



**DA v Republic (Criminal Appeal E072 of 2019)
[2024] KEHC 4271 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E072 OF 2019
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

DA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. Menya
in Eldoret law court cr. SO. NO. E132 of 2018)*

JUDGMENT

Representation:

Mr. Mark Mugun for ODPP

1. The Appellant 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 were that on 28th June 2018 within Kakamega county, the appellant unlawfully and intentionally caused his genital organ to penetrate the genital organ of BA a child aged 13 years old.
2. The appellant faced an alternative being committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were more or less the same.
3. The appellant was convicted on the main charge and sentenced to 20 years imprisonment.
4. Being aggrieved with the said judgment the appellant lodged the present appeal based on the following grounds:
 - i. That the trial magistrate erred in law and facts when he convicted and sentenced the appellant to 20 years imprisonment yet failed to find that penetration as an ingredient of defilement was not proved.



- ii. That the medical evidence relied upon by the trial magistrate was not sufficient to the standards of the law.
 - iii. That the prosecution evidence was totally inconsistent to support the charge.
 - iv. That the trial magistrate erred in law and fact when he convicted the appellant without putting into consideration that the defence adduced was strong enough to water down the prosecution case.
 - v. That the trial magistrate erred in both law and fact by sentencing the appellant herein yet failed to note that the age of the alleged minor was not proved.
5. Parties filed written submissions in support of their arguments. The appellant now appears to have abandoned his appeal on conviction and has submitted only on the sentence.

Appellant's Submissions

6. The appellant in his submissions sought leave to argue his appeal only on sentence, thus abandoning his appeal on conviction. The appellant argued that in recent legal developments, the high court and the court of appeal have come out to rule that the mandatory minimum sentences in sexual offences are unconstitutional for reasons that they deny judicial officers the discretion to award appropriate sentences in appropriate circumstances. On this, the appellant cited numerous authorities and I have considered the same.
7. The appellant argued that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose, the courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of *the Constitution*.
8. The appellant maintained that the court should consider reviewing his sentence and allow him benefit from a least severe sentence since he also has a constitutional right of being protected by the law under article 27 of the Kenyan Constitution.

Respondent's Submissions

9. The Respondent in opposing the appeal submitted that all the ingredients of the offence of defilement were proved to the required standard.
10. The Respondent submitted that when the Appellant was called upon to make his defence, he raised a defence of alibi and also stated that he was framed up because a cow had trespassed into their land. He also stated that the cow's owner vowed to avenge. The respondent submitted that it was an afterthought because this line of defence was never pursued when cross-examining the prosecution witnesses. That the defence of alibi was raised too late in the day for it to be subjected to any scrutiny.
11. On sentence, which I think is now the focus given that the appellant has abandoned his appeal on conviction, it was submitted for the respondent that the trial magistrate handed down the prescribed sentence and cannot be faulted for complying with the law.

Analysis and determination

12. Having reviewed the trial Record, the grounds of appeal and the appellant's submissions, the main issue is to determine whether the instant appeal is a good candidate for sentence review. In such circumstances, this court is mandated to examine the appropriateness of the sentence meted.



13. What is the appropriate sentence? Section 8 (3) of the [Sexual Offences Act](#) to Convict provides as follows:

“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.”

14. The sentence therefore prescribed for such an offence is a term not less than twenty years. However, in the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to sentencing;

- “(a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaption of the offender;
- (h) any other factor that the Court considers relevant.”

15. In issuing out a reasonable sentence, the sentencing guidelines 2023 have captured the following objectives to be considered: -

- i. Retribution: to punish the offender for his/her criminal conduct in a just manner.
- ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
- iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- v. Community protection: to protect the community by incapacitating the offender.
- vi. Denunciation: to communicate the community’s condemnation of the criminal conduct.
- vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
- viii. Reintegration: To facilitate the re-entry of the offender into the society.



16. Therefore, ideally, the appellant ought to serve a term of twenty years but our justice system is now moving away from mandatory sentences. The appellant has advanced a number of mitigating factors, which I believe should count in sentencing.
17. The appellant has equally sought for a non-custodial sentence. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
- a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
 - b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
 - c) Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - d) Protection of the community: - where the offender is likely to pose a threat to the community.
 - e) Offender's responsibility to third parties: - where there are people depending on the offender.
 - f) Children in conflict with the law: - non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
18. In order to decide whether such a sentence is appropriate, the Court has to consider the seriousness of the offence. The offence in question is that of defilement of a child aged 13 years and, in such cases, age is considered to be an aggravating factor. It is my considered view that the appellant cannot have the benefit of a non-custodial sentence. In *Mokela vs the state (135) /11)2011) ZASCA 166* the Supreme Court of South Africa held that: “ It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. this salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.” (See also the case of *Ogolla S/o Owuor vs. Republic, (1954) EACA 270, Shadrack Kipkoech Kogo –vs- R. Eldoret Criminal Appeal No. 253 of 2003*
19. In considering the circumstances of the case and the objectives of sentencing in totality, I am persuaded that a 12-year sentence is appropriate. The appellant shall equally benefit from the provisions of section 333(2) of the CPC. The sentence shall therefore run from the date of his arrest on 2.7.2018.
20. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 11TH DAY OF APRIL, 2024

In the Presence of:

Mr. Mugun for the State

Appellant

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R. NYAKUNDI

JUDGE

