



REPUBLIC OF KENYA



**Gathogo v Republic (Criminal Appeal 93 of 2019)  
[2023] KEHC 1027 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1027 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL 93 OF 2019  
JWW MONG'ARE, J  
FEBRUARY 15, 2023**

**BETWEEN**

**JOEL KAMWARA GATHOGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from a conviction and sentence of Hon N. Wairimu in Eldoret  
Chief Magistrates' Criminal Case No.97 of 2016 delivered on 8th May 2019)*

**JUDGMENT**

1. 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. The particulars of the offence are that on the 23<sup>rd</sup> of April, 2016 in Eldoret West District within Uasin Gishu County intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of FM, a girl aged 14 years old.
2. The appellant pleaded not guilty and the matter proceeded to full trial. The prosecution called six (6) witnesses the appellant was put on his defence. Upon considering the evidence presented before the court, the testimonies of the witnesses and the submissions of the parties, the trial magistrate found the appellant guilty on the main count and sentenced him to twenty (20) years imprisonment.
3. The appellant, being aggrieved with the sentence of the trial court, instituted this appeal vide a Petition of Appeal filed on June 4, 2019 premised on the following grounds;
  1. That (I) am aggrieved the learned trial magistrate erred in law and facts by failing to grant this matter a fair trial.
  2. That (I) am aggrieved the learned trial court erred in law and facts as it failed to hold that identification was not conclusively proved.



3. That (I) am aggrieved the learned trial magistrate erred in law and facts as she failed to establish that the evidence of penetration was not proved beyond reasonable doubt.
4. That (I) am aggrieved the pundit trial magistrate erred in law and facts as she failed to consider the Appellant's defence evidence.
4. The parties tendered their written submissions on the appeal.

#### **Appellant's Case**

5. Despite the appellant filing grounds of Appeal on both conviction and sentence at the hearing and with his submissions he abandoned the Appeal on conviction and went ahead to submit on the sentence.
6. He admits in his submission that the finding of guilty was proper and asks the court to review sentence imposed upon him by the trial court and wishes to rely on the provisions of sections 362, 364(1)(b) and 365 of the *Criminal Procedure Code*.
7. Further, that he has been humbled by the incarceration and is remorseful. He has served seven years and in view of the circumstances of the case, he submitted that the court be pleased to reduce his sentence or release him forthwith for time served.

#### **Respondent's Case**

8. Learned counsel for the respondent opposed the Appeal and submitted that the offence was proved to its required standard as all the elements of the offence of defilement were met. Counsel did not submit on the issue of the sentence.

#### **Analysis and Determination**

9. As the appeal is only against the sentence, I shall not delve into the merits of the conviction. Section 8(3) of the *Sexual Offences Act* states;

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.

10. It is not in dispute that the Appellant was correctly found guilty of the offence of defilement. I am alive to the emerging jurisprudence in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) ) where G.V Odunga J stated as follows;

To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the Constitution. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

11. Upon considering the circumstances of the case, the grounds of appeal, the mitigation of the appellant and the submissions of the parties, I find no reason to review the sentence meted out by the trial court. It is my view that it was commensurate with the offence committed. The appeal is hereby dismissed. The accused to serve the remainder of the term as passed by the trial court.

**DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 15<sup>TH</sup> DAY OF FEBRUARY 2023**



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**J.W.W. MONGARE**

**JUDGE**

**Judgment delivered virtually in the presence of;**

- 1) Appellant is Present
- 2) Ms. okok- Prosecution Counsel
- 3) Kimathi/Loyanae- Court Assistant.

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**J.W.W.MONGARE**

**JUDGE**

