



**Wetinda v Republic (Criminal Appeal E109 of 2022)
[2024] KEHC 16012 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E109 OF 2022
E OMINDE, J
DECEMBER 19, 2024**

BETWEEN

CLEMENT MUTESHI WETINDA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appeal arises from the conviction and sentence in Eldoret Chief Magistrate’s Court Case No. 240 of 2020.
2. The Appellant was charged with the offence of Defilement of a child contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 13th day of September 2020, at (particulars withheld) in Kakamega County, he unlawfully and intentionally caused his genital organ (penis) to penetrate into the genital organ (vagina) of PC, a child aged 2 years, 10 months old.
3. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the 13th day of September 2020, at (particulars withheld) in Kakamega County, he unlawfully and intentionally caused his genital organ (penis) to come into contact with the genital organ (vagina) of PC, a child aged 2 years, 10 months old.
4. The Appellant pleaded not guilty and the matter proceeded to full hearing. The prosecution called 4 witnesses in support of its case whereas the Appellant gave sworn evidence in his defence. Upon considering the evidence and the testimonies of the witnesses, the trial court convicted him of the alternative charge. After he was given an opportunity for mitigation, the trial court sentenced him to 10 years’ imprisonment on 05/10/2022.



5. Being aggrieved with the sentence only, the Appellant instituted the present appeal vide a Petition of Appeal dated 18/10/2022 which, in a nutshell, seeks to have the period spent in remand during the pendency of the trial to be factored into his sentence. Additionally, he sought for the sentence to be reviewed to a less severe one.
6. The parties were directed to prosecute the appeal vide written submissions. The Appellant filed written submissions in person. The state filed submissions dated 15/11/2024 through Prosecution Counsel S.G Thuo.

Appellants submissions

7. The Appellant submitted that in recent legal developments, the High Court and the Court of Appeal have come out to rule that the mandatory minimum sentences in the *Sexual Offences Act* are unconstitutional on the ground that they deny Judicial Officers the discretion to award the appropriate sentences in appropriate circumstances. He cited the case of Philip Mueke Maingi & Others vs Director of Public Prosecution & The Attorney general in support of this submission.
8. Further, he stated that in determining the relevance and constitutionality of such sentences, Article 27 of *the Constitution* ought to be taken into account. He stated that it is clear that minimum mandatory sentences do not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed sentence would be appropriate.
9. The Appellant submitted that he is alive to the provisions of Section 4(1) and 4(2) of the Probation Offenders Act and urged that it is arguable whether Sexual Offenders qualify to be considered for probation. He stated that, if they do, then the proponents of minimum mandatory sentences may find it difficult to justify such sentences on the ground. He prayed that this court be pleased to re-evaluate the evidence and make an independent finding on sentence. Further, that the circumstances of the case were that the trial magistrate did not call for a probation report for him to know the right sentence to award.
10. The Appellant submitted that he is 72 years old and urged the court to take judicial notice of that the life expectancy in Kenya is at 64 years. Further, that the bible puts life expectancy is 70 years. He urged that prison life is very difficult and at his age, he might not make it out of prison alive. He placed reliance on the principle on the case of Ali Abdallah Mwanza vs Republic where the Appellant had his sentence reduced based on life expectancy.

Respondents' submissions

11. Learned counsel for the prosecution submitted that the sentence of 10 years was informed by the authority in Muruatetu which position was overturned vide SCOK Petition No. E018 of 2023 – R vs Joshua Gichuki Mwangi & Others.
12. Counsel urged that when considering a matter for resentencing, the court must evaluate the evidence in respect of each case and determine whether there existed aggravating factors. Further, that this was a case where the aggravating factors outweighed the mitigation the applicant had offered. It was his view that the crime was heinous and ought to have attracted a life sentence. In conclusion, counsel submitted that the sentence was lenient in the circumstances and that this court is clothed with the powers to enhance the same to life sentence and proceed to dismiss this application.



Analysis & Determination

Consideration of time spent in custody during trial

13. Section 333(2) of the Criminal Procedure Code provides:-

“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 of, the date on which it was pronounced, except where otherwise provided in this Code.

