



**Wanjala v Republic (Criminal Appeal E007 of 2023)
[2023] KEHC 24124 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E007 OF 2023
WM MUSYOKA, J
OCTOBER 27, 2023**

BETWEEN

DICKSON OGEMA WANJALA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. T Madowo, Senior Resident Magistrate, SRM, in Busia CMCSO No. E053 of 2020, of 19th December 2022)

JUDGMENT

1. The appellant, Dickson Ogema Wanjala, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 7th December 2020, in Samia Sub-County, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of WA, a child aged 9 years. The appellant denied the charges, and a trial ensued, where 6 witnesses testified.
2. PW1, WA, a Class 2 pupil at [Particulars Withheld] Primary School, was the complainant. She described how the appellant placed her on his bed, undressed her, removed his penis, dudu, and inserted it in her vagina. She felt pain. The children, who were within the vicinity, mobilized, stormed the bedroom, forcing the appellant to get up quickly. She reported to her mother, who took her to the police, and to hospital. PW2, JO, a nursery school pupil, was among the children who were in the vicinity when the incident happened. He described how he saw, after they stormed the bedroom, the appellant lying on top of PW1, and making thrusting motions. He called PW1, and then went and reported to their mother, who took PW1, and they went to file reports. PW3, MA, a Class 8 pupil, was among the first people to get the report, that the appellant had defiled PW1. She saw PW1, in the company, of PW2, crying in distress. PW1 said that the appellant had “done bad manners” to her, while PW2 said the appellant was on top of PW1. PW4, AA, was the mother of PW1, PW2 and PW3.



She stated that PW1 was born on 17th February 2011. She testified on how PW2 informed her that the appellant had “done bad manners” to PW1, and that he had witnessed the incident. She then met PW1, who was crying, and who informed her about the incident. She went and confronted the appellant, who pleaded with her not to inform her father-in-law, and who urged that the matter be settled out of court. She was advised by her father-in-law to report to the police, which she did. She took PW1 to hospital. The appellant was arrested. She described the appellant as a neighbour, adding that her children used to go to his house to play. They used to refer to him as grandfather, although he was not their grandfather. PW5, Moses Makokha, was the clinician who treated PW1, and filled the P3 form put in evidence. He noted that there were no injuries to the labia, but the hymen was freshly torn. He concluded that she had been defiled. PW6, No. 115304 Police Constable Irene Kimanzi, was the investigating officer.

3. The appellant was put on his defence, vide a ruling that was delivered on 29th August 2022. He made a sworn statement. He denied the charges. He said that he had a land dispute with the grandfather of PW1, and that the charges were a frame up, based on that. He said that PW1 was a neighbour, and that she knew him well. He said that PW1 was told to lie.
4. In its judgment, delivered on 19th December 2022, the trial court found the appellant guilty, as all the elements of the offence had been positively proved, and it sentenced him to 20 years imprisonment, on 16th January 2023.
5. The appellant was aggrieved, and brought the instant appeal, revolving around the charge being incurably defective and bad for duplicity; the prosecution case being comprised largely of hearsay and contradictory evidence; the evidence lacking probative value; there being glaring anomalies in the medical evidence; the defence being disregarded; the sentence being harsh, and mitigating circumstances not being taken into account; and contraventions of Articles 49, 50 and 51 of the Constitution.
6. Directions were given on 22nd September 2023, for canvassing of the appeal by way of written submissions. Both sides filed written submissions, which I have read through, and taken note of the arguments made. In his written submissions, the appellant does not argue his appeal, instead he makes statements in mitigation, about how he has reformed, how he is remorseful, and how he was an elderly family man. The respondent submits on the grounds set out in the petition of appeal: duplicity, evidence being contradictory and largely hearsay, anomalies in the medical report and its lack of probative value, defence not being considered, and sentence.
7. As indicated above, in his written submissions, the appellant did not submit on the merits of his appeal. He did not, in other words, argue the grounds of his appeal, except on sentence. He limited his written submissions to review of sentence, with a view to its reduction. I shall take it that he has abandoned the other grounds of appeal, and I shall, accordingly, limit this judgment to sentence.
8. On the sentence of 20 years imprisonment, being harsh, I will start by stating that section 8(2) of the Sexual Offences Act prescribes a penalty of life imprisonment, where victims of sexual offences are below the age of 12. The trial court only awarded a sentence of 20 years imprisonment because the superior courts, in Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), Philip Muke Maingi & 5 others v Director of Public Prosecutions & another [2022] eKLR (Odunga, J) and Edwin Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J), had declared mandatory sentences unconstitutional, and had stated that the trial courts had discretion to consider other sentences, otherwise it would have imposed the mandatory life imprisonment sentence, prescribed under section 8(2).



9. The victim of the defilement was just 9 years old, a child of tender years, who would require the sort of protection implicit in that sentence. The sentence imposed by the trial court was not proper given the age of the victim. The trial court was very lenient, perhaps after considering that the appellant was 69 years of age at the time. The sentence should have been stiffer. Elderly men in their 60s ought to know better than preying on children of tender years, who tend to be very close to old men of that age, being the age of their grandparents, and who they expect to be warm and caring, not cunning sexual predators patiently waiting for the opportune moment to strike.
10. The age of the offender, for sexual offences against minors of tender age, is critical in determination of sentence. The older the offender the stiffer the sentence should be. Younger offenders should get considerably lower sentences, as it would be expected that they are still foolish and immature, the middle-aged could be taken to have had error of judgment or to have been reckless, but grandfathers in their 60s would have no excuse. At that age they are elders. They would have experienced it all by that age, and would not be expected to struggle to make the correct choices in the matter of judgment of what is right and wrong, and what is good and bad. They are expected to provide moral leadership to the younger cohorts of men, in their 20s, 30s, 40s and 50s. They are expected to be, or to provide, the moral compass for the society. For them to turn rogue is a monumental breach of trust, which should be addressed at sentencing. Exercising leniency towards offenders of such an age, on grounds that they are elderly, is to get it all wrong. A strong message should go out, that elders should not get away with abuse of their positions.
11. In view of the above, I shall interfere with the sentence imposed by the trial court. I am guided by *Julius Kitsao Manyeso v Republic*, Malindi CACRA No. 12 of 2021, (Nyamweya, Lesiit & Odunga, JJA), where a sentence of life imprisonment was substituted with 40 years in jail, for an offender who had defiled a child of tender years, aged just 4 years. The complainant in the instant case was also a child of tender years, and a comparable sentence ought to have been considered, and it was on the basis of that that I indicated earlier that the sentence imposed by the trial court was lenient. Consequently, I do hereby enhance the sentence imposed by the trial court, of 20 years imprisonment, to 35 years. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF OCTOBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Dickson Ogema Wanjala, the appellant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

