



REPUBLIC OF KENYA



KENYA LAW
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**Oloosereka v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 5548 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL E002 OF 2023
F GIKONYO, J
APRIL 30, 2024**

BETWEEN

SAIGILU OLOLOSEREKA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. P.L. Shinyada(SRM)
in Narok CM SOA No. E003 of 2023 on 11th January 2023)*

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve life imprisonment and three years imprisonment for the defilement of a 10-year-old girl and subjecting a child to early marriage. The sentences were to run concurrently.
2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide the undated petition of appeal received in court on 16/01/2023. Under section 350(1) of the Criminal Procedure Code, the appellant's counsel filed a petition of appeal dated 26/06/2023 and received in court on 27/06/2023 as follows;
 - i. That the honourable Magistrate erred in law in failing to find that the appellant's constitutional rights to a fair trial under articles 50(f) and (h) were violated.
 - ii. That honourable Judge(sic) erred in law in failing to find that the appellant's constitutional rights to a fair trial under article 25(c) were violated.
 - iii. That the honourable magistrate erred in law and fact by failing to order a mental assessment test for the appellant when the appellant herein was outrightly incoherent and unable to comprehend the proceedings.



Brief background

3. The appellant was on 19/01/2023 charged with two counts and an alternative charge.
4. Count I: He was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*.
5. The particulars of the offence were that on diverse dates from the year 2019 to December 2022 at [Particulars withheld] village in Losialale location within Narok south sub-county within narok county intentionally and unlawfully caused his penis to penetrate the vagina of NS a girl aged 12 years.
6. An alternative charge: He was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
7. The particulars of the offence were that on diverse dates from the year 2019 to December 2022 at [Particulars withheld] village in Losialale location within Narok south sub-county within narok county intentionally and unlawfully committed an indecent act with NS a child aged 12 years by causing his penis to come into contact with the vagina of the said NS.
8. Count II: He was charged with the offence of subjecting a child to early marriage contrary to section 23(c) as read with section 23(2) of the *Children Act* no. 29 of 2022.
9. The particulars were that on diverse dates from the year 2019 to December 2022 at [Particulars withheld] village in Losialale location within Narok south sub-county within Narok county, the appellant subjected NS a child aged 12 years to early marriage an act that negatively affected the child's dignity.
10. The substance of the charges and every element thereof was stated by the court to the appellant in the language he understood. On being asked whether he admits or denies the truth of the charges, he replied in Maasai language. He stated that it is true he caused his penis to penetrate the vagina of the minor child on count I. Count II, stated that it was true he was given the child to marry her and he agreed to so marry her.
11. Plea of guilty was entered for Count I and Count II. The alternative charge was left in abeyance.
12. The trial court cautioned the appellant that the charges he faced carry a very serious punishment in law and he was asked whether he still maintains his plea of guilty. He was informed the sentence is up to life imprisonment.
13. The appellant stated that he was given this girl by her parents to marry her and he took her in.
14. The prosecutor read the facts of the case.
15. The facts were that on 06/01/2023 officers from the children's office in Narok County received information from members of the public that there was a minor who had been admitted to the Narok County referral hospital. The minor by the name of NS aged 12 years had undergone caesarian surgery. The children's officers visited the hospital and interrogated the child. She told them she was married off to the appellant in the year 2019. She told them she had been brought to the hospital after being referred from Entasikira dispensary. The children's officer informed the police and the appellant who was within the said hospital was arrested.
16. Upon interrogation of the appellant by the police and further investigations, it was established that the appellant aged 50 married the victim in the year 2019. The appellant has been having sexual intercourse with the child and this led to her pregnancy. Sadly, while the victim was giving birth the baby died. The



appellant was arrested and charged with the offence before the court. the victim was still admitted to the hospital at the time of the plea. She was examined and a P3 form was filled.

17. The prosecution produced a P3 form, treatment notes, post-care form, and age assessment report as P Exh 1,2,3 and 4 respectively.
18. Upon the facts being read to him, the appellant stated that the child was his wife. The facts as presented before the court are true. He had married the child.
19. The appellant was found guilty on his own plea of guilty in both counts I and II and consequently convicted of the same.
20. In mitigation, the appellant urged the court to pardon him. That he was given that girl when he was looking for a wife. He did not take her from her parents by force.
21. The appellant was sentenced to serve life imprisonment and three years concurrently for Counts I and II respectively.

Directions of the court.

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

Appellant's submissions.

