



REPUBLIC OF KENYA



KENYA LAW
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**Chepkenda v Republic (Criminal Appeal E057 of 2021)
[2023] KEHC 18171 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E057 OF 2021
RE ABURILI, J
MAY 23, 2023**

BETWEEN

ANTHONY NGAINA CHEPKENDA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Tamu Senior Principal Magistrate's Court Sexual Offences Case No. E023 of 2021 delivered on 23rd November 2021 and sentenced on /12/2021 by Hon. P. K. Rugut, Principal Magistrate)

JUDGMENT

1. This appeal arises from the conviction and sentence in Tamu Senior Principal Magistrate sexual offences case No E023 of 2021. The appellant herein Anthony Ngania Chepkenda was convicted and sentenced to serve life imprisonment on December 6, 2022 by Hon P. K Rugut, Principal Magistrate, for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act.
2. Particulars of the charge were that on July 11, 2021 in Muhoroni sub county within Kisumu county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MNJ, a child aged 10 years.
3. The appellant also faced the alternative charge of committing an indecent act with the same child at the same place and time contrary to section 11(1) of the Sexual Offences Act.
4. The appellant pleaded not guilty to both the main and alternative charges. The prosecution called 5 witnesses who testified against the appellant. Placed on his defence, the appellant gave sworn statement of defence and denied committing the offence and only stated how he was arrested saying the complainant's family had his debt of Kshs 35,000 and that they also had a feud over land.



5. Aggrieved by the conviction and sentence, the appellant filed this appeal challenging both the conviction and sentence imposed. He also filed supplementary grounds of appeal and written submissions dated March 27, 2023.
6. When the appeal came up for hearing, after the appellant had filed his submissions, he applied to withdraw his appeal/challenging conviction and urged the court to consider sentence only.
7. The prosecution had no objection save that they supported the sentence imposed following the conviction of the appellant. The court therefore marked the appellant's appeal against conviction as withdrawn.
8. The appellant submitted in mitigation that he was suffering, that his wife was expectant while his mother was sick. That he regretted committing the offence, that he will never repeat the offence and asked for leniency from the court.
9. I have considered the submissions on sentence reduction on appeal and the fact that the appellant has conceded that he committed the offence which act he now regrets and promises not to repeat the offence.
10. Section 8(2) of the Sexual Offences Act provides for mandatory minimum sentence of life imprisonment upon conviction where the victim child is under the age of 11 years.
11. I observe that on the 1st hearing, after PW 1 had testified, the appellant requested the court to allow the case to be settled at home but he was reminded by the court that sexual offences cannot be settled at home.
12. After returning a guilty verdict, the trial court called for a presentencing report which was filed by the probation officer. It is dated December 6, 2021. He also considered the victim impact report. There is however no evidence on record that the accused person was even given the opportunity to mitigate before sentence was pronounced.
13. The trial court considered the fact that the appellant was a first offender, that the victim had been defiled severally, that the community attitude is positive towards the offender, and the sentence prescribed under section 8(2) of the Sexual Offences Act was life imprisonment.
14. From the presentence report, the appellant had a family of a wife and six children who all depended on him, that he had admitted committing the offence, was remorseful and was praying for leniency.
15. No doubt, a sexual offence such as the one facing the appellant is heinous. There is no excuse for what a so called 'good man' according to the family of the appellant did to a child aged 10 years, however remorseful he may be, now, upon realisation of the serious consequences of his actions. The appellant was aged 30 years old. The victim was indeed, like a daughter to the appellant. He had a legal duty not to violate her. He breached that duty. He knew that he was married and had dependants who relied on him hence the need to ensure that he does not involve himself in crime that would affect their livelihood.
16. The appellant was granted lenient bond terms by the trial court which terms were reduced further from Kshs 100,000 with one surety of similar amount to Kshs 80,000 plus one surety of similar amount but no surety showed up to secure his release. That in itself is telling about the socio economic situation of the appellant and his family.
17. From the charge sheet dated July 23, 2021, the accused/appellant was arrested on July 18, 2021. The uncontroverted evidence of conviction shows that he had defiled the complainant on three occasions



