



**VCK v Republic (Criminal Appeal E003 of 2023)  
[2023] KEHC 21539 (KLR) (1 August 2023) (Sentence)**

Neutral citation: [2023] KEHC 21539 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL APPEAL E003 OF 2023  
RN NYAKUNDI, J  
AUGUST 1, 2023**

**BETWEEN**

**VCK ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**SENTENCE**

Coram: Before Justice R. Nyakundi  
M/s Ngig Mbugua & Co. Advocates  
Mr. Mugun for the State

**Background**

1. The history of this proceedings is traceable to the trial court record in SPMCR E015 OF 2022 whose brief facts are that the subject went through a trial for an offence of defilement contrary to Section 8(1) of the *Sexual Offence Act* No. 3 of 2006. The specific of the offence being that on 18<sup>th</sup> March 2021 in Elgeyo Marakwet County he intentionally and unlawfully had sexual intercourse with a minor duly identified as CJM aged 15 years old. Primarily it is noted that the subject pleaded not guilty necessitating a full trial for the state to test the evidence in terms of Section 107 (1) 108 & 109 of the *Evidence Act* to secure judgement for the indictment.
2. The learned trial magistrate having considered both the prosecution and defence case arrived at a decision that the subject was guilty of the offence and proceeded to pass a custodial sentence of 10 years. Through learned counsel Mr. Ngigi on behalf of the subject being aggrieved with the decision on conviction and sentence filed and appeal to this court premised on various grounds in Memorandum of Appeal. What then was required of the court is to evaluate and examine trial court record, the impugned judgement and issues raised in the memorandum of appeal with a view to come up with an



independent findings and decision as an appellate court. The court in its decision affirmed the finding on conviction by the trial court and in respect of sentence exercise of such discretion called for new/fresh evidence from the Director of Probation and Children Services to inform the parameters to be applied in sustaining or reviewing the verdict by the learned trial magistrate.

3. General principles the on sentencing that may be adopted in their role between a system of sentencing vary significantly with context. For examples  
Retribution: It rests on the motion that if a person has knowingly done wrong, he or she deserves to be punished.  
Denunciation: this refers to Denouncing/condemn or censure unlawful conduct/particular type of behavior engaged by the offender  
Reparation: This provides for the repay, repair or compensate the victim or community loss and harm. Reparation for harm done to a victim or the community.  
Rehabilitation: Assists an offender be rehabilitated & re-integrating him into society.  
Proportionality: The sentence must be proportionate to the gravity of the offending behavior.  
Parsimony: The sentence should not be more severe than is necessary to meet the purposes of sentencing.  
Parity: Similar sentence should be imposed for similar offences committed by offenders in similar circumstances  
Totality: Where an offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behavior.
4. The common idea from these principles is quite simple, It is to focus on the fairness of the procedure and appropriate tools for determining the correct penalty on a case to case basis. Thus our legal system must make provisions for conducting orderly sentencing trials and hearings which guarantee rational procedures of inquiry to ascertain the truth in ways consistent with guidelines on sentencing befitting the crime and personal circumstances of the offender. There is a presumption in law that sentencing of an offender or defendant provides effective deterrence measures against re-offending. However, from the above cluster on objectives and principles of sentencing, the deterrence agreement only requires that a reasonable number of offenders or defendants for tht matter will be deterred by the penalty of the overall crime rate to reduce. It is questionable whether Kenyans want unjust and disproportionate sentences particularly where long custodial sentences or mandatory minimum applies to vulnerable members of the society such as juveniles or as commonly referred to as a child in Section 2 of the [Children's Act](#) as an individual who has not attained the age of eighteen years.
5. First faced with unacceptable high levels of prison incarceration rates mostly those convicted under the [Sexual Offences Act](#). Of later there has been an intervention by the judicial process to address the arguments for and against the mandatory minimum sentencing procedures. The rationale for minimum mandatory sentences has always been the held view that serious offences should be severely punished with long prison sentences to protect the public and that goal of public protection would then be in such a case carry a higher weight than any other objective or principles like reformation. Rehabilitation or reparation. The new jurisprudential typology in [Francis Muruatetu & Another v Republic, Katiba Institute & 4 Others \(Amicus Curiae\)](#) (Petition 15 & 16 of 2015 [Maingi & 5 others V Director of Public Prosecution and Another](#) (Petition E017 of 2021), [Republic v Nicholas Wambogo](#) (2022) eKLR, [Simon Kipkurui Kimori v Republic](#) (2019) eKLR that minimum mandatory sentences which deprive judicial members to exercise discretion before acceding to a particular sanction for a particular offence are unconstitutional and in violation of Articles 19, 22, 23, 24, 25 27, 28, 29, 48, and 50 of the [constitution](#). It also literally means that sentences imposed for general deterrence are in effect is proportionate unless such sentences have taken into account aggravating, and mitigating factors, the reflection on the age and personal antecedents of the offender, the appropriateness of non-custodial sentence and the likelihood or unlikelihood of rehabilitation. In other words, the need to ensure that for the first and young offenders or children under the age of eighteen years as defined in the children's Act, the application of general deterrence raises questions in right of the Bill of Rights Chapter 4 of the [Constitution](#). It is also true to state that general deterrence for minors /juveniles should be an



