



**Makete v Republic (Criminal Appeal E173 of 2019)  
[2023] KEHC 714 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 714 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E173 OF 2019  
DK KEMEL, J  
FEBRUARY 8, 2023**

**BETWEEN**

**DAVID SIMIYU MAKETE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the judgment and sentence of Honourable D.O Onyango-SPM dated 7th March 2018 in Kimilili Senior Principal Magistrate's SO Criminal Case No. 68 of 2016)*

**JUDGMENT**

1. The Appellant herein, David Simiyu Makete, was charged before Kimilili SPM's Court in Criminal Case No 68 of 2016 (SO) with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars were that the Appellant between 20<sup>th</sup> and October 21, 2016 in Bungoma North within Bungoma County intentionally caused his penis to penetrate the vagina of PNM, a girl aged 16 years.
2. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that between 20<sup>th</sup> and October 21, 2016 in Bungoma North District within Bungoma County the appellant intentionally touched the vagina of PNM a child aged 16 years.
3. The Appellant pleaded not guilty and the matter proceeded to full hearing. In support of its case the prosecution called five (5) witnesses.
4. In his judgement, the learned trial magistrate held that all ingredients of the offence of defilement were proved beyond reasonable doubt and proceeded to convict the Appellant with the offence of defilement contrary to section 8 (1) as read with 8 (4) of the *Sexual Offences Act*. On sentencing, he



found that the sentence of fifteen (15) years imprisonment was probable and proceeded to sentence him to serve the said period from the date of conviction namely March 7, 2018.

5. Being aggrieved by the aforesaid decision the Appellant filed an appeal and set out 7 grounds of appeal namely; -
  - i. That the he is not opposing the finding of the trial Court as per the decision and conclusion arrived by the Court.
  - ii. That upon his arrest and conviction he was the only bread winner in his family as he was a married man with four (4) children who have since dropped out of school and risk becoming destitute due to his incarceration.
  - iii. That he has suffered enough over the three years that he has been behind bars and do feel remorseful for the offence which resulted to his incarceration.
  - iv. That his family is very poor and he was the only breadwinner.
  - v. That he believes the lasting remedy concerning his appeal lies with this Court.
  - vi. That he is a born again Christian totally reformed, well trained and a law-abiding citizen and if granted the opportunity by this Court he shall be in the forefront to engage in seminars and to caution young men against crimes.
  - vii. That he is remorseful and repentant for his involvement in the said crime which was motivated by evil spirits and prays for leniency.
  - viii. That this Honourable Court be pleased to allow his appeal as per the laid grounds.
6. He prayed that the sentence imposed on him be reduced or substituted with a non-custodial sentence.
7. He submitted that this Court do consider the provisions of section 333 (2) of the *Criminal Procedure Code*. He insisted that he was repentant and remorseful as a first offender and that this Honourable Court be pleased to reduce his sentence.
8. In opposition, the Respondent submitted that the lower Court did consider minimum sentence and the same can't be termed as harsh as it is what the law prescribes. It was further submitted that the Appellant has not demonstrated any change in the circumstances that entitles him to a reduction of sentence. The Respondent finally submitted that the Appellant's mitigation was duly considered and urged this Court to dismiss the appeal as it lacks merit.
9. In this appeal, the Appellant is only aggrieved with the sentence. It is therefore important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court



is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

10. Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

11. The predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor v Republic* [1954] EACA 270, pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

12. To this, I would add a third criterion namely,

“that the sentence is manifestly excessive in view of the circumstances of the case”. (*R v Shershowsky* (1912) CCA 28TLR 263)

while in the case of *Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No 253 of 2003* the Court of Appeal stated thus:-

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka – vs- R.* (1989 KLR 306)”

13. The Court of Appeal, on its part, in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

14. In this case the appellant was charged under section 8(1) as read with 8(4) of the *Sexual Offences Act* which provides as follows:

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

.....  
.....



(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

15. It is therefore clear that where a person is charged with an offence under the above section, where the victim is between the ages of 15 to 18 years old, the offender faces an imprisonment of not less than 15 years. This means that the offender may be imprisoned for any term between 15 years and life imprisonment.
16. The seriousness of the offence is a relevant factor in sentencing in sexual offences. Generally, it is worth noting that the assault leaves the innocent victim with an eternal and time-explosive dent in the integrity of the person as a human being. For a girl, the assault destroys the beauty of a woman which is encapsulated in the pride, self-esteem, confidence, integrity and honour of the person. To say the least, their self-worth and innocence are irreparably damaged by the beastly act. They are left with deep and chronic trauma which will affect them psychologically, emotionally, health wise and physically for the rest of their lives. These things must be said to dramatize what it means to rape or defile a person. It is apparent that legislative intent which is a reflection of the societal detestation of defilement excludes sexual offences from settlement through alternative dispute resolutions, traditional methods of dispute resolutions, plea bargaining, probation, and even community service orders.
17. The aggravating factors weigh heavy against the mitigating factors of the appellant.
18. Exercise of discretion by the trial Court ought to have been exercised judicially. The trial Court did consider the tender age of the minor, the seriousness of the offence, the violent and brutal manner the offence was committed, the severe injuries the minor sustained and the traumatic effects on the girl which deserved a stiffer and deterrent sentence. Thus, the trial Court was within principle thereby imposing a patently deterrent sentence. The sentence is neither harsh nor excessive as it is the possible minimum in law. There was aggravating circumstances wherein the appellant locked up the complainant in his house for several hours and later forcefully defiled her. I see no reason to interfere with the said sentence. The appellant was out on bond and thus the sentence ought to commence from the date of conviction namely 2.3. 2018.
19. In the result, I find no merit in the appellant's appeal. The same is dismissed.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

David Simiyu Makete Appellant

Mukangu for Respondent

**Kizito Court Assistant**

