



**MA v Republic (Criminal Appeal 3 of 2023)
[2024] KEHC 7166 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL 3 OF 2023
RB NGETICH, J
JUNE 13, 2024**

BETWEEN

MA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the decision of the Honourable J. Nthuku (SRM) in Eldama Ravine Magistrate's courts Criminal case No.509 OF 2017 delivered on the 30th April,2018)

JUDGMENT

1. The appellant herein, M.A., was charged with the offence of incest by male contrary to Section 20(1) of the [Sexual Offences Act](#). The particulars were that the accused on the 5th day of May, 2017 at 1800hrs at [particulars withheld]village in Koibatek Sub- County within Baringo County, being a male person had carnal knowledge of Z.A a female person aged 8 years who was to his knowledge his grandchild.
2. The Appellant faced an alternative charge of committing indecent an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that the appellant on the 5th day of May, 2017 at 1800hrs at [particulars withheld]village in Koibatek Sub-County within Baringo County, intentionally and willfully committed an act which caused his penis to come into contact with the vagina of Z.A a child aged 8 years.
3. On 8th May 2017 when the charge was read over and explained to the appellant, he denied the charges and the matter was set down for hearing. Upon close of hearing, the trial court found the appellant guilty, convicted and sentenced him to serve 15 years imprisonment.
4. Dissatisfied with the decision of the trial court the Appellant has filed an appeal to this court on the following grounds: -



- i. That the learned trial magistrate erred in both law and facts by failing to appreciate that the evidence was both contradictory and inconsistent.
 - ii. That the Learned trial magistrate erred in law and in fact by failing to appreciate that the age of the complainant was not proved.
 - iii. That the trial magistrate erred in law and in fact by failing to appreciate that there were crucial witnesses who were not called upon to testify.
 - iv. That the learned trial magistrate erred both in law and fact by failing to find that the medical evidence adduced was insufficient to both corroborate the charge and sustain a safe conviction.
5. The Appellant prays for the total success of this appeal, conviction be quashed, sentence be set aside and he be set at liberty.
 6. When the matter came up for hearing on the 15th January,2024, the Appellant informed the court that he is not challenging the conviction. He stated that his prayer is for the remaining sentence to be reduced. He stated that his family has not communicated with him since 2018 and he has been in prison for about 7 years now and that he will be 67 years in April,2024. He stated that he has learnt trained in welding while in prison and has Grade III certificate.
 7. The prosecution counsel Ms. Ratemo informed the court that the appellant was charged with the offence of incest and that the victim was his grandchild aged 8 years. She submitted that by virtue of the fact that the victim was below 11 years old, the appellant ought to have been jailed for life but perhaps because of his age, he was jailed for 15 years and submitted that the sentence was quite lenient and prayed that it be confirmed by this court.
 8. This court called for a social inquiry report which was filed on the 26th February,2024. From the report, the appellant attended Koibatek primary school up to class 3 and later enrolled himself for mechanics course via apprenticeship. He later learnt driving skill after which he was employed as a lorry driver for a period of about 7 years. He also engaged himself in casual jobs up to the time of his arrest. The prisoner stated that he has been experiencing pain on his back and occasionally accorded medical attention while in prison.
 9. He stated that he was once married with 5 children who are all grown up and live independently. His siblings however denied knowledge of the said marriage. He maintained that he did not commit the offence and therefore did not express remorse.
 10. His relatives stated that he had committed similar offence before and are not comfortable having him back due to his past accusations against minors. The victim was by then aged 8 years old and is currently a form 1 student at Kamelilo secondary school. She displayed bitterness and resentment towards the prisoner. She is not willing to forgive him nor interact with him again and fear he may repeat of the act by the prisoner.
 11. The mother to the victim expressed bitterness towards the prisoner. She went on to state that he was like an uncle to her since the father to the prisoner and the grandmother to the victim's mother were siblings. The mother too was unforgiving and dreaded a return of the prisoner into the extended family.
 12. The area administrator described the prisoner as one whose social record was tainted and confirmed that similar previous accusations had been reported against the prisoner. He hoped that the prisoner will have reformed before he is reintegrated back into the community so as to guarantee safety of all. The probation officer is of the opinion that the home environment is currently not receptive for the reintegration of the prisoner.



Analysis And Determination

13. The Appellant has informed the court that he is not challenging conviction. He prays for revision of sentence. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

14. In the case of *Shadrack Kipkoech Kogo v R*. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated as follows: -

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R*. (1989 KLR 306).”

15. Further in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR the court of appeal restated as follows:-

“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.”

16. Record show that the Appellant was convicted of is the offence of committing indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No. 3 of 2006. The penalty for indecent act with a child under section 11(1) of the *Sexual Offence Act* is an imprisonment term for not less than 10 years as follows:

“ 11.

- (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

17. It is clear therefore that the trial court considered the fact that the Appellant was a first offender, he also considered the circumstances of both the victim and the appellant and noted that the offence required a stiff punishment. I take note of the fact that from the social inquiry report, the applicant had history of similar offence and there is need to protect young innocent children in the society from exposure to people with such history. In view of the above, I decline to interfere with sentence imposed by the trial court.

18. Final orders: -



1. Appeal on conviction abandoned.
2. Appeal on sentence on sentence is dismissed.
3. Period served by appellant in remand from the date of arrest to be computed in sentence

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 13TH DAY OF JUNE 2024.

RACHEL NGETICH

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of

Court Assistant: Karanja

Ms.Omari for state

Appellant: Present

