



**Ng'eno v Republic (Criminal Appeal 16 of 2016)  
[2024] KEHC 14905 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL 16 OF 2016  
HI ONG'UDI, J  
NOVEMBER 27, 2024**

**BETWEEN**

**MICHAEL KIPRUTO NG'ENO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment and sentence delivered by Hon H. Nyaga on 26th July, 2012 in Chief Magistrate's Molo Criminal Case No. 1863 of 2008)*

**JUDGMENT**

1. Michael Kipruto Ng'eno the appellant herein was charged with the offence of defilement of a child contrary to section 8(1) of the [Sexual Offences Act](#). The particulars being that on 29<sup>th</sup> October, 2008 at 6.30pm in Kipkelion district of the Rift Valley province did an act which caused penetration to JC a child aged 16 years.
2. The appellant denied the charge and the case proceeded to full hearing with the prosecution calling five (5) witnesses. The appellant gave a sworn statement and called one witness for his defence. After the full hearing the court found the appellant guilty, convicted him and sentenced him to serve twenty (20) years imprisonment. Being aggrieved by the Judgment he filed this appeal on 8<sup>th</sup> August, 2012 challenging both the conviction and sentence on six grounds. This was on 7<sup>th</sup> July, 2014. Later he filed the following amended grounds of appeal:
  - i. That the period spent in remand custody as from the date of arrest on 30/10/2008 (see the charge sheet) to the time of conviction on 26/07/2012 a duration of 3 years, 9 months and 16 days was not computed into the twenty (20) year sentence imposed by the trial court.
  - ii. That the Court of Appeal in [Ahmad Abolfathi Mohammed & Another vs Republic \[2018\] eKLR, Criminal Appeal No. 135 of 2016](#), held that it is not enough for the court to merely state



that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody.

- iii. That Paragraph 2.3.18 of the revised sentencing policy guidelines, 2023 provides that section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed.
  - iv. That the constitutional court's decision in *Jona & 87 others vs Republic* is relevant in the present case.
3. The Appeal was canvassed by way of written submissions.

### **The appellant's submissions**

4. In the submissions the appellant, submitted that he was no longer pursuing the appeal against conviction. He was only pursuing the one against sentence. He thus contended that the trial court gave him a sentence which was five (5) years more than the mandatory minimum sentence of fifteen (15 years). Further that him being a first offender should have been given the minimum sentence.
5. His other argument is based on paragraph 2.3.18 of the revised sentencing policy guidelines 2023. He has submitted that the trial court did not apply section 333(2) of the Criminal Procedure code while sentencing him. The said section provides that the sentence should run from the time a convict was incarcerated. Reliance was placed on the Court of Appeal decision in *Ahmad Abolfathi Mohammed & Another vs Republic* [2018] eKLR where it was held that the court must clearly state that the sentence runs from the date of one's arrest. He thus indicated that his date of arrest was 30th October, 2008 from which his sentence should run.
6. The respondent's submissions are dated 23<sup>rd</sup> day of October, 2024 and were filed by M/s Emmah Okok Principal prosecution counsel. Counsel submitted conceding the appeal based on section 333(2) of the Criminal Procedure Code which was not complied with. That the court in sentencing did not consider the period the appellant had been in custody prior to the date of Judgment.

### **Analysis and determination**

7. I have carefully considered the evidence on record, the amended grounds of appeal, both submissions and the law. The issues I find falling for determination are as follows:
  - i. Whether the charge of defilement was proved
  - ii. Whether section 333(2) of the Criminal Procedure Code was complied with.
8. This being a first appeal, the court is called upon to re-evaluate and re-consider the evidence and arrive at its own independent conclusion. This is the position in the cases of:
  - i. *Okeno V republic* (1972) E.A 32
  - ii. *Mark Oiruri Mose V Republic* [2013] eKLR
  - iii. *Kariuki Karanja V Republic* [1986] KLR 190
9. The ingredients for proof of a case of defilement are:
  - i. Age of the victim



- ii. Penetration of the victim's sexual organ
- iii. Identification of the culprit.

### **Age**

10. PW2 FM the mother of PW1 informed the court that the minor was born in 1993 and had mental health challenges. The P3 form (EXB 1) confirms that PW1's estimated age was 16 years at the time of incident. It also confirmed that the girl was mentally retarded. I find that age was proved.

### **Penetration**

11. PW1 explained to the court that when she was going to fetch water she met the culprit who covered her mouth and tore her clothes then dropped her down. He tore her underwear and lay on her. Her mother (PW2) who had sent her heard the girl screaming. She went and found the culprit having sex with the girl. Her clothes were on the ground.
12. PW1 was taken to hospital the next day. PW5 – Yego Kirwa is the Clinical Officer who examined PW1. He found the girl to have a swollen neck, bruises on the lips and forehead, swollen right knee, bruises on labia majora, broken hymen with white discharge. He confirmed that the girl had been defiled. The P3 form was produced as EXB 1. The medical report confirmed the evidence by PW1 and PW2 on sexual assault.

### **Identification**

13. PW2 testified, that she had sent PW1 for water at around 6.00pm as she prepared supper. It was therefore daytime. Both PW1 and PW2 identified the appellant as the culprit. Both stated that they had known the appellant prior to this incident.
14. It was also the evidence of PW3 – Richard Kipng'eno Cheruiyot that PW2 is his neighbour. On the date of incident, he heard PW1 and PW2 screaming. He later went to their home and was told the person who had defiled PW1 was the appellant who is also a neighbor. He followed him and found him at Sangoma's house. In his defence the appellant states that he was at the home of Samuel whom he referred to as PW4. I have gone through the evidence and have not seen any one who testified as Samuel. PW4 was No. 33170 Cpl Kizito Otieno
15. The evidence of the appellant's witness David Koproono Langat a fellow prisoner for another offence was of no assistance to him. He even lied that the appellant was arrested while at his own home. The appellant stated he was arrested at Samuel Ngetich's home.
16. Upon evaluation of the evidence I am satisfied that the appellant was well identified by PW1 and PW2 as the person who defiled the former. The story by the appellant and his witness (DW2) of radio repairing, and eating maize was a made up story contradicting itself on his place of arrest. I find that the learned trial Magistrate analyzed the evidence very well and arrived at the correct decision in convicting him.

### **Whether section 333(2) of the Criminal Procedure Code was complied with:**

17. The said section provides
  2. Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day, the date on which it was pronounced, except when otherwise provided in this Code.



Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

18. I have perused the lower court record and as admitted by the respondent the period the appellant was in custody i.e 3<sup>rd</sup> November, 2008 – 26<sup>th</sup> July, 2012 was not taken into account at the time he was sentenced.
19. Though the charge sheet did not cite section 8(4) of the *Sexual Offences Act* which indicates the sentence that in itself does not make the sentence meted out to be unlawful. The minimum sentence provided is fifteen (15) years. Considering the condition of the victim, what the appellant did was very bad, hence the enhancement of the sentence by the trial Magistrate.
20. I therefore review the sentence and order that the sentence of twenty (20) years imprisonment shall run from the date the appellant was first arraigned in court which is 3<sup>rd</sup> November, 2008.
21. The conviction is thus upheld while the appeal against sentence succeeds only as stated above.
22. Orders accordingly

**DELIVERED, DATED AND SIGNED THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

