



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbula v Republic (Criminal Appeal 061 of 2023)  
[2025] KEHC 11925 (KLR) (14 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11925 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL 061 OF 2023  
BK NJOROGE, J  
AUGUST 14, 2025**

**BETWEEN**

**ANDREW ODERO MBULA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the sentence of life imprisonment imposed upon conviction for the offence of defilement in Gatundu Chief Magistrate’s Court Criminal Case No. E036 of 2022, delivered by Hon. W. Ngumi, Principal Magistrate, on 24th November 2022)*

**JUDGMENT**

1. This judgment concerns the Appeal filed by the Appellant on 5th December 2022, challenging the sentence of life imprisonment imposed upon conviction for the offence of defilement in Criminal Case No. E036 of 2022 at the Chief Magistrate’s Court in Gatundu. The impugned sentence was delivered by Hon. W. Ngumi, Principal Magistrate, on 24th November 2022.
2. The Appellant contends that the Trial Court erred by failing to consider his mitigation during sentencing, contrary to the provisions of Sections 216 and 329 of the Criminal Procedure Code. He submits that this omission amounted to a violation of his right to a fair trial as enshrined under Article 50 of *the Constitution* of Kenya, 2010. The Appellant urges the Court to find that the sentence imposed failed to afford him an opportunity for rehabilitation, to make amends, and to take responsibility for his actions. This is in a manner that would enable him to reintegrate with his family and contribute positively to the community. He further contends that the Trial Court failed to take into account his age—being 18 years at the time of sentencing—his status as a first offender, and the circumstances of the case. As a result, the sentence imposed was harsh, disproportionate, and amounted to a violation of his rights under Article 50(2)(p) of *the Constitution*.



3. Pursuant to the directions of this Court, the appeal was to be canvassed by way of written submissions. The Court has accordingly perused and considered the Appellant's written submissions dated the 25<sup>th</sup> June 2024, alongside those of the Respondent dated 29<sup>th</sup> November 2024. The Court commends both parties for the diligence and industry exhibited in the preparation and presentation of their respective cases. Due to pressure of work, exigencies of time and personal issues that befell the Court, there has been delay in delivery of this Judgement. The Court apologises to the parties herein for any unintended consequences.

### **Background Facts**

4. The Appellant was charged on the 7<sup>th</sup> November 2022 at the Chief Magistrate's Court at Gatundu with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) (2006). The Particulars of the charge is that on diverse dates between 1<sup>st</sup> October 2022 and 21<sup>st</sup> October 2022 at [Particulars withheld] village in Gatundu South Sub- County in Kiambu County intentionally caused his penis to penetrate the vagina of V.V, a child aged seven (7) years.
5. The Appellant also faced an alternative Charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) (2006). The particulars of the alternative Charge were that on diverse dates between 1<sup>st</sup> and 21<sup>st</sup> October 2022 at [Particulars withheld] Village in Gatundu South Sub-County in Kiambu County, intentionally touched the buttocks and vagina of V.V. a child aged seven (7) years with his penis.
6. The Court record shows that the charge was initially read to the Appellant on 7<sup>th</sup> November 2022 in Swahili. However, it became apparent that the Appellant did not comprehend the nature of the charge. The matter was therefore deferred. On 8<sup>th</sup> November 2022, the charge was re-read to him in a language he understood, and the Appellant pleaded guilty to the main charge.
7. The facts presented by the prosecution were that the complainant, a female minor aged seven (7) years and a pupil in Grade One at [Particulars withheld] Primary School, was observed by her teacher, one M.M., to be walking with difficulty. Upon being questioned, the child disclosed that her brother had inserted his genital organ into hers the previous day. The school contacted the child's parents and advised that the minor be returned to school the following day. A social worker, Scola, was also notified. The complainant's mother subsequently made a report to the police. Upon further inquiry, the minor disclosed that she had been subjected to acts of defilement on multiple occasions, particularly on Saturdays between 1st October and 21st October 2022. It was further established by the social worker that the complainant's mother was aware of the said occurrences. The Appellant was thereafter arrested. The complainant was taken to Gatundu Level 5 Hospital, where a medical examination revealed that she had sustained a torn hymen and was diagnosed with a urinary tract infection and a vaginal infection. A birth certificate produced and admitted into evidence confirmed that the complainant was born on 8th April 2015.

