



**Nalinya v Republic (Criminal Appeal E092 of 2022)  
[2023] KEHC 20966 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20966 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E092 OF 2022**

**DK KEMEL, J**

**JULY 28, 2023**

**BETWEEN**

**AUGUSTINE JUMA NALIANYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the sentence of Hon Manasseh (RM) in Sirisia  
Principal Magistrate's Court S.O No. E011 of 2022 dated 7th November, 2022)*

**JUDGMENT**

1. The appeal herein arises from the conviction of the Appellant by Hon Manasseh (RM) in Sirisia S.O E011 of 2022 dated 7<sup>th</sup> November 2022, for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* as well as Assault causing actual bodily harm contrary to section 251 of the *Penal Code* wherein he was sentenced to 15 years' imprisonment and 3 year's imprisonment, respectively and which were to run concurrently.
2. He was aggrieved by the said conviction and sentence and filed a Petition of appeal on November 21, 2022 where he raised grounds inter alia; that the sentence imposed is harsh and excessive; that his family is very poor as he is the only breadwinner; that the sentence be substituted with a sentence under probation.
3. The matter was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
4. The Appellant in a nutshell submitted that this Court considers reducing the imposed sentence and that it may fall under probation terms.
5. The Respondent opposing the appeal submitted that the Appellant was granted the opportunity to mitigate before the sentence and that the same was considered. Counsel reminded the Court that



section 8(4) of the [Sexual Offences Act](#) provides for a minimum sentence of 15 years and that the Appellant was given the minimum sentence as was the case in the Assault charge. Counsel relied on the cases of [S v Malgas](#) 2001 (1) SACR 469 (SCA) and the case of [Bernard Kimani Gacheru v Republic](#) (2002) eKLR. Counsel submitted that the Appellant in this case assaulted the victim and strangled her then defiled her. She urged this Court to dismiss the appeal.

6. As a first appellate Court, I will re-evaluate the evidence and make my own conclusions, except, bearing in mind that I neither saw nor heard witnesses, thus, matters of demeanour are best observed by the trial Court. See [Okeno v Republic](#) [1972] EA 32.
7. I find the main issue for determination is whether the sentence was manifestly harsh and excessive.
8. The Respondent submitted that the sentence passed by the trial Court was just and fair considering the circumstances of the case. That considering all the aggravating factors in this case, the sentence imposed upon the Appellant was quite lenient and urged this Court to affirm the sentence passed by the lower Court.
9. The relevant penalty clause is section 8(4) of the [Sexual Offences Act](#) which provides as follows: -

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
10. Sentencing is a matter within the discretion of the trial Court. The [Kenya Judiciary Sentencing Policy Guidelines](#) appreciated that whereas mandatory and minimum sentences reduced sentencing disparities, they however fettered the discretion of Courts, sometimes resulting in grave injustice.
11. In sentencing the Appellant, the trial Court did not take into account that the decision in [Francis Muruatetu & Another v Republic](#) [2017] eKLR and [Maingi & 5 others v Director of Public Prosecutions & another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR) that grant trial Courts the discretion to impose an appropriate sentence and that they are not bound to impose the minimum prescribed sentence. This was an error of law, which entitles this Court to interfere with the discretion exercised by the trial Court.
12. I have taken into account that the Appellant is a first offender and has been in custody since his date of arrest. It is noted that the trial court called for a social enquiry report on the appellant. The same is dated 4/11/2022. It seems the trial court did not consider the said report during the sentencing of the appellant. The same appeared to favour a non-custodial sentence namely probation. However, the offences were committed against the complainant after the appellant had strangled her. The social enquiry report revealed that the complainant was traumatized by the incident. It also indicated that the appellant might have been drunk at the time. Looking at the circumstances of the offences and the social enquiry report, I find that a custodial rehabilitation is appropriate. The appellant had preyed upon a hapless complainant who almost lost her life through due to the appellant's action in strangling her before defiling her right along a foot path at around 4.00 pm. The appellant did not have any regard for the complainant. I find that he need the custodial rehabilitation before being released back to the society.
13. The appellant did tender his mitigation before the trial court before it imposed the sentence. This court has to adhere to the well-trodden path namely that sentence is a matter that rests in the discretion of the trial court. As an appellate court, I will not interfere with the sentence unless it is shown that the same is manifestly excessive in the circumstances or that the trial court took into consideration irrelevant factors or a wrong principle. The record of appeal shows that the appellant's mitigation was



duly taken into consideration by the trial court. The trial court imposed the minimum sentence on the first count while on the second count a sentence of three years was imposed. The second count attracts a maximum sentence of five years' imprisonment and hence the three years' imprisonment is not excessive in any way. Going by the cases decided after the *Muruatetu*(*Supra*), the courts are now not hamstrung to impose the minimum sentences but that they can impose appropriate sentences depending on the circumstances of each case.

14. In view of the foregoing observations and considering the circumstances of the case including the mitigating and aggravating factors, I find the sentence imposed on count one is manifestly excessive. I find a sentence of twelve (12) years' imprisonment on count one would be appropriate in the circumstances. The sentence imposed on count two is reasonable and not excessive.
15. In the result, the appeal partly succeeds to the extent that the sentence of fifteen (15) years' imprisonment on count is set aside and substituted with a sentence of twelve (12) years' imprisonment. The sentence on the second count shall not be interfered with. Both sentences shall run concurrently and shall commence from the date of arrest namely April 4, 2022.
- 16 It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 28<sup>TH</sup> DAY OF JULY 2023.**

**D.KEMEI**

**JUDGE**

**In the presence of:**

Augustine Juma Nalianya Appellant

Ayekha for Respondent

Kizito Court Assistant

