



REPUBLIC OF KENYA



KENYA LAW
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**PKM v Republic (Criminal Appeal E017 of 2021)
[2023] KEHC 2625 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E017 OF 2021**

LW GITARI, J

MARCH 9, 2023

BETWEEN

PKM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act, 2006* vide Chuka Chief Magistrate's Court Sexual Offences Case No 42 of 2020.
2. The particulars of the offence are that on diverse dates between March 16, 2019 and 28th Jul, 2019 at Kaare sub-location, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of FKM, a child aged 17 years. In the alternative, the Appellant faced the charge of committing an indecent act with a child.
3. After full trial, the Appellant was convicted on the main count and sentenced to fifteen (15) years imprisonment.
4. Being dissatisfied with the judgment of the trial court, the Appellant filed a petition of appeal dated October 18, 2021 and filed on even date. His appeal is based on the following grounds:
 - i. That the learned trial magistrate erred in law and fact by failing to consider the Appellant's mitigation when rendering the judgment.
 - ii. That the learned trial magistrate erred in law and fact by failing to take into account that the accused was a first offender.



- iii. That the learned trial magistrate erred in law and fact by holding that Section 8(4) of the *Sexual Offences Act* was couched in a mandatory nature despite the judgment of Muruatetu case which held that a mandatory sentence imposed by law is unconstitutional.
5. The Appellant thus urged this court to allow the appeal by setting aside and/or vacating the judgment of the trial court that was rendered in October 4, 2021 and consequently, to make any other such order(s) that will meet the end of justice.
6. The appeal was canvassed by way of written submission which I have summarized hereunder.

The Appellant's Submission

7. The Appellant filed his written submission on August 2, 2022. It was his submission that the learned trial magistrate erred in both points of law and facts by failing to consider the Appellant's mitigation when rendering the judgment. Acknowledging that the trial court has discretion in deciding the sentence to impose on a convicted person in each case, the Appellant submitted that the same should be exercised judiciously and not capriciously. That in this case, the sentence of 15 years' imprisonment meted against him was harsh, excessive and amounted to a miscarriage considering that he was a first offender and demonstrated remorsefulness prior to the imposition of the sentence by paying for the victim's hospital bill.
8. According to him, the relationship between him and the victim was in good faith and the complainant willingly consented to the union. He stated that during the commission of the offence, he neither knew that his acts were illegal and the consequences that would follow. It was his submission that considering the circumstances of the case, a conditional discharge would have sufficed. He relied on the case of Joshua Antony Gitonga v Republic, Criminal Appeal No 9 of 2020 in the High Court at Embu to buttress this position.
9. The Appellant thus urged this court to intervene and substitute the imposed sentence of 15 years with a lenient sentence or a non-custodial sentence in order to enable him to go back home and take care of the innocent child that was born out of what he says was his ignorance.

The Respondent's Submissions

10. On their part, the Respondent filed its written submissions dated October 26, 2022 on October 27, 2022. From the onset, the Respondent noted that the present appeal only challenges the sentence meted out by the trial court and not the conviction. Subsequently, the Respondent submitted that the learned magistrate did take into account the mitigation provided by the Appellant by noting that the offence was prevalent not only within the region but also the country as a whole. Further, it was the Respondent's submission that the trial magistrate cannot be faulted for imposing a sentence that is prescribed by law.
11. On the import of the judgment in the Muruatetu's case in this case, the Respondent referred to the directions given by the Supreme Court on July 6, 2021 on the Muruatetu judgment. It was the Respondent's assertion that the Supreme Court was categorical that the Muruatetu judgment was not intended to be applied to any offences other than the offence of murder. The Respondent thus submitted that the trial magistrate was not bound to apply the Muruatetu judgment in sentencing the Appellant.

Issue for determination

12. As correctly pointed out by the Respondent, the Appellant herein is only challenging the sentence meted against him. Accordingly, the only issue that this court is called upon to determine is whether



the sentence meted against the Appellant by the trial court was harsh or excessive in view of the circumstances of the case.

