



REPUBLIC OF KENYA



KENYA LAW
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**Okore v Republic (Criminal Appeal E047 of 2022)
[2023] KEHC 18994 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18994 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E047 OF 2022
RE ABURILI, J
JUNE 12, 2023**

BETWEEN

MICHAEL ONDONYI OKORE APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the sentence by the Hon. C.L. Yalwala on the 11.5.2021 in the Senior Principal Magistrate's Court in Maseno in Sexual Offence Case No. 24 of 2017)

JUDGMENT

Introduction

1. The appellant Michael Ondonyi Okore filed this appeal challenging both conviction and sentence. However, at the oral hearing, he abandoned the challenge against conviction and urged the court to only consider reduction of sentence.
2. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* and sentenced to serve fifteen (15) years imprisonment on May 11, 2021 in Maseno SPM Sexual Offence Case Number 24 of 2017.
3. The offence took place on the 18th day of September 2017 at 1600hrs at [Particulars Withheld] area within Korando, a sub-location in Kisumu West sub-county within Kisumu County when the appellant unlawfully and intentionally caused his penis to penetrate the vagina of CA a child aged 13 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
4. The appellant pleaded not guilty to the charge and the case proceeded to full trial where the prosecution called five (5) witnesses in support of its case. Placed on his defence, the appellant herein gave a sworn testimony denying the charge and called one witness in support of his case.



5. In his judgement, the trial magistrate rejected the appellant's alibi on the grounds that the appellant only raised it during his defence and had not raised it at any time during cross-examination of the prosecution witnesses. The trial magistrate further found that the evidence of the appellant and his witness did not corroborate each other thus rendering the said alibi doubtful.
6. The trial court convicted the appellant of the main charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* and after considering the appellant's mitigation as well as the pre-sentencing report, observing that the appellant had committed the offence in an aggravated manner and subsequently sentenced him to serve 15 years' imprisonment.
7. This appeal was canvassed by way of written submissions.

The Appellant's Submissions for Sentence Reduction

8. The appellant acting in person submitted that he was remorseful and sorry for the offence and thus urged the court to accept, carefully weigh and consider his mitigation. It was his submission that he was 26 years old and a first time offender and that he had enrolled for educational and theological training and subsequently received certificates and that the said training had reformed, transformed and rehabilitated him making him ready for re-integration into the society.
9. The appellant urged the court to have mercy on him stating that he did not know the consequences of committing the offence and further that he would not repeat the offence. he submitted, asking for reduction of sentence to enable him go and do something beneficial and meet his family.

The Respondent's Submissions

10. The respondent through the Office of Director of Public Prosecutions submitted that all the ingredients of the offence of defilement were proven beyond reasonable doubt. On the age of the complainant, it was submitted that that the age of the complainant was proven and that she lacked the capacity to give consent to engage in any sexual act. On identification of the perpetrator, it was submitted that the respondent was well known to the complainant as they were living in the same area and further regarding penetration, that this was proved beyond reasonable doubt.
11. On the sentence imposed on the appellant, the respondent submitted that Section 8 (1) as read with section 8(3) of the *Sexual Offences Act* prescribes a sentence of life imprisonment and having been sentenced to 15 years imprisonment, the appellant had failed to demonstrate how the sentence imposed was harsh and excessive especially considering the age of the complainant and the aggravated manner in which the appellant executed the offence.

Analysis and Determination

12. This appeal is against sentence only. A sentence reduction hearing or any other sentencing hearing for that matter is neither a hearing *de novo* nor an appeal. Such proceedings are undertaken on the understanding that conviction is not in issue. It therefore follows that in such type of proceedings, the convict is not entitled to take up the issue of the propriety of his conviction. He must proceed on the understanding that the conviction was lawful and restrict himself to the sentence and address the court only on the principles guiding the imposition of sentence and on the appropriate sentence in the circumstances.
13. Similarly, the court can only refer to the evidence adduced in so far as it is relevant to the issue of sentencing but not with a view to making a determination as to whether the conviction was proper. While the court is entitled to refer to the evidence in order to determine whether there existed



aggravating circumstances or otherwise for the purposing of meting out the sentence, it is not proper for the court to set out to analyze the evidence as if it is meant to arrive at a decision on the guilt of the accused.

14. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the *Sexual Offences Act*. the Court observed as follows:

“We hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

15. Under the *Sexual Offences Act*, the sentence for defilement is prescribed based on the age of the victim of the offence. Although the Act does not expressly say so, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. For that reason, the age of the victim of sexual offence is an aggravating factor which the court should always consider amongst other factors in sentencing.

16. In this case, the complainant was aged 12 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the *Sexual Offences Act* which provides that:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

17. Sentencing is an exercise of judicial discretion by the trial court which discretion should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R* and *Wilson Waitegei v Republic* [2021] eKLR).

18. The aggravated nature of the appellant’s assault on the complainant must be noted. The evidence on record shows that the appellant chased the complainant, rough-handled her by tying her hands together then forcefully spread her legs apart after which he defiled her. The Court considers the offence to be heinous against a minor. It bears repeating that the penalties enacted in the *Sexual Offences Act* reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement. Thus, seriousness of the offence is a relevant factor in sentencing and in sexual offences. Defilement leaves the innocent child victim with eternal and time-explosive dent on the integrity and dignity of the child as a human being.

19. In his mitigation before the trial court, the appellant stated that he was a first time offender who was remorseful and thus sought for leniency. The aggravating factors weigh heavy; against the mitigating factors of the appellant. Nonetheless, albeit the section 8(3) provides for minimum of twenty (20) years imprisonment, the trial court exercised discretion and imposed fifteen (15) years imprisonment. In my



view, that sentence was appropriate having regard to the circumstances under which the offence was committed against a minor. I find no reason to interfere with that discretion and sentence imposed on the appellant by the trial court.

20. I therefore find no merit in this appeal on sentence. I dismiss the appeal and uphold the sentence of fifteen (15) years' imprisonment meted on the appellant.
21. However, as the appellant was arrested on 24/9/2017 and taken to court on 26/9/2017, and was only released on bond on 5/10/2017, taking into account the provisions of section 333(2) of the *Criminal Procedure Code*, I hereby direct that the 15 years imprisonment shall be calculated less the 12 days that the appellant was in custody from the day of arrest on 24/9/2017 to the day of release on bond on 5/10/2017.
22. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF JUNE, 2023

R.E. ABURILI

JUDGE

