



**Mutuku v Republic (Criminal Appeal E053 of 2021)
[2024] KEHC 1571 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1571 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E053 OF 2021
A. ONG'INJO, J
FEBRUARY 15, 2024**

BETWEEN

FRANCIS MUTUKU ALIAS BABU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant Francis Mutuku alias Babu was charged in Mombasa CMC. Sexual Offence Case No. 39 of 2018 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. He was convicted and sentenced to serve 30 years jail term.
2. The Appellant was aggrieved by the sentence and in his amended ground of Appeal he said the trial court erred in fact by imposing a sentence that does not take into account the appellants mitigation which he reiterated in his submissions herein.
3. The Appellant prayed that this appeal on sentence be allowed and the sentence adjusted accordingly.
4. Appeal was canvassed by way of the appellant's written submissions. The appellant filed his submissions on 28th November 2023 together with an application to amend his grounds of appeal.

Appellant's Submissions

5. The appellant claimed that the trial magistrate breached Section 216 and 329 of the [Criminal Procedure Code](#) as the sentence of 30 years was nothing short of life imprisonment going by his age.
6. The Respondent did not file submissions.



Analysis & Determination

7. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

8. After considering the ground of appeal, records of the trial court and submissions, the issues for determination is whether sentence took into account the appellant’s mitigation.

9. The Appellant availed his photocopy of the handwritten proceedings and typed photocopy of typed judgment as the trial courts records were not traced. The photocopy of the handwritten proceedings and typed judgment that were provided by the appellant in court did not include the testimonies of PW4 and PW5 as well as the appellant, and mitigation and sentencing were also missing. It is therefore not possible to say that the trial magistrate considered or did not consider the mitigation before arriving at the conclusion that 30 years was appropriate.

10. The offence of defilement under Section 8(2) provides: -

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.

11. Although this court has not been able to see what the trial Magistrate said while sentencing the Appellant to 30 years imprisonment, it is clear that she exercised discretion to pass a determinate sentence of 30 years instead of life imprisonment long before the Court of Appeal in the case of *Julius Kitsao Manyeso v Republic* declared that life imprisonment was unconstitutional.

12. The trial Magistrate deviated from the mandatory nature of penalties in Sexual Offence. The Appellant who was referred to by the 10 years old complainant as Babu defiled a child who stands in the position of his grandchild. The penalty mirrored the breach of trust that is impliedly bestowed on the appellant by society to protect rather than prey on children. I find no reason to unsettle the sentence.

13. The appeal is dismissed save that the sentence should run from 4th July 2018 when appellant was arraigned in court and does not seem to have secured release on bond. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
15TH DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel - Court Assistant



Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