objectionable goal of punishment for it would result in sentences that are cruel, inhuman or degrading treatment to an offender of that age. In Article 27 of the Constitution includes: “Equality includes the full and equal enjoyment of all rights and fundamental freedoms”

6. The point reached here is that individual circumstances have to be weighed against public interests when dealing with children in conflict with the law and therefore shifting the sentencing policy to reflect the doctrine of best interest of the child. In terms of Section 4(3) of the Children’s Act, it provides that:

A judicial or administrative institution or any person making an interpretation as to conflict of any provision or laws shall have regard to the best interests of a child” similarly in Article 53 (1) &(f) (2) is phenomenal as follows:

- (1) Every child has the right
  - a. To a name and nationality from birth
  - b. To free and compulsory basis education
  - c. To basic nutrition, shelter and health care
  - d. To be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour
  - e. To parental care and protection, which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not and
  - f. Not to be detained, except as a measure of last resort and when detained to be held
    - i. For the shortest appropriate period of time and
    - ii. Separate from adults and in conditions that take account of the child’s sex and age
2. A child’s best interests are of paramount importance in every matter concerning the child.

7. Further the courts must also consider fundamental principles of the rule of law which include concepts of natural justice, procedural fairness and that at all times comply with Article 25 (5) of Constitution which states that “ the general rules of international law shall form part of the law of Kenya, Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution “ In essence the convention on the right of a child applies to persons under the age of 18 such that in Article 1 it requires that in dealing with Courts should have the best interests of the child as a primary consideration (Article 3(1)Detention must be used as a last resort and for the shortest appropriate period (Article 37(b)Sentences must be proportionate to the circumstances of the offence and must be subject to appeal (Article 40)

8. To this end, the CRC has proclaimed that the best interests of the child should be envisaged as: “ A substantive right of the child to have his or her best interests assessed and taken as a primary consideration hen different interests are being considered, and the guarantee tht this right will be implemented whenever a decision is to be made concerning a child (...) a fundamental interpretation legal principle ensuring that the interpretation which most effectively serves the child’s best interest



should be chosen whenever a legal provision is open to more than one interpretation (..) and a rule of procedure that the decision process in any matter concerning a child must include an evaluation of the possibility of any negative or positive impact of the decision of the child.

