



**AAK v Republic (Criminal Appeal E069 of 2022)  
[2023] KEHC 790 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 790 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E069 OF 2022  
JWW MONG'ARE, J  
FEBRUARY 8, 2023**

**BETWEEN**

**AAK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the sentence of Hon. R. Odenyo in Eldoret Chief Magistrates' Criminal Court Case No. 296 of 2016 delivered on 17th May, 2022))*

**JUDGMENT**

1. 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*. The particulars of the offence are that on December 8, 2016 at [Particulars Withheld] area in Wareng Sub - County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of BK, a girl aged 8 years.
2. The Appellant pleaded not guilty and the matter proceeded to full trial. Upon consideration of the testimonies of the witnesses and the evidence adduced in court, the trial magistrate found the Appellant guilty and sentenced him to 30 years imprisonment.
3. Being aggrieved by the sentence, the Appellant instituted the present appeal *vide* a Petition of Appeal filed on May 23, 2022. The petition is premised on the following grounds;
  1. That (I) am aggrieved the trial court erred in law and in fact as it failed to hold that the charge sheet was fatally defective.
  2. That (I) am aggrieved the trial court erred in law and in fact as it failed to observe that the witness evidence was inconsistent and uncorroborated.



3. That (I) am aggrieved the trial court erred in law and in fact in failing to hold that this case was not proved beyond doubt.
4. That (I) am aggrieved the trial court erred in law and in fact by convicting in manifestly insufficient prosecution evidence.
5. That (I) am aggrieved the trial court erred in law and in fact by failing to consider the Appellant defence evidence.
6. That (I) am aggrieved the trial court erred in law and in fact as it failed to hold that the evidence of identification and recognition was not conclusive.
7. That the learned trial magistrate erred in law and facts by shifting the burden of proof from the prosecution backyard to the Appellant when the evidence failed to link him to the offence.
8. That, other grounds will be adduced during the hearing.

The parties filed submissions on the appeal.

### **Appellant's Case**

4. The Appellant submitted that he is a first offender and is remorseful. Further, that he is repentant and regrets his actions. He urged the court to be persuaded by Petition No. 97 of 2021 at Mombasa and Petition E17 of 2021 at Machakos in considering his appeal.

### **Respondent's Case**

5. Learned Counsel for the State opposed the Appeal and stated that all the elements of the offence had been proved. She submitted that, taking into account the provisions of section 8(2) of the *Sexual Offences Act*, the sentence was illegal. She urged the court enhance the said sentence and grant the Appellant an appropriate sentence in accordance with the law.

### **Analysis And Determination**

6. The appeal is against the sentence and therefore I shall not delve into the merits of the conviction. Section 8(2) of the *Sexual Offences Act* states;
  - (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.
7. The Court of Appeal sitting in Kisumu in the case of Jared Koita Injiri v Republic HCCRA No. 21 of 2019[2019] eKLR per Musinga, M'Inoti & Murgor JJ.A held that despite the mandatory nature of section 8(2) of the *Sexual Offences Act* in providing for the minimum sentence of life imprisonment, applying the principles set out in the *Francis Karioko Muruatetu & others v Republic* case[2017]eKLR, it was inclined to hold that life imprisonment was not mandatory sentence under section 8(2) of the *Sexual Offences Act*. The Court of Appeal reduced life imprisonment imposed on the Appellant to thirty (30) years imprisonment.
8. I also take note of the decisions in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021 - Machakos) [2022] KEHC 13118 (KLR) and Petition No. 97 of 2021 – *Edwin Wachira & 10 others vs Republic* - Mombasa, where it was held that courts need not be bound by the mandatory minimum and maximum sentences set out in statute. The import of these decisions is that courts are allowed to use their discretion and determine the appropriate sentences in each of the cases



before them depending on the circumstances and other factors that may be made available to them during trial. The trial magistrate exercised this discretion and thus, the sentence was not illegal.

9. I am persuaded that the Appellant benefitted from the decisions mentioned above as the sentence prescribed in statute for the offence he was convicted of is life imprisonment yet he was sentenced to 30 years' imprisonment.
10. Upon considering the circumstances of the case, the mitigation of the Appellant, and the submissions of the party, I find no reason to disturb the sentence. The appeal is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2023**

.....

**J.W.W. MONGARE**

**JUDGE**

Judgment delivered virtually in the presence of

Appellant Present in court

Ms Okok for the State

Loyanae – Court Assistant

.....

**J. W.W. MONGARE**

**JUDGE**