### **Issues For Determination**

8. Upon a comprehensive re-evaluation of the Record of Appeal, the judgment of the Trial Court, the Appellant's Petition, and the respective written submissions filed by both parties, the Court finds that the following issues arises for determination:
  - a. Whether the plea of guilty entered was unequivocal.
  - b. Whether the sentence was harsh and excessive.



## Analysis

9. In the present case, the Appellant pleaded guilty to the offence of defilement. Section 348 of the Criminal Procedure Code provides as follows:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate Court, except as to the extent and legality of the sentence.”

10. The Court of Appeal, in the case of *Olel v Republic* [1989] KLR 444, held that:

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Code bars it completely.”

Criminal Procedure Code (Cap 75) does not merely limit the right of appeal in such cases

11. The requirements of a valid and unequivocal plea of guilty are set out under Section 207(1) and (2) of the Criminal Procedure Code, as well as in the landmark decision of *Adan v Republic* [1973] EA 445. The Court in that case outlined the procedure to be followed when recording a guilty plea as follows:

1. The charge and all the essential ingredients of the offence are explained to the accused in his language or in a language he understands;
2. Where the accused's own words in response to the charge are recorded and amount to admission, leading to a recording of a plea of guilty.
3. The facts are stated by the Prosecutor and the accused is given an opportunity to dispute or explain the facts or to add any relevant facts;
4. If the accused does not agree with the facts or raises any question of his guilt his reply is recorded and change of plea entered;
5. If there is no change of plea a conviction is recorded and a statement of the facts relevant to sentence together with the accused's reply are recorded.

12. It is incumbent upon a Trial Court, when recording a plea of guilty, to exercise meticulous care in ensuring that the charge is read and explained to the accused person in a language that he or she understands or is familiar with. Thereby enabling the Accused to enter a proper and unequivocal plea. Where an accused pleads guilty, the Trial Court must record the response given in the exact words used by the Accused. The subsequent reading of the facts of the case serves the critical function of confirming that the plea was indeed unequivocal and that the Accused fully comprehended the nature of the charge and its essential elements.

13. The narration of facts by the prosecution enables the Trial Court to satisfy itself that the plea of guilty is both voluntary and unequivocal. That the Accused understands the facts to which he is pleading guilty and raises no defence thereto. A plea is considered unequivocal where, upon the charge being read and a guilty plea entered, the facts are then narrated and the Accused is asked to confirm or dispute the same. It is imperative that both the statement of the offence as contained in the charge sheet and the facts as narrated disclose the offence charged; otherwise, the plea cannot be said to be unequivocal. A conviction may only follow where the facts as narrated by the prosecution are consistent with and support the offence charged.



14. In relation to a charge brought under Section 8(1) as read with Section 8(2) of the [Sexual Offences Act, 2006](#), the facts must disclose the following elements: the existence of a victim who is a child; evidence of unlawful penetration involving the sexual organs of the victim; and the identity of the perpetrator.

**a. Whether the plea of guilty entered was unequivocal.**

15. It is clear to this Court that the Appellant challenges the plea of guilty entered before the Trial Court. This is borne out in the Appellant’s Written Submissions dated 25<sup>th</sup> June, 2024.
16. Bearing in mind the age of the Appellant, said to be 18 years and that he is said to be in Form 2, the Court will consider whether the plea was unequivocal. This is in the interest of justice and fair play noting the seriousness of the offence as well as the severity of the sentence.
17. The Respondent submits that these requirements were satisfied in the present case and that the plea was taken in accordance with the law.
18. The Court notes that at the first instance when the Appellant was arraigned before the Trial Court, his age was duly noted and the charge interpreted to him in Kiswahili.
19. The Trial Court was apprehensive of his age and sent him for an age assessment. The Trial Court properly proceeded with caution as in circumstances of this nature.
20. Most importantly the Trial Court formed an opinion this early that the Appellant did not understand the charge that was read to him. Thus, the taking of the plea was deferred to 8/11/2022.
21. On 8/11/22 the coram indicates as follows;

“ 8/11/2022

Before W. Ngumi PM

Court Prosecutor P/C Timoi

Court Clerk Joseph

Accused present

The substance of the charge and every element thereof has been stated by the Court to the Accused person in the language that he/she understand, who being asked whether he/she admits or denies the truth of the charge replies:

Accused – It is true.

