



**JOK v Republic (Criminal Appeal E060 of 2022)
[2023] KEHC 1032 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E060 OF 2022
RPV WENDOH, J
FEBRUARY 9, 2023**

BETWEEN

JOK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau, and Hon. Langat Senior Resident Magistrate in Rongu Senior Resident Magistrate's Criminal Case No. 10 of 2019 delivered on 5/11/2019)

JUDGMENT

1. JOK, the appellant, was convicted by Hon. Kamau C. M. Senior Resident Magistrate on November 5, 2019 of two counts of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#).
2. The particulars of the charge are that on unknown date in early May, 2018 at South Kamagambo and on 8/6/2018 at the same location, intentionally and unlawfully caused his penis to penetrate the virgin a of QA a child aged nine (9) years of age.
3. In the alternative, he faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). No finding was made on the alternative charge.
4. This case was partly heard by C. M. Kamau Senior Resident Magistrate and Hon. Langat Senior Resident Magistrate.
5. Upon conviction on the main charge, the appellant was sentenced to serve ten (10) years imprisonment.
6. Dissatisfied with the trial court's judgment, the appellant filed two amended grounds of appeal to wit.
 - 1) That the court erred in sentencing him to ten (10) years imprisonment;



- 2) That the trial court erred by not taking into consideration that he was framed for purposes of settling scores.
7. Though the appellant seems to be appealing against both conviction and sentence, he went ahead to state in his submissions that he was not challenging the conviction. It therefore means that the appellant only challenged the sentence. The appellant's prayer is that the court exercise mercy and substitute the prison sentence with a non-custodial sentence or sentence him to the period already served.
8. The prosecution counsel Mr. Omooria filed submissions which addressed both the issue of conviction and sentence. I will not revisit the issue of conviction since the appellant did not challenge it. As regards sentence, counsel submitted that the same was very lenient in view of the age of the minor and the fact that the appellant deliberately infected the minor with HIV a sickness he was aware he was suffering from and could be fatal to the minor. He urged this court to enhance the sentence though they did not file a cross appeal.
9. The appellant was convicted of the offence of defilement under section 8(1) of the *Sexual Offences Act* as read with section 8(2) of the *Sexual offences Act*. The complainant was a child aged, nine (9) years as at May 2018. Under Section 8(2), upon conviction for defilement of a child below twelve (12) years, one is liable to life imprisonment. The trial Magistrate applied the case of *Francis Karioko Muruatetu & others v Republic* (2017) eKLR where the Supreme Court declared the mandatory death sentence as unconstitutional. The trial court therefore misapplied the *Muruatetu case* because the said case does not apply to sexual offences. However, the prosecution counsel did not file a cross appeal or serve notice on the appellant that they would be asking this court to review the sentence to a much harsher sentence in tandem with the law. Considering the age of the complainant and the fact that the appellant took advantage of her innocence when he knew very well that he had HIV, even if the trial court applied *Muruatetu case*, I think that the court abused its direction. When it sentenced the appellant to a mere ten years imprisonment.
10. Furthermore, the court only sentenced the appellant to ten years imprisonment on one count and failed to take into account the fact that he was convicted of two counts of defilement. Although the court cannot enhance the sentence, yet it will go ahead to correct the anomaly in the sentence. When sentencing, the court has to have regard to the circumstances of the case. The trial court did not and erred as a result. This court cannot turn a blind eye to the anomaly. The ten years term was a slap on the wrist. The court will therefore set aside the sentence of ten (10) years. Instead the court will sentence the appellant as follows:-
 1. Count 1: Ten (10) years imprisonment;
 2. Count II: Ten (10) years imprisonment.
11. Sentences to run concurrently so that the appellant is not prejudiced. The appeal lacks merit and is hereby dismissed.

DELIVERED, DATED and SIGNED at MIGORI this 9th day of February, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Maatwa for the State.

Appellant present in person.



