



REPUBLIC OF KENYA



**Momanyi v Republic (Criminal Appeal E036 of 2022)
[2024] KEHC 3111 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E036 OF 2022
DKN MAGARE, J
MARCH 13, 2024**

BETWEEN

KENNEDY MOMANYI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence dated 30th August, 2022 at Nyeri Chief Magistrates Court S.O. No. 18 of 2020 before Hon. F. Muguongo, SRM)

JUDGMENT

1. This is an appeal against the original conviction and sentence dated 30th August, 2022 at Nyeri Chief Magistrates Court S.O. No. 18 of 2020 before Hon. F. Muguongo, SRM.
2. The Appellant Appeared before me and abandoned the prayer for conviction and prayed that sentence be reduced as it is harsh.
3. They prayed as follows: -
 - a. That may this appeal be allowed, conviction of the life sentence be converted as the court may deem fit, just and appropriate since the Appellant has not disputed the conviction but only the sentence.
4. The Appellant was charged with two counts. The 1st count was that on the 25th day of May, 2020 in Nyeri County within the republic of Kenya, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of BNN, a girl aged 11 years. The 2nd count was of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.



5. The Appellant was convicted and sentenced to life imprisonment. He had misled a minor and defiled her in a place they had agreed. This resulted in a child being begotten. During trial he cooperated for DNA test to be given. The minor was 12 years old having been born on 20/6/2008.
6. Though charged with an offence that the minor was 11 years, they proved that the minor was actually 12 years. This was not fatal to the state's case. There was no prejudice suffered with that error on age. Section 8(2) requires sentence for a person who defiles a child of 12-15 years to be sentenced to 20 years. I note that this was a first offender.
7. The incidents narrated are heart rending. The minor kept sneaking from the posho mill to go and have sex with the Appellant. They were caught, the minor left her home to go and have sex, after her mother had slept. She had not slept as she was waiting for the Appellant. They agreed that the Appellant picks her after the mother had slept. They left the Appellant's house at 0300 hours. She asked the Appellant to go back. The minor did not want to go back to their home.
8. The minor said her father could identify them and did not want to be caught. DNA report was given. There was no dispute on the offence. The question was sentence.
9. I note that the minor requires a lot of rehabilitation. She took every step to evade being found by the parents. She is now a parent. The offence did not occur with any violence.
10. In *R v Bieber* [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows;

“40. The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment....”

11. In the case of *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal P. Nyamweya, J. Lesitand G.V. Odunga) stated as doth:-

“We recognize that although the Judiciary released elaborate and comprehensive [Sentencing Policy Guidelines](#) in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in *Jackson Wangui*, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

93. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along



established parameters of criminal responsibility, retribution, rehabilitation and recidivism”.

26. We are equally guided by this holding by the Supreme Court of Kenya, and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence. We note in this respect that the appellant did raise the concern of his sentence of life imprisonment while he was 18 years of age in his first appeal, and the High Court held as follows in this regards; “The nature of the offence and the makeup of the offender are of such a nature that the public require protection for a considerable time, unless there is a change of circumstances of the appellant. Clearly there are no set of circumstances that are different to warrant interference with the legal sentence imposed by the trial court. In my view, it cannot also be said to be excessive, unlawful or punitive to the extent that this court jurisdiction can be invoked to vary it.”
12. The *sentencing guidelines* requires that we consider the circumstances, in deciding whether to impose a custodial or a non-custodial sentence, the following factors should be taken into account, gravity of the offence, Criminal history of the offender, Character of the offender, for offenders who are already remorseful and receptive to rehabilitative measures Offender’s responsibility to third parties, where committing an offender to a custodial sentence is likely to unduly prejudice others, particularly vulnerable persons.
13. Further I note conduct of both the minor and the Appellant, the circumstances of occurrence of the offence, his conduct during trial and at the appeal. All circumstances considered I find the court failed to properly exercise discretion.
14. The Appellant still has a responsibility to the child he sired albeit with the minor. Now we have 2 vulnerable children one of who, is the responsibility of the Appellant. I was informed that the minors are under the care of the grandmother of the newest minor. I must therefore weigh between rehabilitation of the Appellant, lest he impregnates another minor in order to escape liability and the ultimate role to maintain his child.
15. In the first instant, there was an error on the age of the minor. With that error, the life sentence should never have been imposed. I therefore set aside the life sentence.
16. I find that the Appellant deserves leniency in spite of the actions he did. I set aside the sentence meted out and substitute with 10 years. The years should run from the date of arrest, excluding the days he was on bond, as per Section 332(2) of the *Criminal Procedure Code*. The tie is long enough to come out rehabilitated and take care of the child, a product of illicit relations for which he must be punished.

Order

17. The court makes the following orders;-
 1. The life sentence meted on the Appellant is hereby set aside and substituted with 10 years imprisonment. The sentence to run from the date of arrest excluding days he was on bond.
 2. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF MARCH, 2024.

Judgment delivered through Microsoft Teams Online Platform.



KIZITO MAGARE
JUDGE