- before he was nabbed. He was therefore held in custody until the case was heard and determined on December 15, 2021 and to date upon conviction which is about one (1) year and four (4) months.
18. In his written submissions on sentence, he asserts that the mandatory life imprisonment under section 8(2) of the [Sexual Offences Act](#) is unconstitutional. He urged the court to so find and review his sentence on account of its excessiveness relying on Mombasa HC petition No 97 of 2021 Edwin Wachura & 9 others v Republic and also invoke section 333(2) of the [Criminal Procedure Code](#), taking into account the period that he spent in custody.
 19. Judicial discretion is an essential part of the justice system. In exercising judicial discretion, a judge is left to decide on the appropriate sentence by considering the individual circumstances of the offender, the crime, and the victim of the offence. The decision of the trial judge or magistrate should however not be influenced by moral perspectives but should be given according to the established law.
 20. This court is aware of the minimum mandatory sentences espoused in the [Sexual Offences Act](#). Thus judicial discretion is limited by the statute in mandatory sentences.
 21. However, in the [Francis Karioko Muruatetu & another v Republic](#) (2017) eKLR case, the Supreme Court in pronouncing itself on the constitutionality of mandatory death sentence for the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#), upon conviction, was clear that whereas death sentence was lawful and constitutional, the mandatoriness thereof was unconstitutional as it deprived the trial court of the opportunity to mete out appropriate sentence having due regard to the circumstances of the offence and that it also denied the accused convicted person the opportunity and right to mitigate.
 22. In sentencing, the courts must take into account the aims and objects of punishment as reiterated in the Judiciary Sentencing Policy Guidelines being; deterrence; protection of the society; reformation; retribution and rehabilitation of the offender. Life imprisonment is an indeterminate prison sentence because it has no fixed length of time. One has to remain in prison until they expire and return to their maker.
 23. It serves the purpose of deterring the offender from repeating the same offence and also warns those prospective offenders of the serious consequences of committing such offence(s).
 24. In [Maingi & 5 others v DPP & another](#) petition No E017 of 2021 [2022] eKLR applying the principles espoused in [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR and the Muruatetu 2 reiterated that it was the construing of the provisions of the law on sentencing, providing for mandatory death sentence that tied the hands of the trial courts that had to be held to be unconstitutional. The learned judge observed that the finding thereof did not mean that the court ought not to mete out what appears as *prima facie* mandatory minimum sentence. The circumstances of the offence had to be considered and having done so, nothing barred the court from imposing such sentences as were appropriate to the offence committed.
 25. Further, that the court's role was to align legislation that was in existence before the promulgation of the [Constitution](#) of Kenya 2010 with the letter and spirit of the [Constitution](#). He further observed that the [Sexual Offences Act](#) ought to be amended but the decision to do so remained with the legislature. I can't agree more, without watering down the rationale behind the enactment of the Act to punish sexual offenders who take advantage of very young children by defiling them.
 26. Applying the [Francis Muruatetu v Republic](#) (supra) principles, and citing the decisions of the Court of Appeal where the Court of Appeal reduced mandatory sentences under the [Sexual Offences Act](#) the judge declared, just as the Supreme Court did, in the [Francis Muruatetu case](#), the judge found that the mandatoriness of the sentences in the [Sexual Offences Act](#) was unconstitutional.



27. I have no petition before me to apply the above decision verbatim. However, applying the Court of Appeal decision in *Jared Koita Injiri v Republic* [2018] eKLR which relied on the Supreme Court case of *Francis Muruatetu; Christopher Ochieng v Republic* [2018] eKLR; *Dismas Wafula Kilwake v Republic* [2019] eKLR, and the appellant having owned up at this stage to having committed the offence but begging for leniency of the court and considering the presentence report and the fact that the appellant was never accorded an opportunity to mitigate on account of the mandatory nature of the life imprisonment provided for under section 8(2) of the *Sexual Offences Act*, I exercise discretion and allow the appeal against the mandatory life imprisonment imposed on the appellant. I set it aside and substitute life imprisonment with thirty (30) years imprisonment to be calculated from July 18, 2021 the date of arrest as the appellant did not secure a surety to sign for him to be released on bond pending trial.
28. In the end, this appeal is only allowed on sentence as stated above, appeal against conviction having been withdrawn by the appellant.
29. This file is closed.
30. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2023

R. E. ABURILI

JUDGE

