



**BN v Republic (Criminal Appeal E085 of 2023)  
[2024] KEHC 8788 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8788 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CRIMINAL APPEAL E085 OF 2023**

**JR KARANJA, J  
JULY 23, 2024**

**BETWEEN**

**BN ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment, Conviction and Sentence of Hon. S.M. Mookia, (CM) in the Chief Magistrates Court at Kapsabet in Criminal Sexual Offences Case No. E028 of 2020 delivered pm 5th day of July, 2022)*

**JUDGMENT**

1. The Appellant, BN appeared before the Chief Magistrate at Kapsabet facing a charge of defilement, Contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*, in that on diverse dates between 17<sup>th</sup> and 18<sup>th</sup> October 2020 within Nandi County, he defiled a girl aged sixteen (16) years known as CC, or in the Alternative, he committed an indecent act with the said child, Contrary to Section 11(1) of the *Sexual Offences Act*.
2. After a full trial, the Appellant was convicted on the Main Count and Sentenced to fifteen (15) years imprisonment, but was aggrieved by the outcome and preferred the present appeal on the basis of the grounds set out in the petition of appeal dated 14<sup>th</sup> November 2023 filed on his behalf by KC and Company Advocates.
3. While grounds one (1) and two (2) are essentially on conviction, grounds three (3) to seven (7) are on sentence.

On grounds one and two, the Appellant implies that his conviction was against the weight of the evidence which did not prove the charge against him beyond reasonable doubt.



On grounds three to seven, the Appellant complains that the trial court failed to consider the circumstances of the offence, the relationship between the Complainant and himself, the sentencing guidelines, his mitigation and the probation report thereby imposing a harsh and excessive sentence.

4. The Appellant therefore prayed that the appeal be allowed in its entirety with the conviction being quashed and the sentence set aside for him to be set free forthwith. The State/Respondent opposed the appeal and called for its dismissal.

At the hearing of the appeal by way of written submissions, learned defence Counsel, Mr. Choge appeared for the appellant and the Learned Prosecution Counsel, Ms. Oduor, SPPC appeared for the State/ Respondent.

5. The duty of this court at this stage was to revisit the evidence and draw its own conclusion hearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, Okeno Vs. Republic (1972) E.A. 72) And having considered the evidence of the Complainant (PW5) and the rest of the prosecution witnesses i.e. PW1, 2, 3, 4, 6 and 7 as well as the grounds of appeal and the rival submissions, this court holds the opinion that the occurrence of the offence was a factor which was not at all disputed and was in any event established by the Complainant's evidence as corroborated by that of the Clinical Officer, Patrick Kenei (PW4).
6. The Complainant confirmed that she was penetrated by a male sexual organ on the material date and the Clinical Officer confirmed as much after carrying out a medical examination on the Complainant whose mother, JC (PW6) acknowledged the authenticity of the Complainant's birth certificate (P. Exhibit 1) which was produced by the Investigating Officer, CPL. Raela Murei (PW7), showing that the Complainant was born on 16<sup>th</sup> July, 2005, thereby placing her age at 15 years as at the material time of the offence or thereabout. She was legally a minor or child.
7. She (Complainant) indicated that despite her age, she was sexually active even prior to the material date of the offence and more so, with the Appellant whom she said was her boyfriend. She also did indicate and confirm that the male sexual organ which penetrated her female sexual organ with her consent on that material date was that of the Appellant. Little did she know that in consenting to the sexual intercourse with her boyfriend while she was a child was in fact encouraging him to commit the offence of defilement for which her consent was of no consequences.
8. The Appellant exercised his right of remaining silent when placed on his defence and coupled with the fact that he did not attempt to counter the Complainant's evidence by cross-examining her he in essence implied that the evidence against him was the truth and nothing but the truth. In any event, the evidence was credible and cogent enough in establishing and proving the material ingredients of the charge against him.
9. It would therefore follow that the Appellant's conviction by the trial court was lawful, sound and proper and is hereby affirmed with the resultant effect that ground one (1) and two (2) of the appeal and the Appellant's arguments in support thereof are hereby overruled and dismissed.
10. As regards the sentence of fifteen (15) years imprisonment imposed by the trial court, it was lawful in terms of Section 8(4) of the Sexual Offence Act which provides for a period of not less than fifteen (15) years imprisonment for a person who defiles a child of between the age of sixteen (16) and eighteen (18) years. This was a mandatory sentence for which the trial court had no discretion.
11. However, regard being given to emerging jurisprudence on the constitutionality of mandatory minimum sentences "vis-à-vis" a court's discretion in sentencing as well as the fact that the Appellant was a first offender who was tempted by his minor girlfriend to "eat the forbidden fruit" and also that



the pre-sentence report availed by the Probation Officer was more or less in his favour, the sentence imposed upon him was rather excessive and is hereby reduced to seven (7) years imprisonment.

12. Other than the alteration in sentence, the appeal is dismissed for want of merit.

**DELIVERED AND DATED THIS 23<sup>RD</sup> DAY OF JULY 2024**

**J. R. KARANJAH,**

**JUDGE**

