



**Milimo v Republic (Criminal Appeal E022 of 2021)  
[2025] KEHC 1461 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1461 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E022 OF 2021  
SC CHIRCHIR, J  
FEBRUARY 20, 2025**

**BETWEEN**

**DENIS ISIONGO MILIMO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein was charged with defilement contrary to section 8(1) and (3) of the Sexual Offence Act.(The Act) . The particulars of the charge were that on the 30/1/2021 at xxxxxx village, xxxxxx Location within Kakamega County intentionally caused his penis to penetrate the vagina of MKV, a girl aged 15 years.( xxx: particulars withheld).He was convicted after a full trial and sentenced to serve 20 years in prison.

**Petition of Appeal.**

2. He was aggrieved and filed this appeal on 25/6/2021 and an Amended one on 17/10/2024. On the Amended petition he has raised the following grounds;
  1. That the Appeal is against sentence only.
  2. That the learned Magistrate erred in law and in fact by imposing mandatory maximum sentence without considering the current jurisprudence on the discretion of trial court on sentencing.
  3. That the trial magistrate erred in law and fact by imposing mandatory minimum sentence without considering that mitigating circumstances were not taken into account.
  4. That the trial magistrate failed to exercise his discretion in determining the sentence



5. That he has been rehabilitated and reformed, has attained training in theology and asks the court to consider his mitigation.
3. The appellant was unrepresented and therefore I have rephrased the grounds for purpose of clarity.
4. The appeal was canvassed by way of written submission.

### **Appellant's Submissions**

5. It is the Appellant's submissions that having been a first offender he was entitled to the benefit of the law pursuant to Section 216 & 329, 333,23 of the criminal procedural code; that pursuant to the provisions of Article 27 and 28 of the constitution he was entitled to fair hearing on sentencing; and that consequently he was entitled to a more lenient sentence than the one imposed.
6. He submits that the discretion of the trial court must be exercised judicially. The appellant faults the mandatory minimum sentence such as the one that has been imposed on him on grounds that it does not take into account the objectives of punishment, disregard the individual characteristics of an offence; disregards the equal treatment and dignity of the offenders and violate the provisions of Article 27, 28 and 29 of the constitution.
7. He argues the court to be guided by the decisions in the case of Githiomi Mbutu Vs R (Muranga Cr. Appeal No. 77/2017) inter alia where the court set aside mandatory sentence.
8. He submits that he has been reformed and obtained valuable skills in prison . He has attached various certificates of the courses he has undertaken in the last 3 years he has spent in prison.

### **Respondent's Submissions**

9. It is the respondent's submissions that the sentence meted out was not excessive, and was within the provisions of the law. It is also submitted that the offence was predatory and therefore called for a harsh sentence.

### **Analysis and determination**

10. Section 8(3) of the Act provides as follows; "A person who commit the offence of defilement with a child between the age of the one and 15 years is liable, upon conviction, to imprisonment for a term of not less than 20 years.
11. Sentencing is at the discretion of the trial court and the principles upon which an appellate court can interfere with such discretion are well settled. The appellate court can only interfere "if it is evident that the trial court has overlooked a material factor , has taken into account an immaterial one, has acted on wrong principles or the sentence is manifestly excessive in the circumstances of the case " (Ref; Wangemia Vs R (1971) E.A 493 as cited with approval in the case of Bernal Kimani Gachene Vs Republic (2002) KECA 94 (KLR).
12. The Appellant has faulted the trial court for overlooking his mitigation. However, a perusal of the record shows that this submission is not true. The appellant was given a chance to mitigate and through his advocate told the court as follows: "Accused is remorseful, he pleads for leniency. He is 30 years old, married with one child. He is the family bread winner. We pray that the court consider a non-custodial sentence following the decision in Muruatetu cases".
13. The record further shows that while sentencing the Appellant the trial magistrate stated "I have considered that he is a first offender. I have considered the general circumstances of the case. Although



the accused pleads for non-custodial sentence, I note that this is not viable because the offence committed is serious. Additionally, the victim is a child who may live with memories of the incident for the rest of her life. The court also notes that the incidence of child defilement is on the rise in this area and thus custodial sentence will suffice. The law requires a minimum of 20 years to be served by anyone convicted for such an offence”

14. Thus, contrary to the Appellant’s submissions the trial court considered both the mitigating and aggravating factors . The sentence is also that which is provided under the law. Thus there was no illegality or error in principle on sentencing to warrant the intervention of this court.
15. The sentence is mandatory sentence, but that is the law. Where the law speaks , then discretion does not apply.
16. Granted, I notice that the Appellant urges the court to be guided by the decision of the supreme court in Muruatetu case. Though not specified, the Appellant must have been referring to the declaration of death sentence prescribed under section 204 of the penal code as being unconstitutional. However, the supreme court has since clarified that their declaration was limited to Section 204 of the Penal Code only.
17. I am also aware about some decisions by the high court that have been expressed themselves on the unconstitutionality of the sentences set out under Section 8 of the Sexual Offences Act. Those of decisions are persuasive but not binding on this court. Am of the view therefore that the sentence on defilement remains as set out in section 8 of Act and for this case as set out under Section 8(3), as the victim was 15 years.
18. The appeal is without merit. It is hereby dismissed

**DATED, SIGNED AND DELIVERED AT ISIOLO ,VIA MICROSOFT TEAMS, THIS 20TH DAY OF FEBRUARY, 2025.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

Godwin Luyundi- Court Assistant

The Appellant- in person

Ms. Kagai for the Respondent.

