



**DOO v Republic (Criminal Appeal E031 of 2023)
[2024] KEHC 7069 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E031 OF 2023
RE ABURILI, J
JUNE 12, 2024**

BETWEEN

DOO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant DOO was charged and convicted of 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 offence were that on the 8th day of November 2020 within Kisumu County, intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of SAO, a child aged 13 years old.
2. Following the trial, the trial court found the appellant guilty as charged and proceeded to convict him of the charge. The trial court then proceeded to listen to the appellant’s mitigation and subsequently sentenced the appellant to twenty years (20) imprisonment.
3. Dissatisfied by the said sentence, the applicant filed his petition of appeal dated 2nd day 2023 which was filed on the 14th August 2023 raising the following grounds of appeal:
 - i. That I am a first offender who came into conflict with the law for the very first time.
 - ii. That this Hon. Court be pleased to consider the aspect of sentence reduction due to this mandatory nature and ambiguity.
 - iii. That due to the long overdue incarceration will make my family suffer irreparably in my absence due to the fact that I am the sole bread winner.
 - iv. That the Hon. Court be pleased to consider that the mandatory nature of sentence violates Article 27 of the [Constitution](#) of Kenya 2010, thus discriminatory.



- v. That I wish to be present during the hearing of this appeal and/or be supplied with true certified record to enable me marshal more grounds.
4. The appellant submitted that he left his family, that his wife died and that his mother was lame and so he had no one to take care of. The appellant thus sought for leniency.
5. In response, Mr. Marete for the stated submitted that he opposed the appeal and that the trial court was right in sentencing the appellant to serve 20 years and that the trial court was lenient.
6. Mr. Marete submitted that this court ought not to interfere with the sentence as the victim was 13 years and further taking into consideration the cruel nature of how the victim was defiled in a rice field. It was submitted that the court ought to dismiss the instant appeal.
7. The sentencing objectives in Kenya have been captured in the [Judiciary Sentencing Policy Guidelines](#) at page 15 to be the following: -
- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 - 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - 5) Community protection: to protect the community by incapacitating the offender.
 - 6) Denunciation: to communicate the community's condemnation of the criminal conduct.
8. In determining whether to impose a custodial or non-custodial sentence, the court is required to consider 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.
9. Prior to the directions of the Supreme Court in [Francis Karioko Muruatetu and Another vs Republic](#) [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
10. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of [Dismas Wafula Kilwake vs Republic](#) [2018] eKLR where it held that



Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

11. With the directions of the Supreme Court which clarified that the case of *Francis Karioko Muruatetu and Another vs Republic* (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.
12. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would consider the peculiar circumstances of each case.
13. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
14. In the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake vs Republic Supra* and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
15. Bearing in mind that the High Court is bound by the decisions of the Court of Appeal as far as sentencing in defilement cases is concerned, this court takes the view that it can exercise discretion to review the Appellant's sentence herein to a sentence that is lower than the 20 years meted out but only after considering the circumstances of the offence and of each case individually.
16. The appellant does not want to serve out the remainder of the sentence that has been imposed upon him. He is in favour of having his sentence reduced. In his mitigation both before the trial court and this court, the appellant avers that he has children who have nobody to take care of as a result of his incarceration.
17. The Court must consider the gravity of the offense in order to determine which sentence is appropriate. In this case, it was defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.
18. The Court of Appeal in *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of *India in Alistar Anthony Pereira v State of Maharashtra* at paragraph 70 – 71 where the court held the following on sentencing;

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As



a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

19. Taking all the circumstances of this case into consideration, I find no reason to interfere with the sentence imposed by the trial court. The trial magistrate noted that the offence committed by the appellant was a serious offence and there was need to meet out a deterrent sentence.
20. The upshot of the above is that the instant appeal is found to be devoid of merit and the same is hereby dismissed.
21. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

