



REPUBLIC OF KENYA



**Thuva v Republic (Criminal Appeal E058 of 2022)
[2023] KEHC 24952 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E058 OF 2022
JM CHIGITI, J
SEPTEMBER 29, 2023**

BETWEEN

GABRIEL NGALA THUVA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in lower court criminal case file No. 52 of 2018 in the CM's Court at Malindi before Hon. Elizabeth Usui (CM))

JUDGMENT

Background

1. The appellant was herewith charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#) no 3 of 2006, in that on July 18, 2018 in Malindi Sub county within Kilifi county, intentionally and unlawfully caused my penis to penetrate into the female genital organ of (vagina) of FMK a child aged 14 years.
2. After a full trial, he was found guilty, convicted and sentenced to 15 years' imprisonment paving way for this appeal on sentence only.
3. Being aggrieved and dissatisfied with the subordinate court's decision to convict and sentence me to 15 years' imprisonment for the offence of defilement under section 8(1), (3) of the [Sexual Offences Act](#) delivered by Hon. Ekusui (CM) dated October 27, 2022 he lodged an appeal that he later amended Appeal which is before this court for determination.
4. The amended appeal raises the following grounds:
 1. Whether the mandatory nature of section 8(3) of the [Sexual Offences Act](#) meets the dictates of the [Constitution](#).



2. Whether the instant matters evidence was materially defilement occasioning a serious prejudice.
3. Whether the trial court did consider the fact that he is a first offender.
4. That, may this court be pleased to deduct the period I spent in remand custody pursuant to the provisions of section 333(2) of *Criminal Procedure Code*.
5. The appellant is asking this court to entered judgment to quash the conviction, sentence to be set at liberty. He is relying on the submissions that he filed alongside the amended appeal.
6. The ODPP had files submissions on June 9, 2023 which were aligned to the appeal. The ODPP did not file any response or submissions to the amended appeal.

Analysis and determination:

7. The Appellant argued all the grounds of the amended appeal together.
8. On the issue of the mandatory nature of section 8(3) of the *Sexual Offences Act* the Appellant invites the court to consider that mandatory sentences prima facie do not permit the court to consider peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances.
9. Further that, the mandatory nature deprives the trial court of its legitimate power of discretion provided to them by the provisions of section 216 and 329 of the *Criminal Procedure Code*.
10. He argues that many global jurisdictions have frowned that any legislation that purports to deprive the court of its discretion in imposing a sentence is liable to be struck off as being unconstitutional due to the fact that it does not permit the court to consider a range of other.
11. He relies on the case of *S v Toms* (1990) (2) SA AT 806 (h) -807 (b) where it was held that: -

“The infliction of parliament is a matter for the discretion of the trial court Mandatory sentences reduces the courts normal sentencing function to the level of rubber stamp. The imposition of mandatory sentencing functioning by the legislature has always been considered a function of the court a provision which reduces the court to a mere rubber stamp is wholly repugnant”
12. He also relies on the case of *S v Mofokeng* 1999(1) SACK 502 (W) at 506 (d) where Justice Stegmann opined that:

“For the legislature to have imposed minimum sentences severely curtailing the discretion of the courts offends against the fundamental constitutional principles of separation of powers of the legislature and the judiciary.

It tends to undermine the independence of the courts and to make the mere cat's paws for implementation by the legislature of its own inflexible penal polices that it is capable of operating with serious injustices in particular case”
13. He argues that mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum leaving no room for an examination of the prospect of rehabilitation and or the incarceration method to be adopted resulting in a gross disregard of the right to dignity on the trial court and the accused person.



14. In his case the foregoing compelled the trial court to impose the prescribed 20 years provided for by section 8(3) of the [sexual offences act](#).
15. He invites the court to be guided by the decision of the court of South Africa in the case of [S v Malgas](#) 2001 (2) SA1222 SCA 1235 at paragraph 25 where it was held that: "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided case."
16. He also relies on the supreme court's landmark decision in the Muruatetu Case where the court necessitated resentencing of all persons who were previously sentenced to a mandatory minimum sentence.
17. The role of this court as the first appellate Court is well settled. It was held in the case of [Okeno v R](#) (1977) EAR 32 and further in the Court of Appeal case of [Mark Oiruri Mose v R](#) (2013) eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
18. He is asking this court to find that the sentence provided by section 8(3) of the [Sexual Offences Act](#) is unconstitutional hence impose a new or lesser severe sentence after consideration of his mitigation.
19. He is asking this court to deduct the 5 years that he spent in remand custody from the new sentence pursuant to the provisions of Section 333(2) of the criminal procedure code and also [Vincent Sila Jona 7 others v Kenya Prisons Service](#) (Petition No 15 of 2020 |2021|KEHC457 eKLR.
20. Since the Appellant is challenging the sentencing only this court has no business disturbing the conviction.
21. That leaves the court with three issues around sentencing to determine being:
 - A. The constitutionality of the mandatory nature of the sexual offenses act Section 8(3),
 - B. whether court considered his mitigation and,
 - C. finally, the question of reducing the number of years served under section 333(2) of the criminal procedure code.

The constitutionality of the mandatory nature of the sexual offenses act section 8(3)

22. The ground for reducing the number of years served under section 333(2) of the criminal procedure code and the issue of mitigation are considered together.
23. I am in agreement with the finding in the judgment in [Maingi & 5 others v Director of Public Prosecutions & another](#) (Petition E017 of 2021) [2022] Para 118. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows:
 1. To the extent that the [Sexual Offences Act](#) prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the [Constitution](#). However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.



2. Taking cue from the decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.

On the question of the Constitutionality of the sentence;

24. During the Mitigation on October 27, 2022, the appellant told the court: “I am a first born in a family of 12 children. I was left taking care of the children. I undertook to take care of children. I now do not know what is happening to them. My father fell from a construction site and got injured. I have been in remand for 5 years. I have suffered a lot in prison. I was not able to raise the bond I was granted. I am 28 years old. I seek mercy. It is the first time I have been found having committed an offence. I seek mercy.”
25. The Court thereafter made a finding that the accused mitigation is noted. It is duly noted that he has been in remand for 5 years. His youthful age is also taken into account. The court has also considered the minimum sentence provided for an offence of this nature as well as the principles of sentencing. In its judgment the trial magistrate made a finding that the court would however not overlook that an offence of the said nature was rampant from the area of its jurisdiction and was noted from the court's own experience.
26. The accused was sentenced to serve 15 years' imprisonment after the court considered the mitigation and the five (5) years he was in custody during the time the proceedings were going on in the sentencing.

Order:

27. I have considered the mitigation, factored in the age of the accused person and the number of years served in reducing the sentence to 7 years. The 5 years that he has already served are taken into account as a result of which the appellant shall serve for the remaining term. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIRTUALLY THIS 29TH DAY OF SEPTEMBER, 2023.

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J.CHIGITI (SC)

JUDGE

