



REPUBLIC OF KENYA



KENYA LAW
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**Kibet v Republic (Criminal Appeal E023 of 2022)
[2023] KEHC 19430 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E023 OF 2022
RB NGETICH, J
JUNE 29, 2023**

BETWEEN

SAMMY KIBET APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence from the Judgment of Honourable
N.M. Idagwa (SRM) delivered on the 30th of August, 2021 at Kabarnet
Senior Principal Magistrate's Court S/o Criminal case No. 3 of 2020))*

JUDGMENT

1. The appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(4) of the *Sexual offences Act* No 3 of 2006. The particulars of the offence being that the 2nd day of February, 2020 in Tiaty East sub-county within Baringo county intentionally caused his genital organ (penis) to penetrate through the genital organ (vagina) of a female juvenile named BC aged 16 years.
2. The accused was charged with alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No 3 of 2006, the particulars of the offence being that the accused on the 2nd day of February, 2020 in Tiaty East Sub- County within Baringo county intentionally caused his genital organ to come into contact with the genital organ of female juvenile named BC aged 16 years.
3. The accused denied the main charge and its alternative. The matter proceeded for full trial where the prosecution called a total of 7 witnesses in support of the charge and the accused gave unsworn statement in his defence and closed his case.
4. By judgment delivered on the 30.08.21, found the accused guilty as charged, convicted and sentenced to serve 15 years imprisonment to start from the date he first appeared in court.



5. Dissatisfied with the conviction and the sentence of the trial court, the appellant filed a petition of appeal on the following grounds: -
 - i. That he is a first offender.
 - ii. That the sentence meted upon him was harsh, unjust, unfair and inhuman.
 - iii. That he is remorseful, repentant and reformed.
6. In submissions, the appellant abandoned appeal on conviction. He stated that he is contended with conviction and prayed that his appeal on sentence be allowed; that the sentence be set aside or substituted with an ideal and proportionate sentence and/or the court grant in other orders that it may deem fit to grant.

Appellants Written Submissions

7. The appellant urged this court to review his sentence arguing that sentencing should have a goal of salvaging and rehabilitation of the offender; that an accused should be treated with compassion and understanding. He cited the case of *Republic versus Thomas Patrick Gilbert Cholmondeley* Criminal case No 55 of 2006 where the accused person was sentenced to serve 8 months imprisonment for the offence of murder and the court put into consideration the period served in pre-trial custody, considered the total circumstances of the case and invoked the guiding principles in sentencing.
8. The appellant in his supplementary grounds of appeal/mitigation submits that he is a first offender and in his supplementary submissions, he stated that he is contended with the conviction but he is seeking the review of the sentence pursuant to section 362, 364 and 365 of the *Criminal Procedure Code* and in reliance of articles 25c and 50 of the *Constitution* by the court reducing the sentence to proportionate terms.
9. The appellant cited the cases of *Maingi & 5 others vs Director of Public Prosecutions & another*, Petition No E017 of 2021 [2022] KEHC 13118(KLR), *Joshua Gichuki Mwangi Vs Republic* (2022) Nyeri HC Criminal Appeal No 84 of 2015, *Moses Kitui Barasa Vs Republic* Eldoret HC Petition No 7 of 2018 where accused persons charged with capital offences had their sentence reviewed to determinate terms under article 27 of the *Constitution*, the appellant argues that his case should be exception.
10. The appellant submits that he is remorseful, repentant and has reformed and begs for leniency. He urged court to invoke the provisions of the sentencing policy guidelines 2016 by the Kenyan Judiciary and be pleased to review his sentence on the basis that he has been rehabilitated having undergone various processes of rehabilitation programs offered in prison.

Respondents Written Submissions

11. I note the state counsel submitted on conviction though the appellant abandoned appeal on conviction. I will consider submissions on sentence.
12. The appellant requested to be released on a non-custodial sentence, that the period he was in remand was reduced by the lower court. That he was sentenced to serve 15 years imprisonment.
13. In response, the state counsel informed the court that the accused was sentenced to start from the time of arrest. That the law is clear on re-sentencing; that the law is clear on the minimum sentence. She however left the issue to the court to decide.



Analysis and Determination

14. I have considered submissions made by both parties. What I wish to consider is whether to revise the sentence imposed by the trial court.
15. In the case of *Bernard Kimani Gacheru vs Republic* [2002] eKLR the Court of Appeal stated as follows:
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“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 states is shown to exist.”
16. The appellant was convicted of the offence of defiling a minor aged 16 years old. Section 8 (4) of the *Sexual Offences Act* which is the penal provision for the offence of defilement where the victim was between 16 years and 18 years, the accused is liable upon conviction to imprisonment for a term of not less than fifteen years. In this case, the appellant was sentenced to 15 years imprisonment which is the mandatory minimum sentence for the offence committed.
17. In *Francis Karioko Muruatetu & another Vs Republic* [2017] eKLR, the court declared mandatory nature of sentences as unconstitutional for taking away the discretion of the judge or judicial officer in imposing sentence according to circumstances of each case.
18. Later in *Muruatetu & another v Republic* [2021] eKLR, the supreme court clarified that the case applied to cases of murder only. The magistrate did not therefore have discretion to impose a sentence below the minimum 15 years and did not therefore act on wrong principles in imposing the sentence herein. I will not therefore disturb the sentence imposed by the trial magistrate.

Final Orders : -

19. The appeal on conviction is marked as abandoned.
2. Appeal on sentence is hereby dismissed.
3. Right of appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 29TH DAY OF JUNE 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms. Ratemo for state.



Appellant present.

