



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Republic (Criminal Appeal E075 of 2022)  
[2023] KEHC 643 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 643 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E075 OF 2022  
JWW MONG'ARE, J  
FEBRUARY 8, 2023**

**BETWEEN**

**DAVID OCHIENG OTIENO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the sentence of Hon. E Kigen in Eldoret Chief Magistrates Case (SO) E099 of 2021 delivered on 3rd June, 2022)*

**JUDGMENT**

1. The appellant was charged and convicted of 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 between January, 2021 and April, 2021 at [Particulars Withheld] Estate the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SW, a child aged 9 years.
2. The appellant pleaded not guilty and the matter proceeded to full trial. Upon considering the testimonies of the witnesses and the evidence adduced in court, the trial court convicted the appellant on the main count and sentenced him to serve 30 years imprisonment.
3. The appellant being aggrieved with the sentence instituted this appeal *vide* a petition of appeal filed on June 14, 2022. The appeal is based on the following grounds;
  1. That (I) am a first offender and thus beg for leniency.
  2. That (I) am remorseful, repentant and reformed since (I) was incarcerated in prison.
  3. That (I) am a young man and pray to be reinstated in society to serve as a role model/mentor to others of similar behaviours.
  4. That (I) have served a substantial part of (my) sentence.



5. That may this honourable court be pleased to consider the sentencing policy of 2016 published by the Kenya and establish the mitigating circumstances that would lessen the custodial sentence.

6. 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 was tempted by intoxication to commit the offence unintentionally. He stated that he is remorseful and repentant since his incarceration and has reformed. The appellant cited the decision by Justice Odunga in Machakos High Court petition E017 of 2021 and Justice Mativo in Mombasa High Court petition No 97 of 2021 and urged this court to be persuaded by the holdings in the said cases. He invited the court to invoke article 50(2) of the Constitution in considering his petition. He also cited article 27 of the Constitution and prayed that the court set aside his sentence.

### **Respondent's Case**

5. Learned counsel for the state opposed the appeal on the grounds that the sentence of 30 years imprisonment is lawful and commensurate with the offence that the appellant committed. He stated that a sentence depends on the facts of the case and the trial court considered those facts in sentencing the appellant. Further, that it is worth noting that the appellant is the father to the complainant, and was the only parent she had by then. The appellant turned beastly and did not show any remorse during mitigation. He urged that due to the aggravating factors, the court should uphold the sentence.

### **Analysis And Determination**

6. As the appeal is only against the sentence, I shall not delve into the elements of the offence. Section 8(1) as read with section 8(2) of the Sexual Offences act provides;

(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.

7. I am alive to the emerging jurisprudence on mandatory sentences in sexual offences, specifically the findings in Maingi & 5 others v Director of Public Prosecutions & another petition E017 of 2021 [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J (as he then was) stated as follows;

To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the Constitution. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

8. The learned trial magistrate, in line with the above decision, sentenced the appellant to 30 years' imprisonment as opposed to the prescribed mandatory sentence of life imprisonment.

9. The appellant was granted the opportunity to mitigate in the trial court. He has also tendered his mitigation in the present appeal. Upon considering the proceedings in the trial court, the circumstances of the case, the mitigation of the appellant and the submissions of the parties, I find no reason to disturb the sentence meted out by the trial court. I hold that the same was commensurate to the offence committed. The appeal is hereby dismissed.



DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023.

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**J.W.W.MONGARE**

**JUDGE**

**Read in open court in the presence of**

- 1. Appellant Present
- 2. Ms Okok For the State
- 3. Loyanae – Court Assistant**

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**J.W.W.MONGARE**

**JUDGE**

