



**Khamala v Republic (Criminal Appeal E065 of 2023)
[2024] KEHC 8707 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E065 OF 2023**

DK KEMEL, J

JULY 19, 2024

BETWEEN

MICHAEL KHAMALA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the conviction and sentence by Hon.G. Getenga
(RM) in Bungoma CMCCSO No. E047 of 2023 on 4th October 2023)*

JUDGMENT

1. The Appellant was convicted on his own plea of guilty for 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 offence were that on the 17th May 2023, at [Particulars Withheld] area in Kibabii sub-location, Bungoma South Sub-County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of LNJ, a child aged six (6) years. On 4th October 2023, he was sentenced to life imprisonment.
2. Being aggrieved by the sentence, the Appellant raised several grounds of appeal inter alia; that the trial Court erred in law and fact by violating his rights and that his conviction was based on fabricated evidence; that his sentence as imposed was rather too harsh and excessive and that this Court be pleased to consider reducing the same on humanitarian grounds.
3. The appeal was canvassed by way of written submissions. However, it is only the Respondent who filed their respective submissions.
4. The Respondent opposed the appeal. Learned counsel submitted that the Appellant was convicted on his own plea of guilt and may only be allowed to lodge an appeal on sentence. Counsel relied on the dictates of Section 348 and Section 207 of the *Criminal Procedure Code* and the cases of *John Muendo M. v Republic* [2013] eKLR and *Obedi Kilonzo Kevevo v Republic* [2015] eKLR.



5. Further, Counsel submitted that the age of the victim was proven. As per the record, the age bracket was between 6 and 7 years. Section 8 (2) of the *Sexual Offences Act* provides for life imprisonment and in this case, the appellant pleaded guilty to the offence. Counsel relied on the cases of *S v Malgas* 2001 (1) SACR 469 (SCA); *Mokela v The State* (135/11) [2011] ZASCA 166; *Ogolla s/o Owour v Republic* [1954] EACA 270; *Shadrack Kipkoech Kogo v R Eldoret* Criminal Appeal No. 253 of 2003; *Bernard Kimani Gacheru v Republic* [2002] eKLR.
6. I have considered the submissions by the Respondent and the entire evidence adduced before the lower Court and find that the issues raised in this appeal are whether the plea of guilty entered was unequivocal and whether the sentence meted by the trial Court was excessive.
7. Section 348 of the *Criminal Procedure Code* provides that-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.”
8. The procedure for taking a plea of guilty is laid down under Section 207(1) and (2) of the *Criminal Procedure Code* which provides:

“

 - “(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;
 - (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary: Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”
9. The Court of Appeal in dealing with the manner of recording a plea of guilty in *Ombena v Republic* [1981] eKLR laid down the following procedure:

“In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —

‘Held:

 - (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
 - (ii) the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;
 - (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;



- (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”

10. In this case, on 12th July 2023, when the Appellant was first arraigned in Court, the charges against him were read to him in Kiswahili language, as the Court record indicates, and that he pleaded guilty. The trial court informed the Appellant of the consequences of pleading guilty to the charge against him and that it attracts a life imprisonment sentence. However, when the facts were read to him, on 13th July 2023, he denied committing the offence and a plea of not guilty was recorded in respect of both the main and alternative charges.
11. On 21st September 2023, after the matter had been set down for hearing and the evidence taking of the complainant herein, on cross-examination, the Appellant stated that he had no questions for the complainant and that her testimony was true. A fresh plea was taken for the second time. The Appellant's rights were explained to him in Kiswahili language and the consequences of pleading guilty were explained to him but he insisted on taking a fresh plea. The charges in the main count were read to him in Kiswahili language and that a plea of guilty was entered. The facts were read to him and that the Appellant told the Court that the facts were true. The Appellant was therefore convicted on his own plea of guilty. In the circumstances, the trial magistrate complied with the provisions of Sections 207(1) and (2) of the Criminal Procedure Code and I find that the plea was unequivocal.
12. I now turn to consider the sentence meted by the trial Court. According to the charge sheet on the main count the alternative count, the complainant was 6 years of age. Age in defilement cases is crucial as it determines the sentence to be meted out by the Court. According to the charge sheet, LNJ, was 6 years old. The birth certificate of LNJ indicates that she was 6 years old at the time of the offence as she was born on 27th July 2016. It is clear that Section 8 (2) of the Sexual Offences Act will apply.
13. In a recent decision by the Supreme Court in Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi, Koome CJ & P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ overturning the Court of Appeal judgement granting Judges and Magistrates power to hand sex offenders lesser sentences, affirming mandatory sentences as provided in the Sexual Offences Act. The Court held that:
 - i. Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters which were not raised at the High Court while canvassing the minimum mandatory sentences question;
 - i. In departing from the decision on minimum mandatory sentences for sexual offences as stated in *Muruatetu & another v Republic* S.C Petition 15 & 16 of 2015) [2021] KESC 31 (KLR)(Muruatetu directions) the learned judges of the Court of Appeal violated the principles of stare decisis and proceeded to determine that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*;
 - ii. Mandatory minimum sentences do not deprive judicial officers of the power to exercise judicial discretion. However, minimum sentences set the floor rather than the ceiling when it comes to sentences with that which is prescribed is the least severe sentence



a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence.

- iii. That the Court of Appeal on the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its
- iv. declaration of unconstitutionality ambiguous, vague and bereft of specificity. Thus, creating inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system.
- v. The Respondent who had been released should serve the remainder of his sentence from the date of conviction by the trial Court.

The erudite Judges reaffirmed that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. Thus, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law.”

14. In the instant case, 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* 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment.
15. Section 8 (2) of the *Sexual Offences Act* provides as follows:
 8. (1)
 - (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.
 - (3)
 - (4)
16. It is noted that the trial Court duly considered the Appellant’s mitigation before sentencing him. The victim of defilement was aged six (6) years old at the time of the offence, hence the victim has been psychologically scarred for the better part of her life. Her innocence was stolen by a person who ought to be her protector. The sentence provided for under section 8(2) of the *Sexual Offences Act* is life imprisonment. Accordingly, and being guided by the above decision of the Supreme Court (*Supra*), i find no reason to interfere with the judicial discretion of the trial Court on sentence.
17. In the result the appeal fails. The appeal against conviction and sentence lacks merit and that the same is dismissed.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF JULY 2024.

D. KEMEI

JUDGE

In the presence of:

Michael Khamala Appellant



Miss Kibet for Respondent

Kizito Court Assistant

