



REPUBLIC OF KENYA



**Kusimba v Republic (Criminal Appeal E051 of 2023)  
[2024] KEHC 8920 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8920 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E051 OF 2023**

**DK KEMEL, J**

**JULY 19, 2024**

**BETWEEN**

**SAMUEL WAFULA KUSIMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon Munyekenye  
(SPM) in Webuye Sexual Offence Case No.E 002 of 2019 dated 27th July, 2023)*

**JUDGMENT**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. He was convicted by the learned trial magistrate, Hon M. Munyekenye (SPM), on the charge of defilement and was sentenced to serve twenty (20) years' imprisonment.
3. Being dissatisfied with the said conviction and sentence, he lodged the Appeal herein on 2<sup>nd</sup> August, 2023 wherein he set out six (6) grounds of appeal namely:
  - a. That he is a first offender and honestly feels remorseful for the offence committed.
  - b. That the appellant seeks for reduction of the sentence on humanitarian grounds.
  - c. That his family is poor and that he is the sole breadwinner.
  - d. That the sentence imposed be reduced to probation terms.



4. From the foregoing, it is clear that the Appellant's main ground is on the sentence imposed by the trial court as he seeks that the same be reduced on humanitarian grounds. The Appellant is simply asking for a review of sentence. Hence, the issue of the Appellant's conviction is not an issue for deliberation and that there is no point in re-analyzing the evidence tendered before the trial court.
5. The appeal was canvassed by way of written submissions. It is only the Appellant who filed submissions dated 2<sup>nd</sup> April, 2024. The gist of the submissions is that the Appellant is entitled to a resentencing pursuant to the decision of the Supreme Court in *Francis Karioko Muruatetu and 2 Others Vs R* (2017) regarding the imposition of minimum sentences.
6. I have considered the appeal as well as the submissions presented.
7. I find that the appeal invokes the revisional jurisdiction of this Court which gives the Court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial Court if the Court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court was so satisfied, the law mandated it to make appropriate orders to correct the impugned order, decision or sentence and align it with the law. The above is the import of Section 362 as read with Section 364 of the *Criminal Procedure Code*.
8. In this case, the Appellant has maintained that his appeal is on reduction of his sentence on humanitarian grounds and also due to his age and health status. Basically, the Appellant seeks for leniency from this court'
9. In *Wanjema v Republic* [1971] EA 493, the predecessor of this Court stated that: -

“ [The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”
10. 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.”

- 11. In the instant case, the Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* 2006 which provides that upon conviction the offender shall be sentenced to not less than twenty years’ imprisonment.
- 12. Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* provides as follows:
  - 8.
    - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
    - (2) .....
    - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
- 13. From the foregoing and being guided by the Supreme Court’s decision (Supra), the Court exercising any discretion, regardless of whether or not the circumstances so require it and giving due regard to the mitigation of the Appellant herein, I find that the trial Court did clarify the considerations that went into its decision for it to issue a sentence of Twenty (20) years.
- 14. The victim of defilement was aged Fourteen (14) 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. In addition to the defilement, the Appellant impregnated the minor who later gave birth to a child. The conduct of the Appellant in putting the minor in the family way at such a young age was bestial to say the least. The minor’s education was thus ruined for good. The sentence provided for under section 8(3) of the *Sexual Offences Act* is imprisonment for a term of not less than twenty years. Accordingly, I find no reason to interfere with the judicial discretion of the trial Court on sentence.
- 15. For the foregoing reasons, i find no merit in the appeal and it is hereby dismissed.  
It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF JULY 2024.**



**D. KEMEI**

**JUDGE**

In the presence of:

Samuel Wafula Kusimba Appellant

Miruka for Akenga for Appellant

Miss Kibet for Respondent

Kizito Court Assistant

