



REPUBLIC OF KENYA



**Agwingi v Republic (Criminal Appeal E013 of 2024)
[2025] KEHC 206 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E013 OF 2024**

DK KEMEL, J

JANUARY 17, 2025

BETWEEN

MICHAEL OMONDI AGWINGI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the conviction and sentence of Hon L.Simiyu (Senior Principle Magistrate) in SIAYA Chief Magistrate's Court S.O. Case No. E022of 2021 delivered on 8th February 2024)

JUDGMENT

1. The Appellant herein Michael Omondi Agwingi was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that within the month of November 2020 within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of NAO a child aged 15 years.
2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that in November 2020 within Siaya County intentionally touched the vagina of NAO a child aged 15 years with his penis.
3. After a full trial, the Appellant was convicted and sentenced to serve twenty (20) years' imprisonment.
4. Aggrieved by the aforesaid sentence, the Appellant has now appealed to this court against the sentence on the following grounds:
 - i. That the sentence meted was too harsh for a first-time offender.
 - ii. That this court considers the provisions of Articles 19, 21(1), and 50(2) of *the Constitution* and interferes with the sentence imposed and that his sentence be reduced to a lesser one.



5. The jurisdiction of the first Appellate Court is well settled. In the widely quoted case of Okeno –vs. R (1972) EA 32, it was held that the duty of the first Appellate Court is to re-assess, re-evaluate and re-analyze the evidence tendered and to come to its own conclusions, of course bearing in mind that the court did not have the benefit of seeing or observing the witnesses as they testified. It is therefore imperative that this court fairly considers the evidence on record and to reach its own conclusion.

6. The prosecution caused a total of four witnesses in support of its case,

7. PW1 LAO testified that she resides at Kap Kagan and that she is a farmer. She went further to state that sometime in March 2021 she realized that her daughter N was moody and would break down and cry for no apparent reason. That later, her younger daughter informed her that N no longer uses sanitary towels. She summoned N and interrogated her. That during the said interrogation, N informed her that Mike had sometimes back called her to the Posho mill where he pulled her to the inner room, threatened to kill her if she screamed and had sex with her.

That on 13/3/2021, she took her daughter N to Siaya County Referral Hospital where she was tested and found that she was pregnant. That she reported the matter to Siaya police station and was issued with a P3 form. She stated that her daughter was 15 years old and that she identified the birth certificate (PMFI 1), Scan dated 13/3/2021 (PMFI 2), Lab request (PMFI 3), P3 form (PMFI 4), Post Rape Care (PMFI 5). She further stated that she had known the Appellant previously as an employee of her neighbor.

On cross examination, she stated that the child informed her what had transpired and that's when she took her to the hospital.

8. The trial court conducted a *voire dire* examination on the complainant and established that she understood the nature and seriousness of an oath and was thus directed to tender sworn testimony. PW2 NRA testified that she is 15 years old and resides at Pap Kagan with her parents and that she is a pupil at [Particulars Withheld] Primary school. She testified that sometime in November 2020 at around 7.00pm when she was from the market, the Appellant implored her to go into the Posho mill. That when she went, he shut the door and pulled her into an inner room where there was a bed. That there was electricity which was on in the posho mill. That he removed her skirt, blouse and underwear and threatened to kill her if she screamed. That he inserted his penis inside her vagina and had sex with her. That he did not use a condom. That when he was done, he threatened her that he would kill her if she reported to anybody. That she was afraid and did not tell anyone until when her mother enquired from her as to whether she had been having her periods and that is when she disclosed the incident to her. That she was then taken to hospital then later reported to Siaya police station.

On cross examination, she testified that although it was 7.00pm, there was electricity which was on in the Posho mill. That she knew him as a casual work at a neighbor's home. That she was not found with him at the date of his arrest.

9. PW3 No. 104947 Pc Esther Chepngetich testified that she is currently attached at Siaya police station. That on 14/3/2021 while performing general duties at the station, the complainant's mother turned up at the station and reported that her class seven daughter at Mulaha primary school had been defiled in November 2020. That she booked the report, issued them with a P3 form and referred them to hospital. That the P3 form was filled and that she recorded their statements and forwarded the file to the ODPP who advised her to charge the Appellant with the offences.

10. That on 16/6/2022 she requested for an order for DNA testing from the Appellant, the complainant and the baby born to her to the government chemist at Kisumu. That she escorted them to the Government chemist on 22/6/2022 where samples were taken. That they were issued with the results



on 30/6/2022. That the finding was that there is 99.99% chance that the Appellant herein is the biological father to the baby born by the complainant. She produced the birth certificate of Natalie as Pexhibit 1, Birth certificate of baby GE as Pexhibit 6, Court order as P. Exhibit 7a, DNA results – Pexhibit 8.

On cross examination, she stated that she found the Appellant at the home where he works where they found him asleep and that they woke him up. That he was alone.

11. PW4 Kennedy Opiyo Omondi testified that he was a clinical officer now at Rwambwa Sub County hospital. That on 14/3/2021 he saw a client by the name N aged 15 years using an outpatient number 007xxx of 2021. That the child reported sexual abuse by a person well known to her in October 2020 at Pap Kakan in Alego Usonga. That she couldn't remember the date of the incident but she claimed that the Appellant had lured her into a Posho mill where he had sex with her.

