



**Tarus & another v Republic & another (Criminal Appeal  
E042 of 2021) [2023] KEHC 825 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 825 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E042 OF 2021  
JWW MONG'ARE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**VINCENT KIPRUTO TARUS ..... 1<sup>ST</sup> APPELLANT**

**VINCENT KIPRUTO TARUS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**REPUBLIC ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the conviction and sentence of Hon C Kutwa in  
Iten Senior Principal Magistrates' Criminal Court Case No 31 of 2020)*

**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 charge were that on the March 26, 2020 at about 9.00pm at Elgeyo Marakwet County intentionally caused his penis to penetrate the vagina of LJ, a child aged 10 years.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the March 26, 2020 at about 9.00pm at Elgeyo Marakwet County intentionally touched the vagina of LJ, a child aged 10 years with his penis.
3. The appellant pleaded not guilty and the matter proceeded to full trial. Upon consideration of the testimonies of the witnesses and the evidence adduced in court, the trial court found the appellant guilty of defilement and sentenced him to 20 years imprisonment.



4. Being aggrieved with the conviction and sentence, the appellant instituted this appeal *vide* a petition filed on July 10, 2021. The appeal is premised on the following grounds;
  1. That I am aggrieved the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.
  2. That the trial court erred in law and in facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.
  3. That I am aggrieved the trial court erred in law and in fact as it failed to hold that the evidence of identification and recognition as not conclusive.
  4. That the learned magistrate erred in law and facts in shifting the burden of proof from the prosecution back to the appellant when the evidence failed to link him to the offence.
  5. That, other grounds will be raised during hearing.

The parties filed submissions on the appeal.

### **Appellant's Case**

5. The appellant conceded to the conviction in his submissions. He stated that he was under the influence of alcohol and is very remorseful and repentant. He further sought to have his sentence start from the date of his arrest and consider the days he spent in remand. As his mitigation, he stated that he is now born again and seeks forgiveness, that he was the sole breadwinner of his family and seeks leniency to allow him provide for his family again. He urged the court to allow his appeal and reduce his sentence.

### **Respondent's Case**

6. Learned counsel for the respondent opposed the appeal. As the appellant seeks to appeal the sentence alone, I shall consider the submissions on the sentence. Learned counsel for the appellant submitted that the appellant was only in custody for five months before the conviction. Further that the sentence was sufficient considering the offence he committed. She urged that the appeal be dismissed.

### **Analysis And Determination**

7. As the appellant seeks only to appeal against the sentence, and has opted not to submit on the conviction, I shall not delve into the merits of the same. The issue for determination that arises is;
  1. Whether the sentence was harsh/excessive

### **Whether the sentence was harsh/ excessive**

8. Section 8(2) of the *Sexual Offences Act* pronounces the punishment for the offence committed by the appellant as follows;
  - (2) A person who commits an offence of defilement with a child eleven years or less shall upon conviction be sentenced to imprisonment for life.
9. The Court of Appeal sitting in Kisumu in the case of *Jared Koita Injiri v Republic HCCRA No 21 of 2019[2019] eKLR* per Musinga, M'Inoti & Murgor JJ A held that despite the mandatory nature of section 8(2) of the *Sexual Offences Act* in providing for the minimum sentence of life imprisonment, applying the principles set out in the *Francis Karioko Muruatetu & others v Republic case[2017]eKLR*,



it was inclined to hold that life imprisonment was not mandatory sentence under section 8(2) of the Sexual Offences Act. The Court of Appeal reduced life imprisonment imposed on the appellant to thirty (30) years imprisonment.

10. I also take note of the decisions in Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021 - Machakos) [2022] KEHC 13118 (KLR) and Petition No 97 of 2021 – Edwin Wachira & 10 others v Republic - Mombasa, where it was held that courts need not be bound by the mandatory minimum and maximum sentences set out in statute. The import of these decisions is that courts are allowed to use their discretion and determine the appropriate sentences in each of the cases before them depending on the circumstances and other factors that may be made available to them during trial. The trial magistrate exercised this discretion and thus, the sentence was not illegal.
11. I have considered the circumstances of the case, the aggravating factors and the mitigation of the appellant and find no reason to disturb the sentence. The complainant was a 10-year-old child whose life will never be the same because of the actions of the appellant. The sentence is commensurate with the offence and is hereby upheld. The same shall be calculated to run from the date the appellant was remanded. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

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**JWW MONGARE**

**JUDGE**

Judgment delivered virtually in the presence of

1. Appellant Present in court
2. Ms Okok –Prosecuting Counsel
3. Loyanae – Court Assistant

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**JWW MONGARE**

**JUDGE**

