



REPUBLIC OF KENYA



**Muli v Republic (Criminal Appeal E014 of 2022)
[2022] KEHC 15742 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E014 OF 2022
MW MUIGAI, J
NOVEMBER 24, 2022**

BETWEEN

JOSEPH KIOKO MULI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being An Appeal From The Conviction And Sentence Of The Senior
Principal Magistrate Court In Kangundo Hon. M. Opanga (srm) Delivered
On 15.11.2021 In Spmcc Cr. Sexual Offence Case No. E065 Of 2021))*

JUDGMENT

Trial Court Record

1. The Appellant was charged with Defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the offence are that on diverse dates between September 1, 2021 and November 12, 2021 at [Particulars Withheld] Sub County within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of CWN a child aged 13 years.
3. In the alternative, he was charged with committing and indecent ac with a child contrary to section 11(1) of the of the [Sexual Offences Act](#) No 3 of 2006.
4. The particulars were that on diverse dates between September 1, 2021 and November 12, 2021 at [Particulars Withheld] Sub County within Machakos County, intentionally touched the breast and vagina of CWN a child aged 13 years with his penis against her will.
5. The matter came up for plea taking on November 15, 2021 and the accused person pleaded guilty in the main count. He said 'true.'



6. The Court entered a plea of guilty.
7. The Court cautioned the Accused person of the consequences of pleading guilty to the offence and the charge was read over to the accused and explained in Kiswahili and the accused person said 'Ni Ukweli'
8. The Court entered a plea of guilty.
9. The Prosecutor read the fact to the accused as follows;

' Facts are that the complainant CWN went to place of abode of accused on a school day dressed in her school uniform. She reached a nearby bush where she changed into civilian wear. She went to the home of the accused. She found accused with his friend. Accused shared a bed with complainant while his friend slept on the sofa set.

On the November 10, 2021 the accused had unprotected sex with CWN. They also had sex on November 11, 2021 and November 12, 2021. On November 14, 2021 at 1500 hours police from Kinyui post stormed house of accused, they found accused asleep. Complainant together with friend were awake. Accused's friend opened the door for police. They were all arrested and taken to Tala police station. Statements were recorded. Complainant was taken to Kangundo Level four hospital where P3 form was filed. Lab tests were done. Parents of CWN were informed and told to report to the police station with birth certificate of CWN which confirmed date of birth as December 5, 2007. The uniform and her clothes were recovered from house of accused. After investigations were complete, accused was charged with this offence.'

10. The accused person's response to this was; 'Facts Are Correct'
11. The Prosecutor produced the following exhibits;
 - i. P3 Form
 - ii. Lab test
 - iii. Photocopy of Birth Certificate
 - iv. School sweater
 - v. School uniform navy blue with light blue colours
 - vi. Orange hood
 - vii. Beige T-shirt
 - viii. 1 black camisole
 - ix. Blue faded T-shirt
 - x. Belt
 - xi. Beige & white knitted trouser
 - xii. Faded camisole
 - xiii. White & pink boob top
12. The Trial Court noted that the accused had been convicted on his own plea of guilty.
13. The Prosecutor indicated that there were no records.



14. In mitigation, the Accused contended that it is the girl who went to his house and she was even in court.
15. The Trial Court noted that the accused was unremorseful and being that he is 21 years old and the complainant is 13years old, he was in a better position to give CWN proper direction.
16. The Accused was sentenced to serve 20 years in jail.

The Appeal

17. Dissatisfied by the conviction and sentence, the Appellant filed a memorandum of Appeal on December 20, 2021 after being granted leave to do so out of time in which he asked the court to allow the Appeal, quash the conviction and set aside the sentence.
18. The grounds of the Appeal are that;
 - i. The Trial Court erred both point of law and fact by failing to observe that the prosecution's case was marred with inconsistencies and contradictions and hence did not prove their case beyond reasonable doubt.
 - ii. The Trial Court erred both point of law and fact by failing to caution about the consequences or dangers of entering a plea of guilty in a case of this nature.
 - iii. The Learned Trial Court erred both point of law and fact in enhancing the sentence to 20years imprisonment term contrary to the provisions of section 354 (6) of the [Criminal Procedure Code](#)
 - iv. The Learned Trial Court erred both point of law and fact by concluding that the prosecution case was proven beyond reasonable doubt.
 - v. The Learned Trial Court erred both point of law and fact by giving a sentence without giving the Appellant a opportunity to be heard as stipulated in section 364 (2)
19. The Appeal was disposed of by way of written submissions.

