



REPUBLIC OF KENYA



**Taalam v Republic (Criminal Appeal E043 of 2021)
[2023] KEHC 18981 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E043 OF 2021
RE ABURILI, J
JUNE 21, 2023**

BETWEEN

VINCENT KIPROP TAALAM APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the sentence by the Hon. P.K Rugut on the 12.10.2021 in the Principal Magistrate's Court at Tamu in Sexual Offences Case No. E007 of 2021)

JUDGMENT

Introduction

1. This appeal is against the sentence of 20 years' imprisonment imposed on the appellant Vincent Kipro Talaam for defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on diverse dates between January and April 2021 in Kipkelion West Sub-County within Kericho County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of D C a child aged 15 years old.
2. In the alternative charge, the appellant was accused of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.
3. After a full trial, the appellant was found guilty of the main charge, convicted and sentenced to serve 20 years' imprisonment. Aggrieved by the said conviction and sentence, the appellant preferred this appeal as set out in his petition of appeal filed on October 28, 2021.
4. Ultimately, the appellant withdrew his appeal against conviction and prayed that this appeal be allowed; and the sentencing orders of the learned trial magistrate be set aside and substituted with an appropriate sentence.
5. The parties filed submissions to canvass the appeal.



The Appellant's Submissions

6. The appellant urged the court to consider the Victim Impact Assessment Report as well as the appellant's youthful age as a positive basis to reduce his sentence. It was further submitted that the reduction of sentence would not in any way render an injustice and as such the sentence ought to be interfered with.
7. The appellant further expressed to the court that he sought a reduction of his sentence so that he could go and care for his children.

Respondent's Submissions

8. On behalf of the respondent it was submitted that going by the seriousness of the offence and the circumstances under which the offence was committed, the sentence of 20 years imprisonment was proper and could not be said to be excessive, illegal or unlawful.

Analysis and Determination

9. The *Sexual Offences Act* prescribes minimum sentences based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. It therefore appears that the age of the victim of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing.
10. In this case, the complainant was 15 years old at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the 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.”
11. However, Sentencing, it has been stated not once or twice, by the Court of Appeal, is in the discretion of the trial court In the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR, it was stated that:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
12. From the above principles, a trial court must take into consideration all the facts of a case as well as the mitigation from the convicted offender before passing sentence. I note that in the present case, the trial magistrate considered these adequately.
13. The trial magistrate considered the pre-sentencing report that showed that the community had a positive attitude towards the appellant as well as the sentiments of the victim and her family who urged the court to consider giving the appellant a lighter sentence. The trial magistrate further considered the appellant's mitigation that he was youthful with young dependants and also noted that he was a first



offender. The court however noted that the Act provided for a minimum sentence of 20 years which it passed on the appellant.

14. The Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] KLR clarified the position and stated inter alia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the *Penal Code*, which was the case before the Supreme Court.
15. In *WOR v Republic* (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR) a (26 April 2022) (Judgment) FA Ochieng J (as he then was) stated inter alia that:

'If the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act* and that he was unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement and that in his view that renders the sentence unconstitutional as the fact that the prescribed sentence completely precluded the Court from exercising any discretion, regardless of whether or not the circumstances so require.'
16. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (*supra*), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory, although, just like in the Muruatetu 2017 decision, the trial court may, having regard to the circumstances of each case, impose a mandatory sentence, which sentence is lawful.
17. For the above reasons, and taking into consideration the appellant's mitigation as well as the Pre-sentencing report dated October 12, 2021 filed before the trial court I find that this is a good case for interference with the mandatory minimum sentence imposed on the appellant, considering that the wordings of the penal section are...liable to, an indication that the court has discretion in meting out the appropriate sentence.
18. For the above reasons, I hereby set aside the twenty years imprisonment imposed on the appellant and substitute the same with ten years imprisonment.
19. In addition, it is evident that the trial magistrate did not take into consideration the period spent in custody by the accused person upon arrest, as he was not released on bond pending trial. This requirement is stipulated under Section 332 of the *Criminal Procedure Code*.
20. The charge sheet shows that the appellant was arrested on July 17, 2021 and although he was granted bond on July 19, 2021 and had it reviewed on August 25, 2021, he was never released and he remained in custody until the conclusion of the case on October 12, 2021, having failed to raise the surety.
21. In the circumstances, I find that in computing the sentence imposed on the appellant, the prisons authorities shall consider the period spent in custody by the appellant from the date of arrest on July 17, 2021 until the date of sentencing which was 2 months and twenty-five (25) days.
22. In the end, the conviction of the appellant is sustained. The appeal against sentence is allowed to the extent that the twenty years imprisonment is set aside and substituted with ten years imprisonment to be calculated from the date of arrest on July 17, 2021.
23. This file is closed. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2023



R E ABURILI
JUDGE

