



**Barchok v Republic (Criminal Appeal E032 of 2022)  
[2023] KEHC 24158 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24158 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E032 OF 2022  
RB NGETICH, J  
OCTOBER 25, 2023**

**BETWEEN**

**JULIUS CHEPTOO BARCHOK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant Julius Cheptoo Barchok was charged in count one with the offence of defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that the accused on the 25<sup>th</sup> day of November, 2019 at unknown time in Baringo central sub-county within Baringo County the Appellant willingly and unlawfully caused his penis to penetrate into the vagina of AJB a girl aged 6 years in contravention of the said Act.
2. The Appellant was charged with alternative count of indecent Act with a girl contrary to section 11 of the *Sexual offences Act* No. 3 of 2006. The particulars are that the accused on the 25<sup>th</sup> day of November, 2019 at unknown time in Baringo central sub-county within Baringo County the appellant willingly and unlawfully caused his penis to touch the vagina of AJB a girl aged 6 years in contravention of the said Act.
3. The accused denied both the main and alternative charge and the matter was set down for full trial with the prosecution calling a total of 5 witnesses in support of the charges against the accused and the accused gave unsworn statement in his defence and closed his case.
4. Upon the close of the prosecution and the defense case, the trial court through judgment delivered on the 8<sup>th</sup> day of October, 2020 found the accused guilty, convicted him under section 215 of the *CPC* and sentenced him to serve 40 years imprisonment.



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 the trial magistrate erred in both law and fact by not realizing that the dispute arose over a grudge from a land dispute.
  - ii. That the trial magistrate failed terribly in law by not realizing that the prosecution's case was not proved to the required standard hence not water tight.
  - iii. That the trial magistrate failed in both law and fact by not realizing that the complainant was not defiled as no ingredients adduced by the doctor or the clinical officer proved the fact.
  - iv. That the trial magistrate failed in law in upholding allegations which were not proved in all circumstances.
  - v. That the trial magistrate failed in both law and fact by not realizing that the appellant was not examined to prove the fact hence causing miscarriage of justice.
  - vi. That the trial magistrate failed in both law and fact by failing to understand that age assessment was not done to the complainant to support the charge sheet.
  - vii. That the trial magistrate failed in both law and fact for being biased in rejecting the appellant's defense.
6. On the 5<sup>th</sup> July, 2023, the Appellant filed amended grounds of appeal under section 350(2) (v) of the *Criminal Procedure Code* stating that is appeal is against sentence only. The appellant brought forth the following grounds on appeal on sentence.
  - i. That the imposed sentence is excessive harsh and unjust considering that the appellant was a first offender, an old man who needed a lesser sentence.
  - ii. That the imposed sentence is excessive and does not go well with the provisions of the policy sentencing directives 2015 under paragraph 4:1.
  - iii. That the appellant is remorseful/repentant and regrets his actions.
  - iv. That the appellant before his conviction and sentence was an old man who worked hard to support self and family.
  - v. That the appellant worked tirelessly to support his family and self and potential if given another chance.
  - vi. That the court considers his mitigation grounds and awards a lesser sentence 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.

### **Submissions**

7. The appeal was canvassed by way of written submissions and on the 6<sup>th</sup> July, 2023 when the matter came up for hearing, the Appellant informed the court that he is appealing against the sentence. He stated that he was jailed for the offence of defilement for 40 years and he prays that the sentence be reduced stating that the child was aged 6 years. He stated that he is aged 53 years and at the time he was convicted, he was 48 years. He stated that he stayed in remand for 2 months.



8. The state counsel Ms Ratemo submitted that the lower court was lenient in sentencing the Appellant as the mandatory sentence was supposed to be life imprisonment since the child was below 11 years old.

### **Analysis And Determination**

9. The appellant abandoned appeal against conviction and prayed for sentence to reduced and for sentence appellant served in remand be considered. He said he was remanded for two months and the trial court did not consider the two months period in reman. Section 333 (2) of the *Criminal Procedure Code* which is stated in mandatory terms. Section 333 (2) is in the following terms:

“Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

10. From the foregoing, there is no doubt that the appellant deserves period served in remand to be considered. As per the records, the accused was first presented to court on the 27<sup>th</sup> November, 2019 where he took plea and the court granted him a bond of Kshs.500,000/= plus one surety of a similar amount. He said he was in remand for a period of 2 months.
11. What I now wish to consider is whether sentence imposed should be reviewed/revise downward. The application invokes the revisional jurisdiction powers of this court. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of *Mbogo & Another v Shab* (1968) 1 EA. 93 thus: -

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

12. In the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, the court of appeal pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

13. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case”. (*R - v- Shersbousky* (1912) CCA 28TLR 263) while in the case of *Shadrack Kipkoach Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated thus:-

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R.* (1989 KLR 306).”



14. Further in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR the court of appeal restated as follows:-

“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.”

15. The appellant herein was sentenced to 40 years imprisonment. The complainant herein was aged 6 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the *Act* which provides:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

16. Sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R.*, and *Wilson Waitegei v Republic* [2021] eKLR).

17. The prosecution’s argument is that trial court was lenient as the appropriate sentence ought to have been life imprisonment. The appellant has not demonstrated that the trial court applied wrong principles. I however note that the appellant is 53 years old and the sentence will take him up to over 90 years. This translates to life sentence bearing in mind the fact that lifespan is approximately 70 years. I take note of the fact that life imprisonment has been declared unconstitutional by the court of appeal on Malindi Court of Appeal Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso Versus Republic*. From the foregoing I am inclined to revise the sentence imposed to 20 years imprisonment and reduce the sentence by period served while in remand.

18. Final Orders: -

1. Sentenced reduced to 20 years imprisonment.
2. Period served in remand to be reduced from above sentence.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25<sup>TH</sup> DAY OF OCTOBER 2023.**

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Mr. Elvis – Court Assistant.

Appellant present.

Ms Ratemo for state.