23. The appellant submitted that the appellant was not informed of the right to have an advocate and a great injustice was occasioned to him due to the gravity of the offence. The appellant's constitutional right under articles 50(f) and (h) were violated by the magistrate due to the failure on their part to provide him with an advocate at the state expense due to the seriousness of the offence. The appellant relied on the case of David Njoroge Macharia Versus Republic [2011] eKLR and Karisa Chengo & 2 Others Versus Republic [2015] eKLR.
24. The appellant submitted that despite the appellant's questionable mental capacity the trial court proceeded with the trial without a mental assessment. The appellant relied on Article 25(C) of *the Constitution* and Macharia versus R.
25. The appellant submitted that the trial court failed to order a mental assessment test when the appellant was outrightly incoherent and unable to comprehend the proceedings. The appellant relied on the case of Republic Versus Lewis (Criminal Case E077 of 2021), the letter dated 17/01/2023, and the appellant's national identification card (though the same is a voting card).

The respondent's submissions.

26. The respondent submitted that the appellant was present during the proceedings, nothing in court was done in his absence. He was arraigned in court and answered the charges. His right to counsel was not violated as nowhere in the proceedings has it been mentioned that he asked to be represented and was denied the chance hence his lack of counsel was not prejudicial to him.
27. The respondent submitted that the appellant was warned by the prosecution and the trial court on the consequences of pleading guilty and the severity of punishment.
28. The respondent submitted that it is not true that the appellant was not able to comprehend the proceedings. Proceedings were conducted in the Maasai language which he stated that he understands. It has not been demonstrated why a mental assessment was required and therefore there was no need for one.



29. The respondent submitted that the sentence was legal and appropriate in the circumstances. The respondent relied on the case of Abdalla versus Republic KECA 1054 (KLR)

Analysis and Determination.

Court's duty

30. The first appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32

Issues

31. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;
- i. Whether the appellant should have been accorded the service of an advocate at state expense.
 - ii. Whether the appellant was mentally unsound and unfit to take the plea.
 - iii. Whether the plea of guilty was properly taken
Of right of representation, and to be accorded an advocate at state expense, and to be informed promptly thereof.
32. Much judicial work has been done in respect of the proximity between the right under Article 50(2) (g), that is the right to choose, and be represented by an Advocate, and to be informed of this right promptly, and the right under Article 50(2)(h) of *the Constitution*, that is the right to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly.
33. Whether these rights were infringed is a matter of factual evaluation.
34. This court is content to cite Mrima J's following findings and conclusions in *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecutions & another (Interested Parties)* [2021] eKLR thus;
- This discussion has, hence, brought to the fore several findings and conclusions on the right to legal representation in Kenya. They include, that: -
- (i) Legal representation is a qualified constitutional right;
 - (ii) Any eligible person is at liberty to apply for legal representation under the Aid Act;
 - (iii) A Court before whom an unrepresented accused person is arraigned is under a constitutional duty to promptly inform the accused person of the right to choose and be represented by an Advocate;
 - (iv) The Court is under a further constitutional duty to promptly inform the unrepresented accused person of the right to have an Advocate assigned to that accused person by the State and at State expense if substantial injustice would otherwise result and the manner in which the accused person may access the right;
 - (v) Unrepresented accused persons charged with the offence of murder and children in conflict with the law continue to be entitled to legal representation at State's expense; and,



- (vi) For the right to legal representation to be firmly embedded in Kenya, it is incumbent upon Courts to ensure that the right is promptly and sufficiently explained to the unrepresented accused persons and that any necessary assistance is accorded to such accused persons towards seeking the representation.

53. Turning back to the case at hand, suffice to state that there is a danger in granting the orders as sought for in the Petition. The danger is that the orders are too general and to a large extent usurp the role of the National Legal Aid Service as provided for in the Aid Act.

35. Other than stating generally, the appellant did not prove that the trial court did not inform him promptly of these rights to legal representation. The appellant did not prove that his right to representation or to be informed thereto was infringed. There was also no specific basis for entitlement to representation at the state's expense.
36. Be that as it may, Courts should ensure that the right to representation is promptly and sufficiently explained to the unrepresented accused persons and that any necessary assistance is accorded to such accused persons towards seeking the representation.
37. Accordingly, this court finds that this ground of appeal fails.

Whether the appellant was mentally unsound and unfit to take the plea.

38. Section 11 of the Penal Code states as follows –“Every person is presumed to be of sound mind at any time which comes in question, until the contrary is proved”.
39. In the present case, however, there was no unusual behavior displayed by the appellant before or even during the proceedings. Even on appeal, nothing shows the appellant cannot comprehend the proceedings or that he suffers from any mental disorder.
40. Thus, to convince a court that an accused person is not of sound mind to take plea, there has to be such proof, on a balance of probabilities. Such proof is lacking in the present case. A mere allegation by counsel or the appellant that he suffers from mental incapacity is not enough.
41. In any case, the record shows he fully comprehended the nature of the charge and the proceedings and responded appropriately to all matters which were succinctly put to him by the trial court in exemplary circumspection.
42. Thus, this court finds nothing on which to find that the appellant was mentally incapable of taking a plea or standing trial. There was absolutely nothing to warrant mental assessment of the appellant in this case.

