



REPUBLIC OF KENYA



**Kilindi v Republic (Criminal Appeal E009 of 2022)
[2024] KEHC 6802 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 6802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E009 OF 2022**

**GMA DULU, J
APRIL 18, 2024**

BETWEEN

TITUS KYALO KILINDI APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 23 of 2020 at Wundanyi Law Court on 12th January, 2021 by Hon. E. M. Nyakundi - RM)

JUDGMENT

1. The appellant was convicted 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 which being that on 3rd July 2020 at around 0700hours at [particulars withheld] in Mwachabo Location, Mwatate Sub County in Taita Taveta County intentionally caused his penis to penetrate the vagina of CA a child aged 12 years.
2. On conviction, he was sentenced to 15 years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the grounds of appeal filed on 15th February 2022, that:-
 1. That the trial Magistrate erred when he convicted him yet failed to resolve material contradictions in the prosecution case in his favour.
 2. The trial Magistrate erred when he convicted him yet failed to observe that this was a family matter of a grudge.
 3. The trial Magistrate erred in convicting him yet failed to find that he was not served with P3 form.



4. The Magistrate erred in convicting him yet failed to see that the investigating officer testified on phone and the appellant did not hear him well and hear his response to cross-examination.
 5. The trial Magistrate erred in convicting him on poor investigations.
 6. The trial Magistrate erred in convicting him in the case having discrepancies between the date of the incident and evidence before the court.
 7. That he was not afforded a fair trial by the trial court.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions. I note that the appellant has dwelt in his submissions only on the constitutionality of the sentence imposed, while the Director of Public Prosecution has addressed the issue of the conviction.
 5. This is a first appeal, and the grounds of appeal and submissions seem to cover both conviction and sentence. As a first appellant court I have to remind myself of my duty to evaluate all the evidence on record afresh and come to my own conclusions and inferences – see *Okeno v Republic* [1972] EA 32.
 6. I also have to remind myself that the burden was on the prosecution to prove all the elements of the offence against the appellant. Such legal burden is codified under Section 107, 108 and 109 of the *Evidence Act* (Cap.80).
 7. Coming back to conviction, though I am duty bound to evaluate the evidence on record afresh if conviction is a ground of appeal, and as the Prosecuting Counsel has addressed conviction at length, in the present appeal I will not address the issue of adequacy of evidence and conviction, as the appellant clearly abandoned the grounds on conviction in submissions, when he specifically stated as follows in the submissions:-

“The applicant charged and convicted 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 in Criminal Case number 244 of 2014 at Wundanyi PM’s court and sentenced to fifteen (15) years imprisonment on 20th day of January 2021.

The applicant is not challenging his conviction but is challenging the legality of the enactment and the application of the mandatory minimum sentence as provided by Section 8(4) of the *Sexual Offences Act*.”

8. In my view, the import of the above submission of the appellant (described as applicant) is clear that he abandoned his appeal against conviction and is now only challenging the sentence. I thus go by that, and address only the issue of sentence.
9. With regard to the sentence imposed, the appellant was convicted under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.
10. In sentencing him the trial court took into account that Section 8(3) of the Act provides for a minimum sentence of 20 years. The Magistrate however referred to the case of *Muruatetu v Republic* a decision of the Supreme Court and in exercise of what he described as discretion, sentenced the appellant to 15 years imprisonment after taking into account that the victim was 12 years old.
11. In my view therefore, the appellant should have considered himself lucky for the liberal position adopted by the trial court and the consequent sentence imposed, which obviously is below the statutory minimum sentence of 20 years imprisonment.



12. I will not enhance the sentence however, as there is no such request made.
13. Otherwise I find no merits in the appeal. I dismiss the appeal and uphold the sentence imposed by the trial court. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF APRIL 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Ms. Kanywira for State