That she had abdominal distress and a mass of pregnancy of about five months.

That vaginal examination showed absent hymen, vaginal area opening spontaneously with whitish discharge, no bleeding. That pregnancy was positive and that ultra sound showed 19 weeks' pregnancy. VDRL and HIV were negative, puss cells in urine suggested infection, and that he linked her to ANC clinic. That he filled a P3 form for the complainant which he had in court together with a lab request he made and the results. That he also made a Post Rape Report and requested for an ultra sound which was done.

That he produced the Ultra sound report as Exhibit 2, P3 form as P-exhibit 4, Post rape form as P exhibit -5 and lab request as P exhibit -3.

On cross examination, he stated that he never examined the Appellant.

That marked the close of the prosecution's case.

14. That marked the close of the Respondent's case. The trial court later established that the Appellant had a case to answer and was subsequently put on his defence. He opted to tender an unsworn statement.

15. DW1 Michael Omondi Agwingit testified that the dates in the evidence of the Complainant and her mother when they went to the hospital were contradictory since the complainant talked of 14/3/2021 while her mother talked of 13/3/2021. That no doctor examined him, and that there were no eye witnesses.

16. That marked the close of the defense case.

17. The appeal was canvassed by way of written submissions. The Appellant submitted that the sentence imposed against him is a minimum mandatory sentence which violates his constitutional rights to fair hearing. He placed reliance on the case of Siaya High court Criminal Appeal No. 35 of 2019 Daniel Onyango Ochar Vs Republic.

The Appellant went on and relied on a myriad of authorities including, G.K. Versus Republic – Criminal Appeal No. 134 of 2018 (2021) EKLK, to wit that the Court of Appeal held that they were no longer rigid with regard to minimum mandatory sentence and would take into account the peculiar circumstances of each case.

The Appellant concluded by submitting that this court does consider the time he spent in custody prior to the sentencing as a basis of reducing the sentence meted.

18. On the part of the Respondent, it was submitted that the Appellant is appealing against the 20-year imprisonment sentence. It was submitted that sentencing was discretionary to the trial magistrate and that the High court may only interfere where the trial magistrate failed to consider material factors or



imposed an excessive or harsh sentence. That as far as the Respondent is concerned, the sentence given was just and reasonable. Reliance was placed on the case of *Wanjema Versus Republic* (1971) E.A. 43 and *Ruphas Furaha Ngombo Vs, Republic* (2019) eKLR.

In conclusion, the Respondent submitted that the appeal lacks merit and that the same should be dismissed.

19. I have given due consideration to the record of the lower court as well as the rival submissions. It is not in dispute that the Appellant's appeal herein is against sentence only. I find that the only issues for determination is whether the sentence imposed by the trial court was proper.

20. The Appellant had been charged under section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The penalty Section thereof namely Section 8(3) thereof stipulates that:

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.

The birth certificate produced by the investigating officer (PW3) as exhibit 1 confirmed that the complainant was then aged 15 years at the time of the offence. Hence, the said age fell within the bracket of 12-15 years for purposes of sentencing and which warrants a sentence of 20 years' imprisonment. There has been a plethora of cases lodged by Appellants seeking to challenge minimum sentences imposed under the *Sexual Offences Act* No. 3 of 2006 following the decision of the Supreme Court in *Francis Karioko Muruatetu and 2 Others Vs R* [2017] eKLR. Several cases both in the High Court and Court of Appeal were reviewed pursuant to the said decision. However, the said Supreme Court vide *Petition No. 18 of 2023 R vs Stephen Gichuki* held that minimum sentences under the *Sexual Offence Act No. 3 of 2006* are legal as long as the said Act is in force and has not been declared as unconstitutional. This decision would appear in my view to now seal all loopholes that Appellants had been using to have minimum sentences reviewed by the higher courts. The decision aforesaid by the Supreme Court is binding on this court. Consequently, i find the sentence imposed is the minimum possible in law.

21. It is noted from the record that the Appellant was arrested on 20th March 2021. It is also noted that he stayed in custody until 3rd September 2021 when his bond was approved. The difference herein is about six months which must be factored in the sentence. From the judgment of the trial court, the learned trial magistrate stated that: "Upon such considerations the accused to serve 20 years' imprisonment starting today 8/3/2024." It is clear that the period spent in custody prior to the sentencing was not considered when computing the sentence yet the same is mandatory pursuant to the provisions of section 333(2) of the Criminal Procedure Code. The same provides as follows:

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.

The Court of Appeal decision in *Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi V Republic* [2018] eKLR is instructive in that the period spent in custody must always be factored during the sentencing of a convict. As the trial court failed to factor in the period spent in custody, the sentence



imposed must be interfered with so as to factor the six months already spent in custody prior to the sentencing.

22. In view of the foregoing observations, it is my finding that the appeal partially succeeds only to the extent that the sentence imposed is hereby set aside and substituted with a sentence of nineteen years six months which shall commence from the date of conviction namely 8/3/2024.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY, 2025

D. KEMEI

JUDGE

In the presence of:

MOA.....Appellant

M/s Kerubo.....for Respondent

Mboya.....Court Assistant

