



REPUBLIC OF KENYA



KENYA LAW
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**Mugambi v Republic (Criminal Appeal E108 of 2021)
[2023] KEHC 510 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E108 OF 2021
TW CHERERE, J
FEBRUARY 2, 2023**

BETWEEN

ERICK MUGAMBI ALIAS MINA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence in Nkubu Criminal
S O no E028 of 2021 by Hon E Ayuka (SRM) on August 17, 2022)*

JUDGMENT

1. Erick Mugambi alias Mina (appellant) was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* no 3 of 2006 (the Act). Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* no 3 of 2006. The offences were allegedly committed on January 30, 2021 against CM a child aged 15 years.
2. Complainant recalled that on January 30, 2021 at about noon, Accused who is her cousin found her collecting firewood from a tea plantation and defiled her. She reported the matter to her grandmother with whom she resides and was escorted to the police station and later to hospital for examination. Accused was arrested by the area assistant chief about 6 months after the incident occurred.
3. Complainant was examined on January 30, 2021 and was found with a broken hymen and whitish discharge. PC Valentine investigated the case and caused appellant to be charged. She tendered an age assessment report dated November 23, 2021 showing that complainant was between 15 and 16 years old.
4. Appellant in his sworn defence denied the offence. He stated that he was framed by his grandmother because there was a dispute concerning his father's land.



5. After considering both the prosecution and Defence cases, the learned trial magistrate found the prosecution case proved and on August 17, 2022 convicted and sentenced appellant to serve 15 years' imprisonment

6. Appellant was dissatisfied with both the conviction and sentence. By his amended grounds of appeal filed together with the submissions on November 29, 2022, appellant challenges only sentence on grounds that it is harsh. 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 vs 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”

7. Similarly, in *Mokela vs 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.”

8. The predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor vs 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.”

9. In the case of *Shadrack Kipkoech Kogo vs 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 and *Bernard Kimani Gacheru vs Republic*[2002] eKLR)’

10. In this case the appellant was charged under section 20 of the [Sexual Offences Act](#) which provides as follows; -

8. Defilement



- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (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.
11. To the extent that the section prescribes a mandatory sentence with no discretion to the trial court to determine the appropriate sentence to impose, I find that the section falls foul of article 28 of the Constitution which provides that “Every person has inherent dignity and the right to have that dignity respected and protected”.
12. From the foregoing analysis, I make the following orders:
1. The appeal on sentence succeeds
 2. The 15-year sentence is substituted with a 10-year imprisonment term from June 17,2021 when appellant was arrested

DELIVERED AT MERU THIS 02 DAY OF FEBRUARY 2023

WAMAE T W CHERERE

JUDGE

Appearances

Court assistant - Kinoti

Appellant - Present in person

For the state - Ms Kitoto (PPC)