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

14. According to The Judiciary Sentencing Policy Guidelines:

“The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

15. In *Bethwel Wilson Kibor vs Republic* [2009]eKLR the Court of Appeal expressed itself as follows:-

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

16. In the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018]eKLR where the Court of Appeal held that:-

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. 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. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

17. Given the above it is clear that the requirement that the period spent in remand during the trial be factored in the sentence meted out by the court is a mandatory one and if in the final analysis the court finds that the Appellant's appeal is merited, it is duty bound to factor in this period in the sentence in the event that it is satisfied that this was not done by the Trial Court.

Probation for sexual offenders

18. In considering the Appellant's application that he be considered for probation as provided under the provisions of Section 39 of the *Sexual Offences Act*, it is necessary that the Court reproduces the said provision and the same is as hereunder;

- (1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has--
 - (a) more than one conviction for a sexual offence;
 - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) been convicted of a sexual offence against a child
- (2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence."

19. From the foregoing provisions it is evident that whereas the Appellant qualified for declaration as a dangerous sexual offender for purposes of Section 39 of the *Sexual Offences Act*, granted the fact that he was convicted of a sexual offence against a child, it is noteworthy that he was not so declared by the Court that convicted and sentenced him. Section 39(2) of the Act is explicit that:

"...the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence..."

20. Hence, "the Court" for the purposes of the aforementioned provision is the trial Court. Therefore, in the absence of an order of the trial Court made declaring the Appellant a "dangerous Sexual Offender" as part of the Petitioner's sentence pursuant to the provision of Section 39(2) of the *Sexual Offences Act*, it is misconceived for the Petitioner to seek succour under the aforementioned provision.
21. It should further be noted that the object of that provision is to provide a mechanism for the supervision of dangerous offenders and not to secure their release. In this regard I am of the view that



the orders sought by the Petitioner are untenable under Section 39(2) of the Sexual Offences Act and his application in this regard is dismissed.

23. Other than the above, the Appellant also not only seeks that the period spent in remand be factored into his sentence but that the sentence also be reduced to a less severe one. On the application seeking that the sentence be reduced, the court notes that Petitioner was convicted on the alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 10 years' imprisonment.
24. In light of the fact that the Appellant has not appealed against the conviction by the Trial Court, it follows then that the Trial Court's finding that the victim was a child aged two and a half years in not at all in dispute.
25. In considering and addressing my mind to the accused submission in seeking that his sentence be reduced I note that he has relied on the various decisions of the courts where it has been held that minimum and mandatory sentences are unconstitutional for reasons that they fetter the discretion of courts to mete out appropriate sentences depending on the mitigating circumstances of each case.
26. However, the Supreme Court in Petition No. E018 of 2023, Republic V Joshua Gichuki Mwangi & Others was emphatic on the issue of the mandatory and minimum sentences provided under the Sexual Offences Act and held that until a decision is made on a constitutional petition properly filed challenging the sentences provided for in the Sexual Offences Act, the sentences as currently prescribed under Act remain legal lawful and valid until such a time when the said Act will be repealed and the Courts are bound to apply those sentences as provided.
27. In the said case, a decision of the Court of Appeal where an imprisonment term of 20 years imposed by a Magistrates' Court upon an Appellant who was convicted for defilement was commuted to 15 years was set aside by the Supreme Court and the 20 year imprisonment term reinstated. In setting aside the Court of Appeal decision, the Supreme Court stated as follows with regard to the minimum and mandatory sentences imposed by the Sexual Offences Act 2006;

“.....the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the Sexual Offences Act remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence”
28. In light of this decision of the Supreme Court and given the age of the victim at two and a half years, I am of the finding that the sentence meted out by the Trial Court was lawful legal and proper as provided under the provisions of the Act under which the Appellant was convicted and I uphold the same.
29. On the Application under Section 333(2) of the CPC, this being a mandatory provision, the Court is bound to apply the same. I had perused the Lower Court file. The plea was taken on 17th September 2020 and the Appellant was sentenced on 5th October 2022. I have also confirmed from the said record that he was in remand throughout the Trial and the aggregate period comes to 2 years and 19 days.
30. Being satisfied that his application under 333(2) has merit, I direct that this period be computed within the sentence of 10 years imprisonment meted out by the trial Court. Right to Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 19TH DECEMBER 2024

E.OMINDE

JUDGE