Whether the plea of guilty was properly taken

43. Concerning the procedure and process adopted by the trial magistrate in taking the plea of guilty herein, in this court's view, the trial court complied with the requirements set out in the case of *Adan v Republic* (1973) EA 445 in that the charge was read in a language he understands and he agreed to it. He was warned of the severity of the charge and sentence in very clear terms, but still maintained that the charges as well as the facts are true. This caution is aimed at ensuring that the plea is the free and informed decision of the accused and is free from any vitiating element. The facts were then summarized by the prosecutor, and he accepted them to be true before he was convicted.



44. Accordingly, this court finds that, the plea of guilty entered herein was proper and unequivocal, and conviction was proper.

On sentence.

45. The relevant penalty clause under which the appellant was sentenced is Section 8 (2) of the Sexual Offences Act which section provides that:

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(2) “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

46. The prosecution submitted that the sentence was within the law.

47. This appeal relates to section 8(2) of SOA which provides for a mandatory sentence, and in respect thereto, the court is content to cite the Court of Appeal in *Dismas Wafula Kilwake vs. Republic* [2018] eKLR that: -

“We hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

48. It appears from the judgment of the trial court that the trial magistrate was guided by the Supreme Court finding in the *Muruatetu* case in sentencing the appellant. She stated, thus: -

‘.... I have put into consideration the fact that the accused person has been committing the offence of defilement against the child herein since she was aged 10 or thereabout, leading to her conceiving. I am alive to the holding in the case of *Francis Karioko Muruatetu*(2017) eKLR, in which it was held that any law that deprives the court of the exercise of judicial discretion by providing mandatory sentencing is ‘harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose’ the mandatory sentence in appropriate cases.

12. In the instant case, I take into account the age of child and the period and manner in which the accused has been committing the barbaric act of defilement against her with a lot of entitlement and without any remorse to the extent of impregnating her. I do not find that the accused person herein deserves any sympathy from this honourable court.

13. I therefore sentence the accused person herein as follows: -

i. With respect to count 1, the accused is hereby sentenced to imprisonment for life.



- ii. With respect to count 2, the accused person is hereby sentenced to serve three (3) years imprisonment.
- iii. The sentences will run concurrently.”

- 49. A perusal of the trial court record, it can be noted that the trial court exercised its discretion.
- 50. The court will exercise discretion in sentencing, and impose an appropriate sentence- which must be dictated by the circumstances and facts of the case.
- 51. The court has considered the fact that the accused is a first offender, but showed no remorse.
- 52. The court has also considered that the offence is serious. The victim was a child of tender age- she was 10 years old when defilement started and continued for 2 years. As a ‘wife’, she is expected to serve ‘conjugal rights’ to her husband. Only God knows the torturous experience she underwent all these years. The manner the offence was committed was brutality causing her injuries and eventually conceived and underwent caesarian surgery. These are dangerous exposures caused by the result of acts of defilement upon her by the appellant. The child also suffers post-traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, this kind of offences leaves the victim with post-traumatic experiences, and the fact that the prevalence of the offence, despite him being a first offender and remorseful, justifies a life sentence in this case. Therefore, a deterrent sentence is necessary.
- 53. Marrying away children is not only criminal but a worst form of abuse of children by the people they look up to for care, nurture and protection. It is outrageous, barbaric, uncouth with no place in the past, present or future of times. It is a direct attack on humanity of the child, life, soul and spirit. It takes away all rights of a child. It is also a manifestation of irresponsibility, shame and disregard of future existence of a nation. Any person who participates in the vice should be prosecuted and be duly punished; the person marrying, the parents marrying away their child daughter, the elders who officiated the ceremony and any other person who knowingly participated in the vice. Those who care should not tire to fight this vice as a way of creating a civilized and responsible society which respects human rights, and promotes realization of full potential of every person; girl or boy; man or woman.
- 54. In the circumstances, the appeal on the sentence is found to be without merit and the same is dismissed. except, however, life sentence herein translates to 30 years imprisonment to which the appellant is hereby sentenced.

Conclusion and orders

- 55. The appellant ‘s appeal is dismissed save life sentence herein translates to 30 years imprisonment to which the appellant is hereby sentenced. The sentence will run concurrently with the other sentence imposed for subjecting a child to marriage.
- 56. It is so ordered

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF APRIL, 2024.

HON. F. GIKONYO M.

.....

JUDGE

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

In the presence of: -

Appellant

Ms. Rakama for DPP

Mr. Otolu - C/A

