



**Waswa v Republic (Criminal Appeal E016 of 2023)
[2024] KEHC 179 (KLR) (16 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL E016 OF 2023
RB NGETICH, J
JANUARY 16, 2024**

BETWEEN

MICHAEL WASWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal in mitigation upon conviction in Criminal Case No. E019 of 2021 delivered on 2nd February, 2022 by Hon. A. Towett, SRM)

JUDGMENT

Background

- 1 The Appellant Michael Waswa was charged with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *sexual offences Act* No. 3 of 2006. The particulars of the charge are that the appellant on diverse dates between 29th January, 2021 and 6th February, 2021 at [Particulars Withheld] village in Mogotio Sub- County within Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of F.J a child aged 15 years.
2. In the alternative, the Appellant was charged with the offence of indecent Act with a child contrary to section 11(1) of the *sexual offences Act* No. 3 of 2006. The particulars of the charge being that the Appellant on the diverse dates between 29th January, 2021 and 6th February, 2021 at [Particulars Withheld] village in Mogotio sub-county within Baringo County intentionally and unlawfully caused his penis to come into contact with the vagina of F.J a child aged 15 years.
3. The accused denied both the main and the alternative charge and the matter was set down for full trial with the prosecution availing 5 witnesses in support of the charges against the accused. Upon the close of the prosecution's case, on the 11th November, 2021, the trial court found that there was a prima facie case and placed the accused on his defence. On the 15th December, 2021, the accused gave unsworn



- statement in his defence. He denied committing the offence and closed his case without calling any witness.
4. Upon the close of the prosecution case and the defense case, the trial court through judgment delivered on the 2nd February,2022, found the accused guilty as charged, convicted and sentenced him to serve 15 years imprisonment.
 5. Dissatisfied with the conviction and the sentence of the trial court, the Appellant filed a petition of appeal on the following grounds:-
 - i. That the learned trial magistrate erred in law and fact in admitting the evidence of witnesses e.g PW2 and PW5 who gave out false information in court.
 - ii. That the learned trial magistrate erred in law and in fact by convicting the Appellant on insufficient medical evidence that could not sustain a conviction and sentence.
 - iii. That the learned trial magistrate erred in law and fact by concluding that penetration was proved though the hymen was intact.
 - iv. That the learned trial magistrate erred in law and fact by pronouncing an excessive sentence far from the weight of the evidence adduced.
 - v. That the learned trial magistrate erred in law and fact by failing to appreciate that prosecution evidence was marred with contradiction which greatly violated the credibility of the prosecution case.
 - vi. That the learned trial magistrate erred in law and fact by failing to appreciate that the investigation's officers' evidence (PW 5) was marred with contradictions by not proving its case beyond reasonable doubt.
 - vii. That the learned trail magistrate erred in law and in fact by convicting the appellant on the strength of the prosecution case which was evidently full of glaring gaps.
 - viii. That the learned trial magistrate erred in law and fact by relying on hearsay evidence to convict the Appellant e.g evidence given by PW3.
 6. The appellant prays that this appeal be allowed, the conviction be quashed, the sentence be set aside and the appellant be set at liberty.
 7. On the 16th November,2023, the Appellant filed amended grounds of appeal under section 350(2) of the [CPC](#) cap 75 Laws of Kenya. He abandoned appeal on conviction and sought sentence review giving mitigating factors.

Appellant's Submissions

8. The appellant filed his submissions together with his amended grounds of appeal. He states that he concedes conviction and is seeking review on sentence.
9. He informed the court that he was jailed in the year 2022 for 15 years imprisonment for defilement of a girl aged 16 years and maintained that he agrees with the conviction.
10. The prosecution submitted that sentence imposed is the minimum provided under the [sexual offences Act](#) where the victim is between 16 and 18 years old and are opposed to the appeal on sentence and prayed that it be dismissed.
11. In a rejoinder the Appellant urged the court to reduce the period he was in remand from his sentence.



Analysis And Determination

12. I wish to consider whether this Honourable court can interfere with the sentence meted on the appellant by the trial court. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, where the Court of Appeal pronounced itself on the issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

13. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case. In the case of *Shadrack Kipkoech Kogo v R.* Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated as follows:-

“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).”

14. Further in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR the court of appeal restated 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 states is shown to exist.”

15. In this case, the complainant was of the age of 15 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the *Act* which provides 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.
16. Sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R.*, and *Wilson Waitegei V Republic* [2021] eKLR).
17. In an appeal on sentence, the court may sustain or reduce or enhance or alter the nature of sentence. The appellant herein is seeking for the reduction of the sentence. On the other hand, the Prosecution maintain that the trial court was lenient as the trial court applied the minimum sentence. Taking into account the age of the child herein and circumstances surrounding the offence as shown by the record, I am satisfied that the sentence imposed by the trial magistrate is appropriate; it is not harsh nor excessive. I therefore have no reason to interfere with the sentence



18. I note that the appellant further argue that the trial magistrate failed to- reduce from sentence the period served in remand and therefore failed to comply with section 333 (2) of the Criminal Procedure Code which provide 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.”

19. In the case of Abamad Abolfathi Mohammed & Another V Republic, [2018] eKLR, the Court of Appeal held that sentence shall take effect from the date of conviction by the trial court. On perusal of the court record, I note that the learned trial Magistrate did not indicate whether he took into account the period the Appellant had spent in custody during the trial and that he did not order that the said period will form part of his sentence.

20. From the Record, the appellant was arrested on 6th February, 2021 and was arraigned in court on 8th February, 2021. He denied the charge and after full hearing, the matter was determined on the 2nd February, 2022. He therefore deserved to have period served in remand reduced from sentence imposed by the trial court.

Final Orders: -

1. Appeal on conviction is marked as abandoned.
2. Appeal on sentence is hereby dismissed.
3. Period served in remand to be reduced from sentence imposed by the trial court.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 16TH DAY OF JANUARY 2024.

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RACHEL NGETICH

JUDGE