Appellant Submissions

20. The submissions were filed on September 8, 2022 in which the Appellant submitted that he entered a plea of guilty and raised two issues with regard to legality of the sentence.
21. While relying on the case of Suleiman [Juma alias Tom vs R, Criminal Appeal No 181 of 2002](#), it was submitted that he was not cautioned that entering a plea of guilty for defilement may result in 20 years imprisonment and therefore the sentence was harsh. Further that the prosecution did not test his mental status as assurance that he was not coerced or under intimidation.
22. It was also submitted that the Trial court did not take into account important factors such as the overall objectives of punishment which is not only ensuring deterrence but also affording the reform and rehabilitator of the offender, disregard all the individual characteristics of the offence, the individual right to equality of treatment and dignity of the offender(s) thereby offending articles 27, 28 and 29 of the [Constitution](#).
23. It was submitted that the trial court failed to take into consideration the sentencing policy guidelines in so far as mating minimum mandatory sentence.
24. The Appellant relied on the cases of [Edwin Wachira 7 9 others Petition 90 of 2021, Mombasa, S vs Malgas 2001 \(2\) SA 1222 SCA 1235, S VS Jansen 199\(2\) SACR 368 \(c\) at 373, S vs Toms \(2\) SA 802](#)



(A) AT 806 (b) -807(b), *Mithi vs State of Punjab [1983] 2SCR 690*, *Fatuma Hassan Salo vs Republic (2006)*, *Charles Muriuki Mwangi vs R (2015) eKLR* and *Christopher Mwangangi Katumo vs R (2007) eKLR*.

Respondent Submissions

25. The Respondent file submissions on June 29, 2022 in which counsel submitted that the facts were read to the Appellant at pleas stage in accordance with Section 207 of the Criminal Procedure code. The prosecution was therefore not marred with inconsistencies and contradiction since Appellant entered a plea of guilty.
26. It was also submitted that the trial court cautioned the Appellant on the consequences of pleading guilty of the offence. The charge was read over again and the accused pleaded guilty. Reliance was placed on the case of *Abdalla Mohammed vs Republic [2018] eKLR*.
27. It was submitted that section 8 (1) and (3) of the *Sexual Offences Act* provides for a sentence not less than 20 years and therefore the Trial court acted in accordance with the law in sentencing the accused to 20 years.
28. Counsel submitted that penetration is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another person by the Sexual Offence Act. Further reliance on this definition was placed on the case of *FOD vs Republic (2014) eKLR*. It was submitted that the physical examination the victim had whitish discharge, she was not pregnant and a high vaginal swab showed puss cells and numerous epithelial cells.
29. From the P3 form, post rape care form and the lab form, the victim was defiled. Counsel contended that the main ingredient for defilement, defilement had been proven beyond reasonable doubt.
30. The Respondent submitted that the age of the victim being 13 years old was ascertained by the Birth Certificate that was produced. The Court was urged to uphold the conviction and sentence imposed by the trial Court.

Determination

31. I have considered the lower court record, the Appeal and the submission of the parties on record.
32. This being a first Appellate court, the duty is to evaluate afresh the evidence adduced before the trial court in order to arrive at an independent conclusion bearing in mind that it neither saw nor heard the witnesses testify. This was stated in the case of *Okeno vs Republic (1972) EA 32*.
33. The Appellant was convicted on his own plea of guilty. Section 348 of the Criminal Procedure Code provides that;

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.
34. In this case the Appeal can only be on the sentence. However, the Court of Appeal in *Alexander Lukoye Malika vs Republic [2015] eKLR* held that: -

' A Court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere



where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged.'

35. The procedure for recording a plea of guilty is provided under Section 207 of the Criminal Procedure Code as follows: -

1. The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement;
- (2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.'

