



REPUBLIC OF KENYA



**Kegode v Republic (Criminal Appeal E026 of 2023)
[2024] KEHC 16025 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E026 OF 2023
JN KAMAU, J
DECEMBER 18, 2024**

BETWEEN

ERICK KEGODE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon M. M. Gituma (SRM) delivered at Vihiga in Senior Principal Magistrate's Court in Sexual Offence Case No 54 of 2020 on 22nd November 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. He was convicted by the Learned Trial Magistrate, Hon M. M. Gituma (SRM), on the charge of defilement and sentenced to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgment, on 17th August 2023, he lodged the Appeal herein. His Petition of Appeal was dated 24th July 2023. He set out two (2) grounds of appeal.
4. His Written Submissions were dated 4th April 2024 and filed on 8th April 2024 while those of the Respondent were dated 16th August 2024 and filed on 27th August 2024. The Judgment herein is based on the said Written Submissions that both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal and parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted. Both Grounds of Appeal were dealt with together as they were both related.
8. The Appellant cited Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) and placed reliance on the cases of *Bethwel Wilson Kibor vs Republic* [2019] eKLR and *Ahmed Abolfathi Muhamed & Another vs Republic* [2018] eKLR where the common thread was that sentence ought to run from the day of arrest. He pointed out that he was arrested on 2nd September 2020 and convicted on 23rd December 2022 but that the said period was not considered during his sentencing. He urged this court to consider the same.
9. He also argued that minimum mandatory sentence that was meted on him was unconstitutional and not warranted no plea (sic). He relied on the case of *Martin Charo vs Republic* [2016] eKLR where it was held that the offence of defilement should not be limited to age and penetration but that the conduct of the complainant should be considered.
10. He contended that young children engaged in sex at a very young age and that it was unfair to sentence offenders to lengthy sentences when the complainants enjoyed the relationships. He pointed out that he approached the Complainant herein, CV (hereinafter referred to as "PW 5") for a friendship which she willingly accepted without coercion and that she knew what kind of relationship she had got into and the consequences thereof. He added that at no point did she report to her guardian, grandparent, friend or relatives that she was being defiled but that she enjoyed sexual intercourse with him.
11. He invited the court's attention to England for instance, where the age of consent was sixteen (16) years and where the sentences were much less stiff at maximum of two (2) years for victims between fourteen (14) and sixteen (16) years of age. In this regard, he relied on the book, *Archbold Criminal Pleading Evidence and Practice* (2002) but did not highlight the part that he was relying upon.
12. He averred that although PW 5 was fourteen (14) years and three (3) months old, she consented to his actions and that she only complained due to the pressure from her father, Leonard Sasi (hereinafter referred to as "PW 2") and grandparents.
13. On its part, the Respondent submitted that the ingredients of defilement were proven during trial and that the Appellant admitted to have had sexual intercourse with PW 5 and conceded that they had sired a child together. It argued that although she had lied that she was sixteen (16) years, the Birth Certificate was produced showing that she was thirteen (13) years at the time of the offence.



14. It placed reliance on the case of Hillary Kipkirui Mutai vs Republic [2022] eKLR where the court in quoting the Supreme Court case of Francis Karioko Muruatetu & Another vs Republic Petition 15 of 2015 (eKLR citation not given) held that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.
15. It contended that the Trial Court considered the Appellant's mitigation before sentencing him and that the sentence was lawful in the circumstances. It urged the court to dismiss his Appeal for lack of merit and uphold his sentence.
16. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

“ A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”
17. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful. It was immaterial that PW 5 agreed to his sexual advances and enjoyed sexual relations with him or that she did not report the incident immediately it occurred or that she was not threatened. He admitted siring a child with her and therefore had to bear the consequences of his unlawful actions.
18. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
19. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
20. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.
21. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.
22. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against him herein undisturbed.
23. In the premises, Ground of Appeal No (2) of the Petition of Appeal was therefore not merited and the same be and is hereby dismissed.
24. Going further, this court was mandated to consider the period that he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).



25. The said Section 333(2) of the Criminal Procedure Code stipulates that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).

26. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“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.”

27. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic*(Supra).

28. The Appellant was arrested on 2nd September 2020. Although he was granted bond, he seemed not to have posted the same. He was sentenced on 23rd December 2022. He therefore spent two (2) years, three (3) months and twenty (20) days in custody before his sentencing. A perusal of the proceedings showed that the Trial Court did not take into account the said period while sentencing him. This period therefore ought to be taken into consideration while computing his sentence.

29. In the premises, Ground of Appeal No (1) of the Petition of Appeal was therefore merited and the same be and is hereby allowed.

Disposition

30. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 24th July 2023 and lodged on 17th August 2023 was partly merited in respect of the prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) only. His conviction and sentence be and are hereby upheld as they were both safe.

31. For the avoidance of doubt, it is hereby directed that the period between 2nd September 2020 and 22nd December 2022 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

32. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF DECEMBER 2024

J. KAMAU

JUDGE

