



**Momanyi v Republic (Criminal Appeal E207 of 2023)
[2025] KEHC 2740 (KLR) (Crim) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E207 OF 2023
AB MWAMUYE, J
MARCH 6, 2025**

BETWEEN

JAMES NYAKUNDI MOMANYI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the original conviction and sentence by
Hon. B. Ochoi in Milimani CM Sexual Offence case No. 13 of 2018)*

JUDGMENT

1. The Appellant, James Nyakundi Momanyi, was charged with the offence of defilement contrary to Section 8 (1), as read together with Section 8(1) (4) of the [Sexual Offences Act](#) No. 3 of 2006. The Appellant was equally charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. Being dissatisfied with both the conviction and sentence, the Appellant initially filed an undated Memorandum of Appeal that espoused the following grounds of appeal, verbatim:
 - a. That the learned trial magistrate erred in matters of both law and in fact by failing to find that the critical ingredients of the offense were not established against the accused person thereby leaving this conviction unsafe.
 - b. That the learned trial magistrate erred in both matters of law and in fact by failing to find there was no corroborative evidence to support the prosecution's allegations against the accused person.
 - c. That the learned trial magistrate erred in matters of both law and fact by failing to find that the prosecution failed in entirety to establish the legal burden of proof as was required by law.



- d. That the learned trial magistrate erred in matters of both law and fact by failing to properly weigh and consider his defence case in light of totality of the whole evidence which reasonably exonerated the accused person from any wrong doing.
3. The Appellant filed written submissions dated 5th November 2024 to which he chose to abandon his appeal against his conviction and instead focus on his appeal against sentence.
4. The Appellant submitted that he has engaged in rehabilitation programs like spiritual mentorship counselling and enrollment into prison academy. He further stated that he has taken positively his incarceration, is highly remorseful and has rehabilitated and reformed himself thus prays that this Court will exercise leniency in reducing the sentence to allow him reintegrate into the society.
5. The Respondent filed written submissions dated 9th December, 2024 where it submitted that this Court needs to carefully consider the facts of the case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors together with the scar the incident left in the life of the victim.
6. It further stated that the pre-sentence report noted that the accused lacked remorse and classified him as a dangerous sex offender. The Respondent further submitted that having considered the aggravating factors against the mitigating factors and the sentence provided under the *Sexual Offences Act*, this Court should consider enhancing the sentence meted out by the trial court.
7. Upon consideration of the facts of the case, the grounds of appeal and the submissions made by parties, there is only one issue permanent for consideration:
 - i. Whether the sentence imposed was appropriate

Whether the sentence imposed was appropriate

8. As regards the sentence, this court is guided by the principles set out in the Court of Appeal case of Benard Kimani Gacheru vs Republic [2002] eKLR where it 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, the 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, any one of the matters already stated is shown to exist.
9. Similarly, the landmark case of Dismas Wafula Kilwake v Republic [2018] eKLR the Court of Appeal set out the factors to be considered in sentencing under the *Sexual Offences Act*. It observed as follows:

“We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences



are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

10. This progressive decision now requires courts to pay attention to individual aspects of the case while sentencing even for convictions under the [Sexual Offences Act](#) which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is an indicator of the sentence to be imposed, the court can impose a different sentence.
11. The trial Court must take into consideration all the facts of a case as well as the mitigation from the accused person. I note that in the present case the trial magistrate considered these adequately together with the Sentencing Policy Guidelines, 2016 and I am satisfied that the trial court exercised discretion to accord the Appellant a sentence of 15 years. He now has sufficient time to reflect on his actions. The trial magistrate however noted that the accused person did not seem remorseful. Based on the fact that this court does not have the privilege of examining the Appellant first hand, I am guided by the observation of the trial court.
12. The trial magistrate did not mention whether she took into consideration the time spent by the accused person in custody as required by law.
13. Section 333 (2) of the [Criminal Procedure Code](#) provides:
 - “(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 the code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take into account of the period spent in custody.
14. The Court of Appeal in the case of Bethwel Wilson Kibor vs. Republic [2009] eKLR stated:

“By proviso of section 333(2) of the [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 22nd September, 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.”
15. The Judiciary Sentencing Policy Guidelines also provide as follows:

“The proviso 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 trial.”



16. In this case I have taken into account the circumstances of the offence and the sentencing guiding principles and authorities outlined above. I have also taken into account the Appellant's mitigation and the period spent in pre-trial custody. I am persuaded to alter the sentence.
17. Consequently, I uphold the conviction. However, the Appellant shall serve 15 years imprisonment imposed by the Trial Court, with the term commencing from the date of arrest, being 6th May, 2018.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH, 2025.

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BAHATI MWAMUYE

JUDGE