9. Article 37 of the [CRC](#) states that should a child be detained, such child shall be detained, such child shall be treated with humility and respect for the inherent dignity of the human person and in a manner which takes into account the need of the (the child's) age and level of maturity.
10. The child's best interest reign supreme and are of paramount importance to be factored by the trial court to afford the child offender special protection more specifically in the sentencing scheme. It is the duty of the court to bear in mind that custodial sentence for a child in conflict with the law is an option to be taken as a last resort and only if compelling circumstances make it a sole appropriate sentence. In the same canopy Section 17 (1) &(2) of the [African Charter on rights and welfare of the child](#) echoes that (1) Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent will the child's sense of dignity and worth and which reinforces the child respect for human rights and fundamental freedoms of others. (2) States parties to the present Charter shall in particular: (a) ensure that no child who is detained or imprisoned or otherwise deprived on his/her liberty is subject to torture, in human or degrading treatment or punishment.
11. It still remains to reiterate that the inquiry on the best interest should stretch to such answers to the following questions:
  - a. Which particular interest is at issue?
  - b. What is the nature of such an interest?
  - c. The duration of that interest, long, medium or short-term duration?
  - d. The objectivity of the criteria for determining such interest or are the basis of the same are they on the child's subjective wishes?
12. Considerations of the public interests when sentencing child offenders must go beyond the blur of deterrence. It should hardly be expected that the framers of our constitution incorporate Article 53 (2) not to make perfect sense in guaranteeing and protection of children's rights in Kenya. The [constitution](#) is a living organism, not a dead letter. It is for the courts to transfuse the provisions to breath life and validity of the sentencing provisions in the various statutes to figure out the best interest principle in the trial process of children.
13. It is necessary for purposes of this appeal emanating from the trial court just to appreciate the character and delinquent behavior which must show up to each individual depending on the social, community, exposure, environmental surroundings as well as their interactions which may have influence to their behavior. There are complex interplay of individual biological and genetic factor which are of significance to every child starting from the point of birth continuing throughout his life. The risk factors confronting the growth and development of any child is as diverse as the community or society itself. Much of what is seen in our legal system, from the children in conflict with the law are not matters to be simplified by the basic principles of criminal law and responsibility or culpability. The prenatal and perinatal stories are never told and their similar effect to the individual child capabilities, competencies and characteristics later in life. The influence of their peers in character development is not a corpus of the horizon of remoteness. The social behaviors of teenagers, adolescents and young adults ordinarily engaging in some form of sexual activity as defined in the [sexual offences Act](#) as being navigated by the prosecution pursuant to Article 157 (6) & (7) of the [constitution](#) has to bear this in mind so as not to strip the human rights of this vulnerable class of our society. The question therefore



is whether the literal incarceration in custody for long periods of time under the guise of punishing crime should not be held to be unconstitutional in consonant with the Bill of Rights.

14. This case is primarily concerned with the appropriateness, legality, fairness, impropriety, justness and proportionality of the ten-year custodial sentence. Proceeding to deal with this issue, the following key principles in *Mokela vs The State* (135/11) (2011 ZASCA 166, the Supreme Court of South Africa held that:

it is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served. Further in the case of *Ogolla s/o Owuor vs. Republic* (1954) EACA 270, the court pronounced itself on this issue as follows:- “ The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors.”

15. In Kenya when it comes to sentencing children in conflict with the law, various legislative tools exist as stated in Section 191 (1) (a) –(i) of the *Criminal Procedure Code*.
- a. By discharging the offender under section 35(1) of the penal code
  - b. By discharging the offender on his entering into a recognizance, with or without sureties
  - c. By making a probation order against the offender under the provisions of the *probation of offenders Act*.
  - d. By committing the offender to the care of a fit person whether a relative or not, or a charitable children’s institution willing to undertake his care
  - e. If the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments
  - f. By ordering the offender to pay a fine, compensation or costs,
  - g. In the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institution
  - h. By placing the offender under the care of a qualified counsellor
  - i. By ordering him to be placed in an educational institution or a vocational training program
  - j. By ordering him to be placed in a probation hostel under provisions of the probation of offender Act.
  - k. By making a community service order, or
  - l. In any other lawful manner.

16. In relation to the instant appeal and in addition to the constitutional imperatives, legal precedents, the children’s Act and the International conventions the trial court had an obligation to consider the best interest of the appellant before sentencing him into a custodial sentence of 10 years. Individualized decision making with respect to the best interests of the child is critical and important so as to secure his or her rights and fundamental freedoms. What was achieved in the sentencing process eliminated the combination of factors constituting best interest of the child framework. The holistic well-being of the appellant including the emotional, spiritual and mental health, freedom from torture and



cruel inhuman or degrading treatment or punishment, human dignity, freedom and security of the person must be given effect in considering the various alternatives to sentencing. Overall there are inherent legal challenges in upholding the ten (10) years custodial sentence imposed by the trial court. Therefore, the wisdom of it is to exercise discretion to substitute incarceration to home based rehabilitation being three years probation supervisory sentence. During the period under review the supervisor to incorporate counseling and mentoring lessons to enhance individual values on behavioral change.

It is so ordered

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 1<sup>ST</sup> DAY OF AUGUST 2023.**

**In the Presence of**

Mr. Ngigi for the Appellant

Probation Officer Mr. David Barasa

Assistant Director Children services Mr Elvis Kurgat

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**R. NYAKUNDI**

**JUDGE**

