. In the present case, the court record indicates that the charge was interpreted to the appellant in Kiswahili language. That upon the charge being read out to him and being asked whether he admitted or denied the charge, he responded in Kiswahili language by stating that:

> " Ni kweli", which meant "it is true."

15. A plea of guilty was then entered.

16. The record shows that the court before proceeding further with plea taking warned the appellant the consequences of pleading guilty in the following words:

> " The appellant is warned of the choices of pleading guilty to such a charge and appeal can be on the severity of the sentence."

17. The appellant responded to the warning by stating that:

> " Ni kweli nilifanya", meaning, "It is true I did it."
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> The trial court then remarked:
>
> > " The earlier plea of guilty remains."

18. The record indicates that the prosecution at that stage proceeded to set out the facts of the case. The facts were that on 24th February 2021 at around 5.00pm the victim MRK was going home from school. On her way she met with the appellant. The appellant offered to give her Kshs.20 if she agreed to have sex with him. He pulled her into the bush and had sex with her. The appellant told her not to tell anyone on what they had done. On the following day, the mother to victim entered into the victim's room to collect dirty clothes in order to wash them. She noticed blood stains on some clothes. When the victim came from school, her mother asked her about the blood stains. She confessed to having sex with Thoya the appellant. The victim's mother informed the village elder who in turn informed the police. She was referred to Ngao Sub-county hospital where she was examined and treated.

19. The appellant was then asked whether he admitted the facts as set out by the prosecution to which he replied in Kiswahili language that:

> " Maelezo ni kweli", meaning that "the facts are true".

20. The trial court then entered a plea of guilty and convicted the appellant. He then mitigated and he was sentenced.

21. The appellant argues that the record shows that the language used in the trial court was English/ Kiswahili. That he was not asked which language he understood nor does the record show that there was any interpretation in a language that he understood.

22. I have considered the above argument of the appellant. I have perused the Amended grounds of Appeal of the appellant. The same did not raise any issue that the appellant did not follow the proceedings because they were conducted in a language that he did not understand. The allegation that the appellant did not follow the proceedings is not part of the appeal.

23. That notwithstanding, it is clear from the record that the proceedings were conducted in English language that was interpreted into Kiswahili language, a language that the appellant understood. His answer to the charge after it was read to him was in Kiswahili language that "Ni kweli". His answer to the facts when they were read out to him was in Kiswahili language that "maelezo ni kweli." His mitigation was that he has 7 children two of whom were very young. He reiterated that the act happened but that he never forced the girl to do the act. He said that he was a first offender and sought for forgiveness. There is no way that the appellant could have answered to the charges in Kiswahili language if the proceedings were not being interpreted to him. His mitigation clearly showed that he understood the charges that he was facing. The allegation that the proceedings were not interpreted to him cannot be true.

24. The appellant contends that he was influenced by the police to admit the charge with a promise of getting a non-custodial sentence. That though the trial court warned him of the repercussions of pleading guilty to the charge he was a lay man and did not understand the full import of guilty plea and more so as regards the long custodial sentence accruing thereto.

25. The importance of warning the appellant person as to the consequences of pleading guilty was considered in the case of Elijah Njihia Wakianda –vs- Republic [2016] eKLR where the Court of Appeal held 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 appellant person. One surely ought to know the consequences of his virtual waiver of his trial rights that *the Constitution* guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented appellant person is not lost at sea in the maze of the often- intimidating judicial process....."
>
> This duty exists not only to capital offences but other serious offences whose sentences may be indefinite or long. The Court must ensure that not only does the appellant understand the ingredients of the offence with which he is charged at all the stages of the plea taking, but that he also understands the sentence he faces where he opts to plead guilty as failure to do so is a violation of his right to a fair trial and that the plea of guilty was in those circumstances not unequivocal.

26. The appellant admits that he was warned of the consequences of pleading guilty to the charge. The court record shows that he was cautioned on the seriousness and the severity of the offence he was pleading guilty to. He insisted on pleading guilty to the charge. The assertion that he was influenced by the police to plead guilty to the charge cannot be true. The police did not take any part during his plea taking in court. The contention that he did not understand the full import of a plea of guilty is, in my view, an afterthought. I find that the trial court complied with the procedure as set out in Adan v Republic (supra) when it took plea in the case of the appellant. I find that the plea of guilty was unequivocal. The conviction is thereby upheld.

27. Section 8(3) of the *Sexual Offences Act* stipulates a minimum sentence of 20 years imprisonment for a person found guilty of defiling a child of the age of between 12 and 15 years. The complainant in this case was aged 14 years. The appellant was given the minimum sentence of 20 years. The sentence is therefore neither harsh nor excessive.

28. The upshot is that I do not find any merit in the appeal and the same is dismissed in its entirely.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 28 TH DAY OF MAY 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Nyakundi for Respondent

Appellant – present in person at GK Prison Manyani

Court Assistant - Ndonye