



**Kibokong v Republic (Criminal Appeal E010 of 2023)
[2024] KEHC 1201 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E010 OF 2023
RB NGETICH, J
FEBRUARY 8, 2024**

BETWEEN

HILLARY CHEBON KIBOKONG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence from Judgment dated 4th October, 2022 by Hon. V.O. Amboko, RM in Criminal Case No. E009 of 2022 at Kabarnet Magistrate's court)

JUDGMENT

Background

1. The Appellant was charged in count one 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 the 14th day of March, 2022 at about 1900 hrs. in Baringo North Sub-County within Baringo County intentionally caused his penis to penetrate the anus of VKK a boy aged 14 years.
2. The accused faced an alternative charge 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 14th day of March, 2022 at about 1900 hrs in Baringo North Sub-County within Baringo County unlawfully and intentionally touched the anus of VKK a boy aged 14 years.
3. The accused denied all the charges and the matter was set down for full trial with the prosecution called a total of 5 witnesses in support of the charges facing the accused. On his defence, the accused gave unsworn statement in his defence and closed his case.
4. By judgment delivered on the 27th day of September 2022, found the accused guilty as charged, convicted him under Section 215 of the Criminal Procedure Code and sentenced him to serve 20 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 by convicting the appellant in a prosecution case which was not proved beyond reasonable doubt.
 - ii. That the learned trial magistrate erred in law and in fact by failing to note that the medical evidence adduced at trial by the prosecution was insufficient to sustain a safe conviction.
 - iii. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note the important element of penetration was not conclusively proved.
 - iv. That the entire prosecution evidence was largely inconsistent and contradicted hence unsafe to rely on to support a conviction.
 - v. That the Appellants defence was not considered accordingly, the evidence tendered was not conclusively considered alongside the appellant's defence.
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.

Submissions

7. The appeal was canvassed by way of written submissions. The appellant filed submissions on the 1st November, 2023. In his submissions, the appellant argues that his appeal is on mitigation grounds on the severity of the sentence. The appellant submits that he is a first offender, remorseful and reformed as he has engaged in rehabilitative programs while in prison. He submits that he has one child, his father who was 95 years has died and that he is ailing from Ulcers. He states that he has no one to take care of his children since his wife remarried.
8. When appeal came up before court for hearing on the 7th November, 2023, the Appellant informed the court that he is not challenging the conviction and said he was sentenced to serve 20 years imprisonment for the offence of defilement and his child was aged 14 years old.
9. The prosecution counsel Ms. Ratemo submitted that in light of the fact that the Appellant has abandoned his appeal on conviction, she submits that the sentence meted by the trial court is in line with the provisions of the law for the offence of defilement of a child aged 14 years which prescribes imprisonment not less than 20 years for defilement of a girl aged 12 years to 15 years. She submits that the trial court exercised discretion and sentenced the appellant to 20 years imprisonment which is the minimum sentence provided. She submitted that the sentence was in line with law and prayed that the appeal on sentence be dismissed.

Analysis and Determination

10. In considering whether to interfere with sentence imposed by the trial court, the appellate court has to consider whether the sentence is harsh and excessive. The Court of Appeal, on its part, in [*Bernard Kimani Gacheru vs. Republic*](#) [2002] eKLR restated that:

“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.”

11. The complainant herein was of the age of 14 years at the time of the offence. Thus, the appropriate penalty clause is Section 8 (3) of the Act which provides:

“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.

12. From principles set out above, 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.

13. Record show that the complainant herein was 14 years old, she suffered physical injuries and the manner of commission of the offence was cruel as evidenced by the injuries she sustained. There is no doubt that the child will be traumatized forever.

14. Record show that the trial court considered the fact that the Appellant was a first offender and looking at the circumstances of the offence, the impact on the child herein and the need to deter other would be offenders, I am satisfied that the sentence imposed is appropriate and have no reason to interfere with.

Final Orders: -

15.

1. This appeal is hereby dismissed.
2. Period served in remand to be considered in computing sentence.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 8TH DAY OF FEBRUARY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Appellant - present.

Ms. Ratemo for State.

Elvis/Momanyi – Court Assistants

