



**Ambuso v Republic (Criminal Appeal E007 of 2022)  
[2023] KEHC 17674 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17674 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E007 OF 2022  
RE ABURILI, J  
MAY 23, 2023**

**BETWEEN**

**JOSHUA AMBUSO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Senior Principal  
Magistrate’s Court Sexual Offences Case No 1 of 2020 at Nyando)*

**JUDGMENT**

1. The Appellant Joshua Ambuso was on February 9, 2022 convicted and sentenced to serve twenty (20) years imprisonment *vide* Nyando Senior Principal Magistrate’s Court Sexual Offences Case No 1 of 2020. He was charged with the offence of defilement of MA, a child aged 13 years on 1<sup>st</sup> to 6<sup>th</sup> day of January 2020 in Nyando Sub location within Kisumu County.
2. He pleaded not guilty but in his sworn defence given on December 7, 2021, he stated as follows:  

“...the charges are true. We had agreed with her. I had agreed with the girl and we went to my home and we stayed with her upto January 6, 2020. I had asked the girl whether she was in school and she said no. she stated that she was a student but before then she had lied that she was not a student. I ask for forgiveness.”
3. On being cross examined by the prosecution, the Appellant stated as follows:  

“I had stayed with the complainant from January 1, 2020 to January 6, 2020. We stayed as husband and wife and had sex.”



4. The witness for the Appellant, DW 2 ZO the Appellant's paternal uncle testified and recalled that in December, the accused went to [Particulars Withheld] town and returned home with a girl and he had slept with the girl for one day and DW1 went to his house and inquired on who she was and the Appellant replied that the girl was his friend. DW 2 told the Appellant that he was not at the stage to marry and asked him to escort the girl to return to her home, which he did after three days.
5. When PW 1 the complainant testified, she stated that she is the one who agreed to follow the Appellant and willingly engaged in sex with him at his house for the days that she stayed with him. She asked the court to forgive Joshua, the appellant herein and to forgive her. She stated that she loved Joshua. She was 13 years old. The Appellant was about 18 years at the time of the offence.
6. The presentence report dated January 31, 2022 recommended probation sentence. I have given the background evidence that led to the conviction and sentencing of the Appellant herein to serve twenty (20) years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.
7. In his grounds of appeal, the appellant laments that the sentence imposed was harsh and disproportionate; the investigations were shoddy and the ingredients of the offence were not proved beyond reasonable doubt.
8. At the hearing of the appeal on April 18, 2023, the Appellant on his own accord urged this court to have his appeal against conviction withdrawn which appeal was withdrawn. He urged this court to consider reducing the twenty (20) years prison sentence. He states that he committed the offence, which submissions is consistent with his defence in the lower court. He stated that he was remorseful and that he was not aware of the consequences of his actions.
9. The prosecution left the issue of sentence to court.

### **Determination**

10. I have considered the appeal on sentence reduction, the fact that the Appellant throughout the trial admitted committing the offence although he did not plead guilty to the charge as read out to him and even called a witness who corroborated his admission.
11. The statement by the minor who nonetheless had no capacity to consent to being defiled by an adult as she was 13 years old and the age of the Appellant which was 18 years as at the time of the offence, was that she willingly went to have sex with the appellant and that she loved him.
12. I have considered the presentence report which recommended noncustodial sentence on probation. The Appellant was also said to be newly married.
13. I have considered the fact that the Appellant was a first offender. The offence of defilement is a heinous offence against the dignity of a child. In this case, the presentence report reveals that she has been mocked at home and at school and she had suffered psychologically because of the stigma. This will affect her for the rest of her life unless she is counselled as she kept blaming herself for willingly going for sexual escapades, saying that it was because of lack of money at her home. Her mother had separated from her father and so they moved with her mother from home to a market place where she found herself in this unfortunate situation. A child should never blame herself for being defiled. She is a child and what she lacked was protection hence she was vulnerable and was preyed upon by the Appellant who took advantage of her naivety and poverty and took her to his residence to have sex with her even before those dates mentioned in the charge sheet.



14. I also observe that the Appellant was and is still a young adult who ignorantly preyed on a child without knowing the serious consequences of defiling a child. Nonetheless, ignorance of the law is no defence.
15. Sexual offences attract Mandatory Minimum sentences and in this case, the Mandatory Minimum sentence is twenty (20) years imposed by the trial court, which is lawful sentence.
16. However, the Section 8(3) of the *Sexual Offences Act* uses the term 'liable' meaning, the court has discretion to impose sentence and not necessarily the Mandatory Minimum.
17. In addition, the debate as to whether the court retains the discretion to interfere with Mandatory Minimum Sentence is raging with courts applying the principles set in the *Francis Karioko Muruatetu & Another vs Republic* (2017) and as clarified by the Supreme Court, with Justice Odunga in Machakos HC Constitutional Petition No 17 of 2021 holding that the courts have discretion, applying the principles responded in the Muruatetu case that Mandatory death sentence was unconstitutional as it deprived the High Court of discretion in sentencing having regard to the circumstances of each case. I addition, that the accused/convict was denied the right to mitigate.
18. Nonetheless, the Supreme Court was clear and it set out guidelines, while holding that death sentence was lawful and constitutional and a court would in appropriate cases and circumstances, impose death penalty on a convict.
19. In the same vein, I am of the view that mandatory Minimum sentence remain lawful and a court of law can still impose such sentences, having regard to the circumstances of each case.
20. In the present case, and having regard to the mitigations and circumstances under which the offence was committed, which do not justify commission of the offence, the respective ages of the victim and accused, I find this court has discretion to interfere with the sentence imposed. See the recent decision of the Court of Appeal at Malindi in *Chigongo Dziye v Republic* CRA No 31 of 2022 rendered on April 14, 2023.
21. I therefore set aside the twenty (20) years imprisonment imposed on the Appellant and substitute it with a prison term of ten (10) years imprisonment to be calculated from January 6, 2020 in line with the provisions of Section 333(2) of the *Criminal Procedure Code*, taking into account the number of days the Appellant spent in custody from the date of arrest on January 6, 2020 and release on bond on January 21, 2020.
22. I so order.
23. File closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 23<sup>RD</sup> DAY OF MAY, 2023**

**R. E. ABURILI**

**JUDGE**

