



REPUBLIC OF KENYA



KENYA LAW
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**Mmasi v Republic (Criminal Appeal E043 of 2022)
[2023] KEHC 24716 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E043 OF 2022
SC CHIRCHIR, J
OCTOBER 26, 2023**

BETWEEN

ANDSOM MMASI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence from the judgment dated 25th
may 2022 Hon. C.N Njalale (SRM) delivered on 25th May 2022 at
Butali Chief Magistrate's court sexual offence case No. 41 of 2020)*

JUDGMENT

1. The Appellant Andson Mmasi, was convicted for the offence of committing an indecent Act with a child contrary to section 11 (1) of the [sexual offences Act](#) No.3 of 2006 and sentenced to 10 years in prison.
2. The particulars of the offence were that on the 16th day of October 2020 at Malava Township in Kakamega County, he intentionally touched the penis of BS ,a child aged 17 years with his hand.
3. The appellant pleaded not guilty to the charge, and after trial, he was convicted of the offence , and sentenced to 10 years as aforesaid.
4. The appellant being aggrieved by the judgment of the trial court has proffered this appeal. In his Petition of Appeal dated 7th June 20022, the Appellant set out several grounds. However he later amended his grounds of Appeal, which were filed alongside his submissions. In the Amended petition he has listed the following grounds:
 - a. That, the imposed sentence is excessively harsh and unjust considering that the appellant was first offender he was a young man who needed a lesser sentence.



- b. That the imposed sentence is excessive and does not go well with the provisions of the policy sentencing directives 2015 under paragraph 4.1
- c. That the appellant is remorseful and regrets his actions. He is repentant.
- d. That the appellant before his conviction and sentence was a young man who worked hard to support himself and his family.
- e. That the appellant worked tirelessly to support his family and self and potential if given another chance
- f. That the court considers his mitigation and award a lesser or substitute the remaining sentence with a non-custodial sentence or the court be pleased to order that the appellant serves in the community service order.
- g. That the court considers the provisions of section 333 (2) of the *criminal procedure code* to be factored in his sentence.

5. This Appeal therefore is against the sentence only.

Appellant's submissions.

- 6. The appellant submits that the circumstances of the case were not too grievous and no one was hurt or injured and a lesser sentence was called for. In this regard he has relied on the case of *Thomas Mwambu wenyi v Republic* [2017] eKLR as well as paragraph 4:1 of the Judiciary sentencing policy guidelines.
- 7. He further submits that he regrets his deeds and is remorseful of actions and promised not to repeat the crime; that he has fully rehabilitated and ready to be productive in building the nation and that the time served is enough and sufficient.
- 8. He urges the court to take into account the period that he has already served while in custody according to section 333 (2) of the *criminal procedure code* and relied in the case of *Abamad Abolfathi Mohammed & another v Republic* [2018] EKLK.

Determination

- 9. Sentencing is an act of discretion by the Trial court, as was set out in the case of *Francis Nkunja Tharamba v Republic* [2012] eKLR it was held as follows :

“... sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law , nonetheless, as to the exact sentence to be pronounced against a convicted person, the trial court has, in most criminal cases , the discretion to decide. That being the case , in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision , it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful , the Appellate court should not interfere” (Emphasis added)



10. Section 11(1) of the *Sexual Offences Act* under which the Appellant herein was charged provides as follows:- “Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years” (Emphasis added)
11. Thus the sentence prescribed for the offence of an indecent act with a child is a mandatory minimum sentence of 10 years. The trial had no discretion in the matter as the law prescribes a minimum sentence. The hands of this court too are tied.
12. This court is alive to the recent trends of some of the decisions of the high court on the mandatory minimum sentences, where the courts have borrowed the reasoning in supreme court decision in *Francis Kariuki Muruatetu & Ano vs Republic* (2017) eKLR in addressing the issue of the mandatory sentences under the *sexual offences Act*. Whereas the said decisions are persuasive, they are not binding on this court.
13. On the other hand the supreme court decision in *Muruatetu & Another v Republic* [2021] KESC31(KLR) (Directions) commonly referred to as Muruatetu 2 is binding on this court. In Muruatetu 2, the supreme court did clarify as follows: “ The decision in Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *penal code*.” It follows that the law on sentences prescribed under the *sexual offences Act*, including the sentence applicable to committing an indecent Act with a child, remain unchanged ,at least , for now.
14. The Appellant has also asked the court to consider and apply the provisions of section 333(2) of the *criminal procedure code*. This section requires that when passing custodial sentence, the court is required to consider the period in which an accused person had spent in remand prior to conviction. However, a perusal of the record shows that the Appellant was out on bond during trial. This ground of Appeal therefore has no basis.
15. At the end ,this Appeal has no merit. It is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF OCTOBER 2023.

S. CHIRCHIR

JUDGE.

In the presence of :

E. Zalo- Court Assistant

Ms. Osoro for the Respondent

Appellant – present in person.

