



**Samuel Mukenya & another v Republic & another (Criminal Appeal
E003 of 2023) [2023] KEHC 21356 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E003 OF 2023
REA OUGO, J
JULY 25, 2023**

BETWEEN

SAMUEL MUKENYA 1ST APPELLANT

SAMUEL MUKENYA 2ND APPELLANT

AND

REPUBLIC 1ST RESPONDENT

REPUBLIC 2ND RESPONDENT

*(An Appeal from the judgment of Hon. G. Adhiambo PM
Kimili Court delivered in Criminal Case E021 of 2022)*

JUDGMENT

1. Samuel Mukenya (the appellant) was charged with Defilement contrary to section 8(1) (4) of the Sexual Offences Act No.3 of 2006. The appellant was also charged with an alternative charge of, committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
2. The appellant was found guilty of the main charge of defilement and convicted and sentenced to ten (10) years imprisonment.
3. In his petition of appeal, he states that he seeks a favorable jail term.
4. The respondent filed a Notice of enhancement of sentence on the 21st March 2023.
5. The appeal was canvassed by way of written submissions. The appellant in his submissions submits that; the sentence imposed is rather harsh and excessive and that the court should consider reducing the sentence on humanitarian grounds. That he has young children and is the sole bread winner of his young family. That his wife is young and is un-employed. That he believes that the period of time



he has behind bars he has been rehabilitated and he is ready to stay peacefully. That he lives with a disability after a road accident. That he has had multiple health issues he is diabetic and needs special health which is not available in prisons.

6. The respondent in its notice seeks an enhancement on the following grounds;
 - i. That the appellant was charged and convicted with the defilement of a minor of 16 years
 - ii. That the complainant was not only a minor, she was mentally challenged.
 - iii. That section 8(4) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child aged between 16 and 18 years is liable to imprisonment of 15 years.
 - iv. That the trial Magistrate erred in law in sentencing the appellant to serve 10 years in prison for the offence.
7. The respondent submitted as follows; that their case was proved beyond reasonable doubt in the lower court. That a person convicted for defilement under section 8(4) of the Sexual Offences Act is liable to imprisonment of 15 years. The appellant was sentenced to 10 years. That the High Court has power under section 354 (3) of the Criminal Procedure Code to alter the findings of the trial court and increase the sentence. That the appellant abused the trust placed upon him by society and took advantage of the complainant who was not only vulnerable by virtue of her being a child but also mentally challenged. That the 10 years imposed on him was is manifestly lenient and ought to be enhanced to at least 15 years provided by the law.

DETERMINATION

8. The issue for determination in this appeal is whether the sentence imposed on the appellant should be reduced as sought by the appellant or enhanced the sentence as sought by the respondent. The respondent did not file a cross appeal.
9. In the case of J.J.W. vs Republic (2013) eKLR the court held that:

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal”
10. A notice to enhance the sentence was filed on the 21st March 2023 after the court gave directions on the hearing of the appeal on the 16/1/2023. This notice was filed late, nor is there any indication that it was served on the appellant. The respondent did not file a cross-appeal. The appellant only acknowledged receiving the respondent’s submission. This court too did not warn the appellant that there was a notice of enhance filed or that it could enhance the sentence to the number of years provided in law.



11. I have noted that the conviction was proper, the appellant was convicted of defiling a mentally challenged minor of 16 years and was sentenced to 10 years imprisonment. Section 8 (4) 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.
12. However, because of failure to notify the appellant of the proposed enhancement this court cannot apply the provisions of section 354 (3). On the appellant's plead to have the sentence reduced, I find that the sentence was so lenient. I decline to reduce the sentence and dismiss the appeal. The appellant will continue serving his sentence.

Dated , signed and delivered at Bungoma this 25th day of July 2023.

R.E.OUGO

JUDGE

In the presence of:

Samwel Mukenya/Appellant- Present

M/s Omondi- For the Respondent

Wilkister/Okwaro- C/A

