



REPUBLIC OF KENYA



KENYA LAW
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**Wakoli v Republic (Criminal Appeal E021 of 2023)
[2024] KEHC 4269 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E021 OF 2023**

REA OUGO, J

APRIL 4, 2024

BETWEEN

ISAIAH MULONGO WAKOLI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence passed arising from the conviction by Hon.
A.A. Odawo (PM) on 4th April 2023 in Bungoma CMCCRC No. E084 of 2022)*

JUDGMENT

1. The Appellant, Isaiah Mulongo Wakoli, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#). The particulars of the offence were that on the 7th July 2022 at about 1600 hours in [particulars withheld] village [particulars withheld] location in Bungoma Central Sub- County within Bungoma County, he intentionally and unlawfully caused his penis to penetrate into the vagina of D.N.W a child aged 5 years old. He was also charged with an alternative count of Committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#).
2. A trial ensued and, in the end, the trial magistrate found that the prosecution had proved its case to the required standard and sentenced the appellant to life imprisonment. The appellant is dissatisfied with the sentence meted out by the trial court and filled his petition of appeal before this court on 11/04/2023 challenging the conviction and sentence. He abandoned the grounds in the petition of appeal by filing an amended petition of appeal on the following grounds:
 1. That the appeal is against sentence only.
 2. That the learned trial magistrate erred in both law and fact to impose harsh sentence without taking into consideration his mitigation thereby imposing a mandatory sentence.



3. That the learned trial magistrate erred both in law and fact when she imposed a harsh sentence without taking into consideration that he is a first offender and the appellant is under Article 27 (1) (2) and 50 (2) (p) of the Constitution guaranteed and or qualified for the benefit of the least severe punishment.
 4. That the learned trial magistrate further erred in law to impose the sentence without invocation of section 216 and 329 of the Criminal Procedure Code hence imposed the same without being fully informed which amounted to unfair discrimination in application of the said law contrary to Article 25 (c) 27 (1) (2) and 50(2) (p) of the Constitution.
3. The appeal was canvassed by way of written submissions and both parties have filed the rival submissions. The appellant submits that the trial court failed to take into account his mitigation and imposed the mandatory sentence a decision which is contrary to the jurisprudence created by superior courts. He argues that he is a first offender and entitled to the least severe sentence and relied on the decision of Evans Wanjala Wanyonyi v Republic.
 4. The respondent filed their submissions dated 12th March 2024. They submit that the appellant defiled a minor of tender age and that children deserve special care and protection from society and the appellant took advantage of the complainant's vulnerability. With regards to the circumstances of the case, the age of the victim and the injuries suffered; which injuries cover both physical, mental, and long-term emotional effect of being deprived of innocence and being exposed to sexual act at a tender age. In Miscellaneous Criminal Application No. E014 of 2021, Rotike v Republic, the High Court held as follows:

“...I doubt a law which expressly prescribes aggravating factors such as;

 - i. Age of the child – younger the child the more severe the sentence.
 - ii. The manner of commission of the offence – violent with harmful intensity. The harm occasioned (immediate and post) physical or emotional etc to justify minimum or most severe sentence of life imprisonment; will be inconsistent with the life Constitution for it leaves the decision to the discretion of the court. With such law, severe sentence such as life sentence will be inflicted in appropriate cases and circumstances without offending the constitution or any other law on sentencing...”
5. The respondent urged the court to uphold the finding of the subordinate court and dismiss the appeal.

Analysis and Determination

6. The appeal before the court is solely on the sentence meted out by the trial magistrate. An appellate court will not normally interfere with a sentence unless the sentence is manifestly excessive or is based on wrong principles or law. The Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR stated 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.”

7. The appellant is a first offender. In his mitigation before the trial court, he stated that he did not know what came over him when he committed the offence. The trial magistrate in her ruling on sentence, considered the nature of the offence and the appellant’s mitigation before sentencing him to life imprisonment.
8. The evidence before the subordinate court supports the fact that the child was approximately 5-6 years old. Section 8(2) of the [Sexual Offences Act](#) provides a mandatory life sentence for an appellant who has been convicted of the offence of defilement where the child is 11 years old or less. However, the appellant’s right to a fair trial and his right to mitigate should not be compromised. The court in [Edwin Wachira & 9 others v. Republic](#) constitutional petition no. 97 of 2021 held that:

...sentencing remains a discretionary power, exercisable by the court and involves the deliberation of the appropriate sentence. To the extent that the provisions of sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the [Sexual Offences Act](#) deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under article 50(1) of the [Constitution](#).

- b. A declaration be and is hereby issued that to the extent that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case, then sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the [Sexual Offences Act](#) deprive an accused person the right to mitigate which is a core component of a fair trial contemplated under article 50(1) of [Constitution](#).

9. The Court of Appeal sitting at Kisumu in criminal Appeal No. 166 of 2016, [Cyrus Kawai Onzere v Republic](#) made the following observations on mandatory sentences:

“...As Odunga J., (as he then was) and Mativo J. (as he then was) have made clear in [Maingi & 5 Others v Director of Public Prosecutions & Another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and [Edwin Wachira & 9 Others v Republic](#) consolidated with petition No.88 and 90 of 2021, respectively, the broader reasoning in [Muruatetu 1](#) can be used analogously to find other parts of the [Penal Code](#) or other penal statutes unconstitutional for impermissibly abridging the discretion of judicial officers sitting as sentencing courts to take into consideration the individual circumstances of the offence, offender and victim in prescribing an appropriate sentence. However, such a case has to be properly pleaded and be placed before the court or preserved for appeal in the case of an appellate court such as ours.”

10. In this case, the trial magistrate gave the maximum sentence but did not give her reasoning behind the sentence. According to the P3 form which was filled 2 days after the incident, the doctor noted that the complainant had sustained mild laceration with bruises on the genitalia and the hymen was not intact. The appellant was a first offender who was aged 19-21 years. The offence committed by the appellant was a heinous one as it impacted the minor physically as her mother testified that when she found the complainant she was not able to walk. I agree with the submissions of the respondent that exposure of the complainant to sexual acts at a tender age can have profound and harmful effects on her overall growth and well-being and will impact her psychological, social, and physical health. The Court of



Appeal in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) had the opportunity to discuss the constitutionality of the life sentence. The court stated:

“

“21. ...we are of the view that the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

...

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.”

11. I set aside the sentence of life imprisonment and substitute it with a sentence of 40 (forty) years in prison. The sentence shall run from 29/7/2022.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 4TH DAY OF APRIL 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant in person – Present in person

Miss Kibet For the Respondent

Wilkister C/A

