



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogongo v Republic (Criminal Appeal E057 of 2023)  
[2023] KEHC 26818 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26818 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E057 OF 2023  
RE ABURILI, J  
DECEMBER 21, 2023**

**BETWEEN**

**EDWIN OTIENO OGONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment, conviction and sentence by Hon.  
L.N. Kiniale, Senior Principal Magistrate at Nyando in Sexual  
Offence Case No. E055 of 2022 delivered on 13th September, 2023)*

**JUDGMENT**

1. The appellant herein is Edwin Otieno Ogongo. He is a convict for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. He was sentenced to serve fifteen (15) years imprisonment which is the mandatory minimum sentence.
2. He was aggrieved by the conviction and sentence imposed. However, when the appeal came up for hearing, he applied to withdraw the grounds of appeal against conviction and urged the court to consider reducing for him sentence which he considered harsh in the circumstances. He readily accepted that he was sorry for what he did as he did not know that it was wrong since he was only 18 years old and the complainant was aged 17 years old.
3. The prosecution had no issue with the withdrawal of the appeal against conviction and submitted that the court may consider reducing sentence, in its discretion in view of the evidence by PW1 that the appellant was her boyfriend and that she was 17 years old, yet the trial court gave mandatory minimum sentence as provided for in law.
4. The Court allowed the withdrawal of the appeal against conviction as applied by the appellant and now I am left to determine the issue of sentence as imposed which is indeed lawful.



## Determination

5. As the appellant is only aggrieved with the sentence, it is important to set out the circumstances under which an appellate court may interfere with sentence imposed by the trial court. The principles guiding interference with sentencing by the appellate Court were set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate.”

6. Equally, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

7. The former Court of Appeal for Eastern Africa in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, 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.”

8. Odunga J (as he then was in the High Court) in *MM1 v Republic* [2022] eKLR added a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case” citing *R v Shersbowsky* (1912) CCA 28TLR 263 while in the case of *Shadrack Kipkoeh Kogo v R Eldoret Criminal Appeal no 253 of 2003* the Court of Appeal stated that:

“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)”

9. The Court of Appeal, on its part, in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:

“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.”

10. In this case, the appellant was charged under Section 8(1) as read with section 8(4) of the [Sexual Offences Act](#). Under section 8 (1) to 8(4) of the Act:

8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) 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.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
- (4) 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.

11. Sections 8(3) and (4) of the [Sexual Offences Act](#) use the phrase is liable upon conviction to imprisonment for a term of not less than twenty years and fifteen years respectively. Sir Henry Webb C.J. in *Kichanjele S/O Ndamungu v Republic* (1941) 8 EACA 64 stated as follows on the proper construction of the words “liable to”, in the penalty section of a statute:

“The wording used throughout the code is “shall be liable to” but a consideration of the various sections shows in our judgment, that the use of the words “shall be liable to” does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated.”

12. In *Opoya v Uganda* [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. stated thus:

“It seems to us beyond argument that the words “shall be liable to” do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it.”

13. See also in *Patrick Muli Mukutha v Republic* [2019] eKLR where Odunga J (as he then was in the High Court) stated as follows, citing all the above cases:

“A similar position was adopted in *D W M v Republic* (*supra*) where the Court held that:

“As for the sentence the 1<sup>st</sup> appellate court properly addressed its mind to the operative words in Section 20(1) of the [Sexual Offences Act](#) that the offender “Shall be liable to imprisonment for life” means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could



be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

14. The learned Judge in the above case noted that however, the relevant provisions use the phrases "shall be liable" and "not less than" in the same breath. He therefore concluded that:

"...as a result, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, since as Mativo, J graphically put it in *Elizabeth Waitiigeni Gatimu v Republic* [2015] eKLR:

"The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

15. I have no reason to differ from the above position and agree that indeed, the twin subsections must be read as if the sentences provided are the maximum sentences.

16. Accordingly, it is my view that the use of the words "shall be liable to imprisonment" in section 8(3) and (4) of the *Sexual Offences Act* though appearing mandatory by the use of the word "shall", gives room for the exercise of judicial discretion. Despite the mitigation that the appellant was a first offender, was remorseful and pleaded for leniency, the learned trial magistrate noted that the sentence under section 8(4) of the *Sexual Offences Act* is mandatory in nature and sentenced him to serve 15 years imprisonment.

17. The trial magistrate only noted the mitigation but did not take into account the discussion above into account. However, as elaborated above, the sentence under section 8(4) of the *Sexual Offences Act* is the maximum sentence and not mandatory minimum because of the use of the words "liable to" In addition, the Court of Appeal in *Charo Ngumbao Gugudu v Republic* [2011] eKLR held that:

"It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was "completely mentally disabled."

18. The Supreme Court in *Francis Karioko Muruatetu & another v Republic*, Petition no 15 of 2015, set out the following guidelines with respect to sentencing:

"71 ...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:



- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

19. In my view, the opinion of the Supreme Court in the *Francis Muruatetu* case with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. This view is supported by the Kenya Judiciary *Sentencing Policy Guidelines* where it is appreciated that:

“Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.”

20. I further associate myself with the opinion of the Court of Appeal in *Jared Koita Injiri v Republic* [2019] eKLR where it was held that:

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

21. However, offences would not be treated the same where there are aggravating circumstances. In other words, the court can still mete out the mandatory maximum sentence where the words “liable to” are not used but that the circumstances of the offence must be taken into consideration which the learned trial magistrate did not consider when imposing the sentence complained of.

22. The appellant was a first offender and his age is given to be 18 years. He was and still remains remorseful and has owned up to committing the offence and not challenged his conviction. Further, from the evidence of the complainant who was a standard 8 pupil, she was 17 years old and she confidently told the court that the appellant was her boyfriend for one month.

23. The age difference between the victim and the accused was narrow and from the testimony of the victim, she was naïve and believed that she could have a boyfriend at her age. There is no evidence that the teenager was forcefully taken to the accused person’s house and defiled. Therefore, albeit the



appellant committed an offence under the law, I find that the sentence imposed on him was excessive in the circumstances.

24. I hereby interfere with the said sentence. I set aside the 15 years imprisonment imposed on the appellant and substitute it with a probation term of three (3) years.

25. This file is closed.

26. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF DECEMBER, 2023.**

**R.E. ABURILI**

**JUDGE**

