



REPUBLIC OF KENYA



**Chebotibin v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 4783 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E023 OF 2023
RB NGETICH, J
MAY 9, 2024**

BETWEEN

MICHAEL SUMUKWO CHEBOTIBIN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant Michael Sumukwo Chebotibin 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. The particulars of the charge being that the appellant on the 5th day of April, 2020 at about 1800 Hrs at Baringo North Sub-county within Baringo County, willingly and unlawfully caused his penis to penetrate the vagina of S.J.R a girl aged 5 years.
2. The accused faced an alternative charge of indecent Act with a child contrary to Section 11(1) of the [Sexual offences Act](#) No. 3 of 2006. The particulars of the charge being that the Appellant on the 5th day of April, 2020 at about 1800 Hrs at Baringo North Sub-county within Baringo County, willingly and intentionally caused his penis to penetrate the vagina of S.J.R a girl aged 5 years.
3. The accused denied both the main and alternative charge and the matter was set down for full trial. The prosecution availed a total of 8 witnesses in support of the charges against the accused. Upon the close of the prosecution's case, the court found that prima facie case had been established to warrant accused be placed on his defence and in his defence, he chose to adduce unsworn evidence and did not call any witness.
4. Upon the close of the prosecution case and the defense case, by judgment delivered on the 11th day of May, 2021, the trial court found accused guilty, convicted him under Section 215 of the [Criminal Procedure Code](#) and sentenced him to serve 20 years imprisonment.



5. Dissatisfied with the conviction and the sentence of the trial court, the Appellant filed a petition of appeal on the following grounds:-
- i. That the learned trial magistrate erred in law and fact by failing to find that the prosecution witnesses evidence were contradictory, inconsistent and unreliable evidence to be relied in a court of law to warrant a conviction.
 - ii. That the learned trial magistrate erred both law and fact while basing its judgement on medical evidence that was insufficient and inconclusive and could not meet the threshold as required by law.
 - iii. That the learned trial magistrate erred in law and fact by convicting the appellant on a framed up charge where she failed to consider that the allegation were as a result of a land tussle.
 - iv. That the learned trial magistrate erred in law and fact by convicting the appellant without the age of the complainant being established.
 - v. That the learned trial magistrate erred in law and fact by convicting the appellant while relying on witnesses who were not reliable and truthful and lacked credibility.
 - vi. That the learned trial magistrate erred in law and fact by failing to enforce section 333(2) of the Criminal Procedure Code where time spent in remand custody was not factored in when sentencing the appellant.
 - vii. That the learned trial magistrate erred in law by failing to ensure that the appellant was provided with legal representation as he did not understand the court procedure.
6. The appellant prays that this appeal be allowed, the conviction be quashed, the sentence be set aside and the appellant be set at liberty. The appeal was canvassed by way of oral submissions.

Submissions

7. On 7th March, 2024 the applicant informed the court that he is not challenging conviction and wishes to pursue appeal on sentence alone and submitted that he was jailed for 20 years and he is now 70 years old.
8. When the matter came up on the 11th April, 2024, the prosecution counsel Ms. Ratemo counsel submitted that the accused was convicted of the offence of defilement of a child aged 5 years. He was sentenced to serve 20 years imprisonment on 18th May, 2021 and while imposing the sentence, the trial court noted that the appellant was 69 years and he had been in custody since 7th April, 2020.
9. She further submitted that the court relied on the case of Muruatetu 1 on the issue of mandatory sentence and exercised its discretion and imposed 20 years imprisonment instead of life sentence. She submitted that the trial court did not consider the period appellant served in remand and she was not opposed to the period being considered in sentence imposed but she objects to the revision of sentence for the reason that the victim was 5 years old.
10. The prosecution counsel further submitted that the court has an obligation to protect the child and the sentence should act as deterrent to other members of the community against defilement of young children and despite the fact that the appellant is of advanced age, it is worth noting that the minor contracted syphilis as a result of being defiled by the appellant. She urged this court to decline revision of sentence and if this court exercises leniency on ground of appellant's advanced age then it will



encourage older people in the society to defile young children. She submitted that the sentence imposed by the trial court was not harsh and excessive owing to the offence.

Analysis And Determination

11. When the appellant appeared before court, he abandoned his appeal on conviction and is now seeking revision of sentence.
12. While considering the issue of revision of sentence, the Court of Appeal in the case of [*Bernard Kimani Gacheru vs. Republic*](#) [2002] eKLR restated 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.”

13. Under [*Sexual Offences Act*](#), sentence for defilement is prescribed based on the age of the victim of the sexual assault. The victim’s age is an aggravating factor which the court ought to consider amongst other factors to be considered in sentencing. The societal desire to get rid of such extreme wickedness and sexual perversion has been expressed publicly and formally through [*Sexual Offences Act*](#). See *James Okumu Wasike* (2020) eKLR.
14. I take note of the fact that the appellant said he is remorseful and is elderly. In my view the appellant being an older member of the society so much was expected of him in respect to the duty of protection owed to the children of tender age in this case, a girl aged 5 years. The appellant instead took advantage of the innocent child aged 5 years and defiled her instead of offering protection and care to the child. The appellant’s act will definitely leave lasting psychological, emotional and physically effect on the child herein.
15. I take note of the fact that the appellant benefited from a lesser sentence of 20 years instead of minimum sentence of life imprisonment as provided in the Act because the trial court applied principles as were then in *Muruatetu 1* before the supreme court gave directions that *Muruatetu* gave directions on 6th July 2022 on applicability of *Muruatetu* case being limited to murder cases only and not cases under [*Sexual Offences Act*](#).
16. In respect to argument that the trial magistrate failed to consider the time he had spent in custody contrary to the dictates of Section 333 (2) of the [*Criminal Procedure Code*](#), Section 333 (2) of the [*Criminal Procedure Code*](#) provide as follows:-

“Subject to the provisions of section 38 of the [*Penal code*](#) (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this [*Code*](#).

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”



17. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In *Ahamad Abolfathi Mohammed & Another V Republic*, [2018] eKLR, the Court of Appeal when dealing with an appeal in which the High Court was faulted for, *inter alia*, substituting the sentence imposed on the appellants by the trial court and ordering that it shall take effect from the date of conviction by the trial court stated as follows:-

“By dint of Section 333 (2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

18. I have perused the record of the trial court and note that the applicant was in remand from 6th April, 2020 up to 18th May, 2021 when the case was determined a period close to 12 months but the period not mentioned by the trial court. Section 333(2) of the *Criminal Procedure Code* is couched in mandatory terms. The period the applicant spent in remand should have been reduced from the sentence imposed by the trial court.

Final Orders:

1. Appeal on conviction is marked as abandoned.
2. Prayer for review of sentence is dismissed.
3. Period the applicant served in remand to be computed in sentence imposed by trial court.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY, 2024

HON. RACHEL NGETICH

JUDGE