Facts:.....

.....

.....

Court – Plea of guilty entered convicted on own plea of guilt.

State Counsel – Treat him as first offender.

Court- Sentencing deferred to the 15/11/2022 for social inquiry report, psychologist report from the Government psychotherapist on the accused person.

Court – Accused to be remanded at the Police Station.”



22. The Court notes three (3) key factors. The Language in which the plea was taken was not indicated. Previously the plea had been conducted in Kiswahili and the Court itself noted that the Accused did not understand the charges facing him. It should concern this Court when the Appellant complains that his plea of guilty was not unequivocal due to his young age and the seriousness of the charge. A perusal of the coram for the day provides no answer to this Court as to the language in which the proceedings took place that day. The Appellant maintains that he did not understand the charges facing him. The coram does not indicate that either he understood or that the charges were read over correctly to him in a language that he understood.
23. In *Wakianda v Republic* [2016] KECA 181 (KLR) Waki J. (as he then was) complained of such manner of plea taking and stated as follows
- “The beginning point of ensuring that the accused person has entered into a free and conscious plea of guilty is being satisfied that he understands the proceedings and that he in particular understands the charge that is facing him. Indeed, the court taking the plea is required to read and explain to the accused the charge and all the ingredients in the accused person’s language or a language he understands. In the instant case, the record reads thus;
- “Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili:- “It is true.”
- 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 “charge(s)” when there was a single charge and the 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 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.”
24. The learned Judge nullified the conviction and sentence in the following words;
- “Where, as here, a plea of guilty is not unequivocal, the ensuing conviction and sentence cannot be allowed to stand. We consider the plea-taking to have been a nullity. Accordingly, we quash the conviction and set aside the sentence. We set the clock back so the process is restarted on proper footing. In consequence, we direct that the appellant shall be presented before the Principal Magistrate’s Court at Nyahururu within fourteen days of the date hereof for the purpose of taking a fresh plea to the charge.”
25. The Appellant was facing a main charge and an alternative charge. The manner in which the plea was taken does not indicate to which charge that the Accused person was confirming it is true. Was it the main charge or the alternative charge. *Wakianda v Republic* [2016] KECA 181 (KLR) still applies.
26. Lastly, after the facts had been read out, the Trial Court did not seek to hear from the Accused whether the facts were indeed true. It is upon this confirmation that the Court would then enter an equivocal plea of guilty. Otherwise, if the Accused person challenged any part of the facts, the plea to be entered would have been not guilty. *Adan v Republic* [1973] EA 445 applies.
27. The Appellant also submits that the sentence imposed was harsh and that the Trial Court failed to consider his mitigating circumstances.



28. The Court having been persuaded that the plea of guilty was not unequivocal, need not consider this ground.
29. The Court is persuaded to proceed to nullify the plea of not guilty and set back the clock. The Court has warned itself that this being a matter involving siblings, it might reopen wounds that were healing. The Court has warned itself of the dangers of the Minor victim facing trauma a second time by being subjected to events she had best learnt to forget. However, the rights of an accused to be tried in a fair and just manner as provided by Article 50 (as to fair hearing) of *the Constitution* cannot be ignored or wished away by this Court. This Court has to be seen to not only preach justice but to do justice at all material times. This is a duty this Court should never be presumed to be shying away from.

### **Determination**

30. In view of the foregoing, the Court finds that the Appeal is merited and declares a mistrial.
31. The conviction and sentence of life imprisonment handed over to the Appellant on 24<sup>th</sup> November, 2022 are hereby set aside, quashed and nullified.
32. The Appellant is to be released forthwith from prison unless otherwise lawfully held. The Police may continue to hold him in Police remand but must present him before the Thika Law Courts within the next Fourteen (14) days for taking of a plea before any other Magistrate other than Hon Ngumi W. PM. In the event that no arraignment takes place within the next Fourteen (14) days, the Appellant is to be released from Police Custody unless otherwise lawfully held pursuant to orders obtained from the lower Court in relation to these charges.
33. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14<sup>TH</sup> DAY OF AUGUST, 2025**

**NJOROGE BENJAMIN K.**

**JUDGE**

Judgment delivered in the presence of

Appellant present at Kamiti Prison.

Miss Torosi for the State.

Ms. Nzioka - Court Assistant

