



REPUBLIC OF KENYA



**Boiyo v Republic (Criminal Appeal E129 of 2021)
[2024] KEHC 5314 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E129 OF 2021**

DK KEMEL, J

MAY 17, 2024

BETWEEN

KIPSANG SIMOTWO BOIYO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence of Hon G. Adhiambo (PM) in
Kimilili Principal Magistrate's Court S.O No. E043 of 2021 dated 20.12.2021)*

JUDGMENT

1. The Appellant, Kipsang Simotwo Boiyo, was charged with an offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act*. The particulars of the offence were that on 2nd September 2021 in Kimilili Sub-County within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of S.C.W, a child aged six (6) years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* with the particulars being that on 2nd September 2021 in Kimilili Sub-County within Bungoma County, he caused his penis to come into contact with the vagina of S.C.W, a child aged six (6) years old. After a full trial, he was convicted on the main count and sentenced to life imprisonment by Hon G. Adhiambo (PM).
2. He was aggrieved by the conviction and the sentence and filed the instant appeal, but later on in his submissions chose to focus on the sentence aspect and not his conviction. This simply means that this appeal shall solely be focused on the sentence.
3. Vide directions dated 19th May 2023, this Court directed parties herein to canvass this appeal by way of written submissions. The appellant through his submissions filed on 15th June 2023 submits that the life sentence as meted out by the trial Court is harsh and excessive as the Court failed to factor in the age of the victim. He submitted that no birth certificate was availed to ascertain the age of the victim and



thus there is prejudice with regard to his sentence. He further submitted that vide the age assessment report, the witness who tendered the same in Court failed to indicate how they arrived at the quoted the age of seven years. He argued that the imposed life sentence was unfair and unjust. He relied on the cases of *George Opondo Olunga v Republic* (2016) eKLR; *Charles Wamukoya Karani v Republic* CRC No 72 of 2013 and *David Ojeabuo Hv Federal Rep. of Nigeria* (2014) Lpelr-2255.

4. As regards sentence, it is noted that the Appellant was sentenced to serve life imprisonment. He has contended that the same is harsh, excessive, inhuman, degrading, arbitrary, demeaning and amounts to psychological torture. The *Sexual Offences Act* created sexual offences of a different nature and wider in scope and imposed more severe sentences. Section 8(1) as read with section 8(2) of the *Sexual Offences Act* provides as follows:

“ 8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) 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.”

5. The victim herein was found to be aged seven (7) years old after an age assessment was conducted on her and hence the sentence imposed fell within the age bracket.

6. In *Wanjema v Republic* [1971] EA 493, the predecessor of this Court stated that: -

“ [The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

7. The Court of Appeal for East Africa in the case of *Ogola s/o Owuor v Regina* [1954] 21 270 as follows: -

“ The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.*, [1950] 18 EACA 147:

“It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shersbawky*, [1912] C.C.A. 28 T.L.R. 364.”

8. The Court of Appeal in the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal No 12 of 2021, the Court was of the view that:

“ We note that the decisions of this Court relied on by the Appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic* Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding



of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code.

This fact notwithstanding, 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.”

9. In the above case, the Appellant who had been previously charged with the offence of defilement of a child aged 4 ½ years and had been sentenced to life imprisonment which was later confirmed by the High Court, the Court of Appeal had this to say while substituting the life imprisonment with a 40-year imprisonment:

“...We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child’s future. We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We therefore in the circumstances, uphold the appellant’s conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”

10. In the instant appeal, the Appellant was charged 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 which provides that upon conviction the offender shall be sentenced to life imprisonment. However, guided by the recent Court of Appeal decision in the case of *Evans Nyamari Ayako v Republic* criminal Appeal No 22 of 2022 Kisumu Court of Appeal where life imprisonment was construed to mean a maximum of 30 years imprisonment, and considering the Appellant is a youth aged 24 years old, he needs a chance to reform and be rehabilitated. To that extent, the request for review of sentence succeeds.
11. In view of the foregoing observations, I find merit in the Appellant’s appeal. The same is allowed to the extent that the sentence of life imprisonment is hereby set aside and substituted with a sentence of 25 years’ imprisonment which shall commence from the date of arrest namely 2.9.2021.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY 2024.

D. KEMEI

JUDGE

In the presence of:



Kipsang Boiyo Appellant
Miss Kibet for Respondent
Kizito Court Assistant

