



**Kamaye v Republic (Criminal Appeal E027 of 2022)
[2023] KEHC 3461 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E027 OF 2022
RE ABURILI, J
APRIL 25, 2023**

BETWEEN

ROBERT AKOLO KAMAYE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment, Conviction and Sentence imposed by Hon FM Rashid Principal Magistrate vide Winam SPM Sexual Offences Case No 34 of 2019 delivered on June 22, 2022.
2. The Appellant Robert Akolo Kamaye 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.
3. He pleaded not guilty to the charge which also had the alternative of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
4. The child victim of the offences was LPO aged 14 years old and the offence took place on July 28, 2019 within [Particulars Withheld] area, Kisumu County.
5. The Appellant denied committing the offence. However, in his defence, he admitted that he met the victim at night near his place, took her to his house and gave her a bed to sleep on as he slept on the floor.
6. The trial magistrate after considering the prosecution and defence case, found the prosecution to have proved its case against the appellant beyond reasonable doubt. She convicted the appellant and sentenced him to serve 10 years imprisonment.
7. Aggrieved by the conviction and sentence imposed, the appellant filed this appeal on July 4, 2022.



8. Upon his appeal being admitted to hearing on March 23, 2023 and the appellant being served with a complete record of appeal and directed to file his written submissions to canvass the appeal, on April 24, 2023 he filed his submissions and an amended petition or grounds of appeal.
9. He also appeared in court virtually and applied to have his appeal against conviction withdrawn, urging this court to only consider sentence reduction to a least severe sentence preferably time already served, pursuant to Section 26(2) of the Penal Code and Article 50(2) (p) and 24(1) (e) of the Constitution.
10. In his written submissions, he cited the ICCPR (the Covenant) and Article 2(b) of the Constitution and 10(3) of the Covenant on its applicability to Kenya under the Constitution.
11. He submitted that although the victim was a minor, applying English decisions and the case of Eliud, Waweru Wambui vs R (2019) eKLR, she was capable of making an intelligent decision to have sex.
12. He complains that our prisons are teeming with young men serving lengthy sentences for having sexual intercourse with adolescent girls whose consent is immaterial because they are under 18 years, which was unfair.
13. He also urged the court to note that he was arrested on July 30, 2019 and his sentence was pronounced on June 22, 2022.
14. The prosecution counsel left the matter of sentence to court but did not object to withdrawal of the appeal against conviction.
15. This court then allowed the withdrawal of the appellant's appeal against conviction.
16. I have considered the amended grounds of appeal, written submissions and the mitigations by the Appellant. I observe that although the appellant denied committing the offence, in this appeal, he has conceded by withdrawing his challenge against his conviction and chosen to pursue the sentence imposed.
17. The Appellant was sentenced to serve 10 years imprisonment upon being convicted under Section 8(3) of the Sexual Offences Act which provides that upon conviction for the offence of defilement under Section 8(1), where the child is aged 12-15 years, sentence is not less than 20 years imprisonment. The minor's birth certificate produced as an exhibit shows that she was born on December 5, 2004. The offence took place on July 28, 2019. The victim was 14 years and six (6) months.
18. The Appellant, upon this court asking him of his age, he stated that he is 26 years old. The trial magistrate was well aware of the mandatory minimum sentence stipulated under Section 8(3) of the Sexual Offences Act but she exercised her discretion and sentenced him to serve 10 years imprisonment instead of 20 years imprisonment.
19. In other words, the Appellant got only half of the Mandatory Minimum Sentence. The circumstances surrounding the offence committed against the minor are such that the Appellant used threats of insecurity of the minor who was on her way home, lured her into his house and defiled her.
20. There was no evidence that the minor at her age of 14 years conducted herself in the manner suggestive that she ventured out to have sex with the appellant who now claims that he was married with a child who has a disability.
21. In Bernard Kimani Gacheru Vs Republic (2002) eKLR, the Court of Appeal stated that:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must



depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

22. In *Charles Ndirangu Kibue v Republic* [2016] the Court observed that in sentencing, the court must take into account the fact that one of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. See also *Julius Maumbo Dzombo v Republic* [2020] eKLR.
23. The trial court having exercised discretion and having imposed only half of the Mandatory Minimum sentence, I find no reason to interfere with that discretion to reduce that sentence further as the Appellant preyed on an innocent child and defiled her mercilessly then he gave her Kshs 200/=.
24. I find the appeal against sentence not merited. I dismiss it.
25. However, as the Appellant was in custody during the trial upon his arrest on July 30, 2019 as per the Charge sheet dated 1st August 2019 until he was sentenced on June 22, 2022, I hereby invoke the provisions of Section 333(2) of the *Criminal Procedure Code* and order that the ten (10) years imprisonment shall be calculated from July 30, 2019, the date of arrest.
26. I so order
27. This file is hereby closed.

Dated, Signed and Delivered at Kisumu this 25th Day of April, 2023

R. E. ABURILI

JUDGE