36. This was also stated in the case of *Adan vs Republic [1973] EA 445* was followed as follows:-

- a. The charge and all its ingredients must be explained to the accused in vernacular or some other language that he understands.
- b. The accused's own words in reply should be correctly translated into English and carefully recorded.
- c. If the accused admits the charge, then the facts pertaining to the charge shall be read out to the accused, still in vernacular or in some other language that he understands.
- d. The accused shall then be asked to confirm to the court whether or not he admits the facts as given and in this regard, his full answer shall be recorded by the court.
- e. Where the facts as given are admitted, the court shall proceed to confirm the plea of guilty and to convict the accused.
- f. Where the accused's response to the facts suggests a change of plea, the same shall be recorded and a plea of not guilty entered.

37. In this case, the Trial court complied with all the procedures above. From the record, there is nothing to suggest any hesitation on the part of the Appellant with regard to the particulars and evidence presented before the court. In mitigation he in fact admits that it is the girl who went to his house. Despite being told the consequences of pleading guilty, the Appellant confirms that it is indeed true that he committed the offence. Furthermore, the Appellant has also conceded that he entered a plea of guilty in his submissions. There was no misapprehension of facts, the offence was known to law and the plea was clear. I therefore find that this Appeal can only be on the sentence of 20 years.

38. As regards the sentence, I note that the Appellant has been charged under Section 8 (1) and (3) of the *Sexual Offences Act*;

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- (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.

39. Section 333 of the Criminal Procedure Code provides:

- (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
- (2) Subject to the provisions of section 38 of the *Penal Code* 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.

38. The Judiciary Sentencing Policy Guidelines (2014) also provides guidance on this as follows:

' The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.'

40. The Court of Appeal in *Bethwel Wilson Kibor vs Republic [2009] eKLR* stated as follows in this regard:

' By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

41. In the present case, the Appellant was arrested on November 14, 2021 from the charge sheet and was convicted on November 15, 2021. This period should be taken into consideration.

42. On the issue of sentence, the Court of Appeal in the case of *Bernard Kimani Gacheru vs Republic [2002] eKLR* where stated 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 stated is shown to exist.'

43. The same Court in the case of *Joshua Gichuki Mwangi vs Republic, CA 84 of 2015*, Karanja, Kiage & J Mohammed, JJA) handling a similar situation held as follows;

'Even though the mechanical nature of mandatory sentences may promise certainty of severity of sentences, it is often at the expense of proportionality and an individualized approach to sentencing which balances between deterrence and the rehabilitation of an accused. In *Daniel Kipkosgei Letting Vs Republic [2021] eKLR* this Court pronounced itself as follows;

'With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.'

We emphasize that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished as was pronounced in *Athanus Lijodi Vs Republic [2021] eKLR*;

'On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (*supra*) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance *Evans Wanjala Wanyonyi v Republic [2019] eKLR*). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited.'

We acknowledge the power of the Legislature to enact laws as enshrined in the *Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.'

44. This Court is guided by the decisions above. From the birth certificate sealed on September 1, 2010, the Complainant was born on December 5, 2007 therefore at the time the offence was being committed, she was 13 years. From the P3 form, the hymen had been broken a long time ago and there were no injuries or lacerations on the labia majora, labia minora or vagina. From the P3 form, there was no clear evidence of defilement. This only goes to show that there was no struggle between the complainant and the minor.



45. It is trite that for the charge of defilement to stand, the Prosecution must prove three main ingredients as provided for under section 8(1) of the *Sexual Offences Act* No 3 of 2006 being the age of the victim (must be a minor), that there must be penetration and proper identification of the perpetrator (see *George Opondo Olunga vs Republic [2016] eKLR*).
46. From the record, all the main ingredients of defilement were proved in this case.
47. This Court agrees with the Trial Court that the Appellant being the adult ought to have shunned such a relationship. Further, this was a school going child who even had her school uniform when she was found at the Appellants house, the Appellant in mitigation only confirms this position and does not seem to see anything wrong in what he did. Taking further account that the Appellant was convicted on his own plea of guilty, thus saving the Court's time, this Court exercises its discretion and reduce the sentence to 15 years from the date he was taken into custody.

It is so ordered.

**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 24TH NOVEMBER, 2022 (VIRTUAL/
PHYSICAL CONFERENCE).**

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

JOSEPH KIOKO MULI - APPELLANT

MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

