



REPUBLIC OF KENYA



KENYA LAW
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**Ochoro v Republic (Criminal Appeal E084 of 2022)
[2023] KEHC 1025 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E084 OF 2022
JWW MONG'ARE, J
FEBRUARY 16, 2023**

BETWEEN

JACOB ODHIAMBO OCHORO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the sentence of Hon. B. Kiptoo in Eldoret Chief Magistrate's Court Case No. 264 of 2019 delivered on 28th July, 2022)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the October 13, 2019 at [particulars Withheld] in Kapsoya Sub-County, within Uasin Gishu County intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of MM a child aged five (5) years.
2. The appellant pleaded not guilty and the matter proceeded to full hearing. Upon consideration of the evidence in court and the testimonies of the witnesses, the trial court was convinced that the appellant was guilty of the offence of defilement and sentenced him to 25 years imprisonment.
3. Being aggrieved with the sentence only, the appellant instituted the present appeal *vide* a petition dated August 11, 2022. The appeal is premised on the following grounds;
 1. That the trial magistrate erred in law in convicting and sentencing the appellant to serve 25 years yet failed to take into consideration all the mitigating factors raised by him which was manifestly harsh and excessive in the circumstances and occasioned a failure to justice.
 2. That the learned magistrate erred in law in convicting and sentencing the Appellant minus considering section 333(2) of the *Criminal Procedure Code* and petition No 15 of 2020 and



E017 of 2021 respectively at Machakos High Court by justice GV Odunga by considering (my) pretrial (remand) period and minimum mandatory sentences respectively.

3. That (I) beg the honourable court to reduce (my) sentence to a less severe one as a way of facilitating effective rehabilitation.
4. That (I) am a first offender and thus beg for leniency.
5. That (I) am remorseful, repentant and reformed since (I) have been incarcerated in prison.
6. That may this honourable court be pleased to consider the sentencing policy of 2016 published by the judiciary and establish the mitigating circumstances that would lessen the custodial sentence.
7. That more grounds to be adduced at the hearing thereof and determination of this appeal.

The parties filed submissions on the appeal.

Appellant's Case

4. The appellant submitted that he is a first offender and the offence was committed mistakenly. He submitted that during his time in prison he has learnt some useful skillsets that will help him fit back in society if he is released. He argued that he got enrolled in industrial courses and will be able to use his skills when he gets released to benefit the community. He further stated that he is remorseful and has since been rehabilitated. He stated that he has family members who depended on him for their daily needs and his absence has caused them a lot of anguish as he was the sole breadwinner. To augment his grounds he referred to decided cases to support the case. He cited the cases of Petitions 97 of 2021 at Mombasa and Petition E17 of 2021 at Machakos and urged the court to consider reducing his sentence. He submitted that under section 333(2) of the *Criminal Procedure code* the court should take into account the time spent in remand pending the hearing of his case before he was convicted and sentenced and reduce or set aside his sentence.

Respondent's Case

5. Learned counsel for the respondent submitted that the elements of the offence of defilement were proved to the required standard. He urged the court that the evidence warranted the conviction and the sentence and asked the court to confirm the findings of the trial court.

Analysis And Determination

6. Upon consideration of the petition of appeal and the submissions of the parties, the appeal is only against sentence and therefore I shall not delve into the merits of the conviction. The following issue arises for determination;
 1. Whether the sentence was harsh/excessive
Whether the sentence was harsh/excessive
7. Section 8(1) as read with section 8(2) 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.
 - (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.



8. It is not in dispute that the appellant was correctly found guilty of the offence of defilement. However, mandatory sentences have been discussed extensively by various court decisions and currently, the general disposition is that they are unconstitutional. In *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J held as follows;

My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the *Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the *prima facie* mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.

9. I am persuaded that the upshot of the foregoing decision is that courts can still sentence an accused person to the prescribed maximum or minimum sentences but the mitigating circumstances must be considered.

10. Therefore, upon considering the circumstances of the case, the grounds of appeal, the aggravating circumstances, 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. The victim was a child of tender years and will be affected by the acts of the appellant for the entirety of her life. It is my view that the sentence was commensurate with the offence committed and I find no reason to disturb the same. The appeal is dismissed. Orders accordingly.

DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 16TH DAY OF FEBRUARY 2023

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J.W.W. MONGARE

JUDGE

Judgment delivered virtually in the presence of;

Appellant is Present

Ms Anguria holding brief for Ms okok- Prosecution Counsel*

Loyanae- Court Assistant.

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J.W.W.MONGARE

JUDGE

