



REPUBLIC OF KENYA



KENYA LAW
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**Gitahi v Republic (Criminal Appeal 81 of 2017)
[2023] KEHC 1307 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 81 OF 2017
J WAKIAGA, J
FEBRUARY 22, 2023**

BETWEEN

SAMUEL KIBURI GITAHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence of Hon. D.M
Kiviti SRM in Kangema SPM SO NO 15 of 2017)*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006, the particulars of which were that on the 27th day of August 2017, at Kangema, he intentionally caused his penis to penetrate the vagina of MKW a child aged 15 years.
2. He pleaded guilty to the said charges and was sentenced to serve twenty-five (25) years imprisonment.
3. Being aggrieved by the said sentence, he filed this appeal on the grounds that the same was excessive being a first offender and that in holding that his hands were bound by legislation, the same misapprehended the law.
4. When the appeal came up for hearing, Mr. Kirubi, submitted that the victim was born on March 30, 2002 and was therefore fifteen years and five months, which the court did not take into account.

It was further contended that the court did not exercise discretion while sentencing the appellant.

It was submitted that the court did not take into account the fact that the appellant had been in custody since 2018 and had since reformed.



5. On behalf of the State, Ms. Otieno submitted that the sentence was lawful as the victim was fifteen years until she turns sixteen. It was submitted that the court could not amend the statute which provided for the sentence mated out.

Determination

6. The issue for the court determination, is the vexing question of the place of the minimum and maximum sentences arising from the determination of the Supreme Court in the *Muruatetu Case* and the directions issued thereafter in the *Muruatetu 2* where the court stated that the ratio decided of Muruatetu1 was only applicable to the offence of murder under section 203 as read with section 204 of the *Penal Code* and therefore did not out law or other mandatory sentences under the Penal Code or *Sexual Offences Act* under which the appellant was charged.
7. Of note is that the Supreme Court in *Muruatetu 2* directed that a challenge to the mandatory sentences on other offenses to be filed in the high court and true to their challenge, the High Court Odunga and Mativo JJ (as they then were) have pronounced themselves thereon by declaring the mandatory sentences under the *sexual Offences Act* unconstitutional which though not binding on this court is persuasive.
8. In this appeal it therefore follows that in holding that his hands were bound by legislation, having found as a fact that the sexual act was consensual as a result of love affair, despite the age of the complainant, the court fell into error.
9. Further having found that the sentence provided for was a minimum of twenty years, being a first offender and the circumstances of the case where he found as a fact that the complainant enjoyed the pleasure of the sexual intercourse, and was a girlfriend of the appellant who was very happy to meet with him at a market in the company of her friend Wairimu, without any evidence that she was school going , there was no justification in sentencing the appellant to a twenty-five-year imprisonment.
10. Whereas the sentence was lawful, the trial court did not give the reasons for going outside the minimum sentence provided for by the law and would therefore allow the appeal, quash the sentence herein and this being first appeal, substitute the same with a sentence of ten (10) years with effect from September 4, 2017 when the appellant was convicted. The appellant is entitled to remission thereon.
11. And it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 22nd DAY OF FEBRUARY 2023

J.WAKIAGA

JUDGE

In the presence of:-

Court assistant: Ms Carol Mutahi