Analysis

13. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect. See *Okeno 0v-Republic* (1972) E.A 32 to the same proposition.
14. However, as stated above, the Appellant is neither challenging the facts of the case nor his conviction. His appeal is only against the sentence. The 1st appellate court has a duty to analyse the evidence and make its own independent finding. The facts of this case are not in dispute. Briefly, the appellant and the complainant are first cousins. The appellant offered to assist the complainant with her education since her parents had separated and her mother was unable to educate her. The complainant who was then aged 17 years moved to the appellant's house and started hiring with him in January 2019 at his Kaare home. The appellant enrolled the complainant at [Particulara Withheld] Primary School in Class 8. The appellant did as he had promised and catered for all her education needs, food, shelter and clothing.
15. Unknown to her, these were just but baits and she would soon realize his real intentions. One night on 16/3/2019, the appellant pounced on her and told her he wanted to marry her and make her his wife. The appellant went to the complainant's bedroom at night and demanded sex from her. The complainant resisted but the appellant covered her mouth and told her that if she refused his advances, he would no longer continue to take her to school and take care of her other needs. The complainant had no choice. She stopped resisting the advance. The appellant penetrated her. Thereafter the appellant continued to penetrate her repeatedly during the night.
16. The complainant conceived in the process and bore a baby boy on 25/4/2020 and name him AM. Thereafter the appellant was arrested and arraigned in court for defiling the complainant. A D.N.A was done on the complainant's baby and the result was that there were 99.99 % chances that the appellant was the father of the said baby. He was then charged in court. The trial magistrate found the accused person guilty since the complainant was a child at the time the offence was committed and had no capacity to give consent to sexual intercourse.

Having considered the evidence tendered before the trial court, I find that there was sufficient evidence tendered to support the charge. The conviction of the appellant was therefore safe.

17. In considering what constitutes a just sentence, the Court of Appeal in the case of *Thomas Mwambu Wenyiv Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharesbtra* where the said court expressed itself as follows:

“There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As



a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

18. In this case, the Appellant was convicted of the offence of defilement contrary to Section 8(1) of the [Sexual Offences Act](#) which states that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

19. Section 8(4) of the [Sexual Offences Act](#) further provides that:

“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.”

The sentence is couched in mandatory terms. This meant to deter the commission of certain offences and especially sexual offences.

20. The Appellant in his mitigation stated that he had a small child and that he was the one taking care of four (4) children of his sister. That his father is mentally challenged and that he has a child that he takes to university.

21. I find that the trial court did consider the Appellant’s mitigation and took into account the prevalence of sexual offences, especially against minors, in the subject region and the entire Republic. The court was therefore correctly guided by principle of deterrence in meting out the sentence appealed against.

22. Finally, on whether the trial court was bound to consider the judgment in the case of [Muruatetu \(Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others \(Amicus Curiae\)](#) [2021] eKLR), the Supreme Court gave directions on this case by holding as follows:

“[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision’s expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

“[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of [the Constitution](#); an absolute right”.

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases”.



23. It follows from the above decision that the mandatory minimum sentences provided under Section 8 of the *Sexual Offences Act* remain the statutory and legal sentences for persons found guilty of the offence of defilement. The Appellant cannot therefore claim that the trial court failed to apply the reasoning in the Muruatetu's case is ill-informed. The sentence imposed by the trial court was commensurate with the nature and gravity of the crime and was the bare minimum sentence prescribed by law. In my view, the same was therefore appropriate, just, and proportionate in the circumstances.

Conclusion

24. From the foregoing, it is my view that the sentence meted out against the Appellant by the trial court was proper and in accordance with the prescribed law. As such, I opine that this appeal is without merits.

Order:

The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF MARCH 2023.

L.W. GITARI

JUDGE

