



**Musungu v Republic (Criminal Appeal 65 of 2020)
[2023] KEHC 1028 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 65 OF 2020
JWW MONG'ARE, J
FEBRUARY 15, 2023**

BETWEEN

FRED MUSUNGU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the sentence of Hon. B. Kiptoo in Eldoret Chief
Magistrate's Court Case No.87 of 2020 delivered on 18th December 2020)*

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 were that on the 8th day of May 2020 at Moiben Sub County, within Uasin Gishu County intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of CJC a child aged 14 years.
2. The Appellant pleaded not guilty but later on changed his plea to one of guilty. He was convicted of his own plea of guilty and sentenced to twenty years imprisonment. Being dissatisfied with the sentence of the court he instituted the present appeal vide a petition dated December 30, 2020 premised on the following grounds;
 1. That (I) pleaded guilty to the charges against (me) at the trial.
 2. That the sentence meted upon (me) was too harsh considering (my) mitigating factors and circumstances.
 3. That (I) am praying that my entire time spent in remand custody be commuted as part of (my) entire sentence.



4. That under the provisions of section 362, 333(2), 364 of the *Criminal Procedure Code* and Articles 50(2)(q), 159 and 165 of the *Constitution* of Kenya which gives the court discretion to hear and determine applications of this nature.
5. That (I) am remorseful, repentant and reformed as (I) have learnt how to take responsibility of (my) own actions.
6. That the Honourable Court be pleased to consider the sentencing policy of 2016 published by the judiciary and invoke the provisions of article 165(3)a, b, d & 258(1) of the *Constitution* of Kenya and reduce (my) sentence to more reasonable and/or set such other orders as the court may deem fit.
7. That other further grounds to be adduced during the hearing of this matter.
8. That (I) wish to be present during the hearing of the appeal.

The parties filed submissions on the appeal.

Appellant's Case

3. The Appellant submitted that he is a first offender and is remorseful and repentant for his actions. He urged that he is young and productive, has undergone various rehabilitation programs and is ready to join the society. He asked the court to consider the provisions of section 333(2) of the *Criminal Procedure Code* and take into account the time spent in remand in considering his sentence.

Respondent's Case

4. Learned Counsel for the Respondent opposed the appeal and stated that the Appellant was in custody for six months before conviction. She cited the sentencing policy guidelines and submitted that the sentence was sufficient to deter other members of the community from committing the offence. She urged that the appeal be dismissed.

Analysis And Determination

5. This being an appeal on sentence only I shall not delve into the merits of the conviction. Section 8(1) as read with section 8(3) of the *Sexual Offences Act* states;
 - 1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 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.
6. The current jurisprudence dictates that a court has unfettered discretion to determine the sentence regardless of the mandatory sentence prescribed. The Court of Appeal in Criminal Appeal no 84 of 2015 – *Joshua Gichuki Mwangi vs Republic* held that;

“We acknowledge the power of the Legislature to enact laws as enshrined in the *Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various



cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution.”

7. I have considered the petition of appeal and the submissions of the parties as well as the mitigation of the Appellant and I find that there is no reason to reduce the sentence. The sentence meted out is commensurate with the offence and achieves the goals of the sentencing policy guidelines of deterrence. The sentence is hereby upheld and shall take into account the time spent in remand from March 13, 2020 in compliance with section 333(2) of the Criminal Procedure Code. Orders Accordingly.

DATED, SIGNED AND DELIVERED ON THIS 15TH DAY OF FEBRUARY 2023

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J.W.W. MONGARE

JUDGE

Judgment delivered virtually in the presence of;

Appellant is Present

Ms Sakari holding brief for Ms okok- Prosecution Counsel

Loyanae- Court Assistant.

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J.W.W.MONGARE

JUDGE

