



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwikali v Republic (Criminal Appeal E045 of 2023)  
[2025] KEHC 9117 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E045 OF 2023**

**EN MAINA, J**

**JUNE 26, 2025**

**BETWEEN**

**STANLEY KIOKO MWIKALI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the judgment by Hon. Paul Wechuli (PM) in Kithimani Senior Principal Magistrate's Court in Cr. S.O No. E005 of 2023 Delivered on 29th November, 2023)*

**JUDGMENT**

1. The Appellant herein Stanley Kioko Mwikali was charged with the offence of Attempted Defilement contrary to Section 9(1)(2) of the *Sexual offences Act* No.3 of 2006.
2. The particulars of the offence were that on 3<sup>rd</sup> day of February 2023 in Yatta Sub-County within Machakos County he intentionally attempted to cause his penis to penetrate the vagina of N.N.M a child aged 8 years.
3. In the Alternative Charge it was alleged that the Appellant committed an indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No.3 of 2006 in that on the 3<sup>rd</sup> day of February 2023 in Yatta Sub-County within Machakos County intentionally touched the vagina of N.N.M a child aged 8 years with his penis.
4. After the trial commenced and three witness had testified the Appellant decided to change his plea. The charge was therefore read to him in Kiswahili and he pleaded guilty in the principal charge. The trial magistrate then sentenced the accused to imprisonment for ten (10) years on his own plea of guilt.



5. Aggrieved by the conviction and sentence, the appellant preferred this appeal which according to the Amended Petition is premised on the following grounds;
  - “ 1) That the Learned Magistrate erred in law and fact by basing the Appellant’s conviction on an involuntary guilty plea.
  - 2 That the Learned Magistrate erred in law and fact by convicting the appellant based on inadequate evidence.
  - 3 That the Learned Magistrate erred in law and fact by violating the appellant’s right to fair trial.
  - 4 That the Learned Magistrate erred in law and fact in failing to properly assess the circumstances of the offence before imposing the sentence
  5. That the Learned Magistrate erred in law and in fact by failing to consider the appellant’s age and mitigating factors
  6. That the Learned Trial Magistrate erred in law and in fact by meting out a harsh and excessive sentence.”
6. The Appeal was canvassed by way of written submissions.
7. The Appellant submitted that his plea of guilty was not entered voluntarily as he had no full understanding of the consequences.
8. The appellant also contended that there were inconsistencies with the evidence of the prosecution witnesses PW1 and PW2 which in turn displaced the credibility of those witnesses. He thus concluded that the prosecution’s evidence was inadequate in proving the offence of attempted defilement beyond reasonable doubt thus the conviction should be quashed and sentence set aside.
9. The Appellant submitted that his right to a fair trial was violated due to the fact that he was unrepresented during the proceedings and was in violation of his constitutional rights. He also submitted that the trial court failed to properly consider his age and other mitigating factors which would have played a significant role in determining a fair and proportionate sentence.
10. The appellant also took issue with the sentence stating that it was excessive and disproportionate.
11. He urged the court to quash his conviction and set aside the sentence.
12. For the Respondent it was submitted that the Appellant was convicted on his own plea of guilty and he is therefore barred from appealing the conviction by Section 348 of the [Criminal Procedure Code](#).
13. It was also submitted that the sentence of imprisonment for ten (10) years was lawful but lenient taking into consideration the age of the complainant and the circumstances of the case.

### **Determination**

14. I have considered the appeal, the submissions of parties and the law. As stated in the case of Okeno – vs- Republic [1972] EA 32 this being an appellate court, I am entitled to reconsider and evaluate the evidence adduced in the lower court so as to arrive at my own independent conclusion, albeit bearing in mind that I did not see or hear the witnesses who testified and to make provision for that.
15. However, the record of the lower court indicates that this case did not go to full trial because after the court had taken the evidence of the third witness the Appellant said he wanted to change his plea. The



charge was then read to him and he admitted it. It was therefore upon that admission of guilt that he was convicted. This court is not therefore bound to consider the testimonies of the witnesses as the same were ousted by the Appellant's plea of guilty. The question for determination would then be whether or not the conviction is appealable. It is trite that even where the accused person has pleaded guilty that conviction will be of no effect if the plea was equivocal. The Appellate court must therefore be satisfied that the plea was unequivocal for it to uphold it. He sentence is however appealable as of right.

16. In the case of *John Muendo Musau v Republic*[2013] KECA 266 (KLR) the court stated:- “The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan v Republic* [1973] EA 445 where the court 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. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.(ii)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 facts relevant to sentence together with the accused's reply should be recorded.”
17. From a reading of the proceedings of the court below, it is clear that the above legal principles were followed before the plea of guilty was entered. The charges were read to the Appellant in Kiswahili on two separate days and when he admitted the charge. The second occasion the facts were also read to him in Kiswahili which he understands. The Appellant clearly stated that those facts were correct. I am satisfied that those facts disclosed the offence of attempted defilement which is what the appellant was convicted and sentenced for.
18. The appellant also took issue with the fact that he was unrepresented and thus was not accorded a fair hearing as he did not understand the consequences of the plea of guilt and had no one to guide him. In the case of *Simon Gitau Kinene v Republic* [2016] KEHC 1569 (KLR) it was held that in circumstances where the accused is not represented the courts ought to ensure the plea of guilty is unequivocal and that the same is informed by the accused fully appreciating the charge all its particulars and the facts supporting such particulars. The court stated:

“In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened.” (Emphasis added).
19. In this matter, the record shows that before the facts of the charge were read out to the accused the court warned him that the offence was serious and the sentence was punitive. It even postponed the matter and read the charge to him two days later to give him time to rethink. The Appellant still admitted the charge and when the facts were read to him he also admitted that they were correct. The proceedings in the trial court were conducted in Kiswahili which the Appellant understands as it is also the language he has been using in this court. I am therefore satisfied that his plea of guilty was unequivocal. Accordingly, the appeal against conviction is not merited.



20. On the issue of sentence, the Appellant was sentenced to 10 years imprisonment which is what is prescribed in Section 9 of the [Sexual Offences Act](#) which states:

“(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”

21. In Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition 18 of 2023) [2024] KESC 34 (KLR) 12<sup>th</sup> July 2024) (Judgment) the Supreme Court faulted the Court of Appeal for reducing the sentence imposed on the Appellant from 20 years to 15 years on the grounds of the unconstitutionality or otherwise of minimum sentences under the [Sexual Offences Act](#). The Supreme Court held that those minimum sentences are lawful and shall remain to be so unless declared unconstitutional. That court observed as follows:

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”

22. From the foregoing it is clear that the trial court imposed the minimum sentence that is provided under Section 9(2) of the [Sexual Offences Act](#) and as that sentence is lawful this appeal fails and the conviction and sentence of the learned magistrate are upheld.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 26<sup>TH</sup> DAY OF JUNE, 2025.**

**E. N. MAINA**

**JUDGE**

In The Presence of

Ms Kaburu for the Respondent

Appellant – online from Kamiti Maximum

Geoffrey – Court Assistant

