



**Nyangweso v Republic (Criminal Appeal E86 of 2022)
[2023] KEHC 22484 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E86 OF 2022
JRA WANANDA, J
SEPTEMBER 22, 2023**

BETWEEN

ISIAH OKINDA NYANGWESO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged in Butere Principal Magistrate’s Court Criminal Case No. 376 of 2012 with the offence of defilement of a girl contrary to Section 8(1) of the [Sexual Offences Act](#) No. 3 of 2006 as read with Section 8(1)(3) thereof. The particulars of the charge were that on 17/11/2012 in Khwisero District of Kakamega County, he intentionally caused his penis to penetrate the vagina of HAB, a child aged 12 years. He was also charged with the alternative charge of committing an indecent act with the same child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.

Judgment of the trial Court

2. After analyzing the evidence, the trial Court found that the age of the complainant was approximately 16 years and not 12 as stated in the charge sheet. It then found the Appellant guilty and accordingly convicted him. On 19/04/2013, the trial Court sentenced the Appellant to serve 20 years imprisonment. It was the Court’s finding that the same was in accordance with the mandatory sentence provided under the law

Filing of Appeal & Grounds thereof

3. On 29/07/2022, about 9 years after being convicted and sentenced, the Appellant applied for leave to Appeal out of time. The Application was allowed whereupon the Appellant filed this Appeal.
4. I have not come across the Petition of Appeal but the Record contains two separate Supplementary Grounds of Appeal. The first one was drawn by the Appellant in person and appears to have been



filed even before leave to Appeal was granted since it is dated 13/01/2021. The second one is dated 21/11/2022 and is drawn by Messrs Mokeira Repha & Co. Advocates.

5. The first Supplementary of Grounds of Appeal drawn in person by the Appellant refers to the case of Vincent Sila Jona & 87 Others vs Kenya Prisons Service & 2 Others [2021] eKLR and basically prays that the Court orders that the period of time spent in remand custody before sentence be taken into account and directs that the sentence commences from the date of arrest which, according to him, was 18/11/2012. He quoted Section 333(2) of the Criminal Procedure Act.
6. The second Supplementary Grounds of Appeal, which is more precisely drafted states as follows:
 - i. The minimum mandatory sentences provisions under the *Sexual Offences Act* have been declared unconstitutional for fettering the discretion of the Judges and Magistrates in meting out sentences.
 - ii. That the learned Magistrate was deprived of discretion to appreciate the circumstances of the case in meting out sentence and could not therefore consider the mitigating and unique circumstances in meting out sentence.
 - iii. There was absolutely no aggravating factors to compel the trial Court to impose on the Appellant a maximum sentence of 20 years imprisonment.
 - iv. That the learned trial Magistrate erred in law and facts by convicting the Appellant without appreciating the critical ingredient of defilement i.e. age which was not properly and adequately proved beyond reasonable beyond reasonable doubt.
7. The Appellant, through the said Advocates, filed Submissions on 12/12/2022. On her part, Learned Prosecution Counsel Ms Busienei opted to submit orally, which she did on 17/01/2023.

Appellant's Submissions

8. The Appellant's Counsel submitted that the Appellant has been incarcerated for the past 10 years, in sentencing, the Court was deprived of the discretion to appreciate all the aggravating circumstances, the sentence was therefore extremely harsh and did not consider the mitigation which deprived the Appellant of the right to fair hearing, in light of mandatory sentences under the *Sexual Offences Act* being reviewed and a string of Judgments setting aside such sentences, the Appellant is hopeful that his sentence shall be set aside and he shall be released forthwith as having served his sentence, the Magistrate noted the Appellant's mitigation and proceeded to note that the *Sexual Offences Act* provides a mandatory sentence and without considering the Appellant's mitigation sentenced him to serve imprisonment for 20 years. He cited the cases of G.V. Odunga in Maingi & 5 Others versus Director of Public Prosecution & Another, E017 of 021 where the case of Francis Karioko Muruatetu & Another versus Republic (2017) eKLR (Muruatetu 1) was cited. He also cited Fatuma Hassan Salo v R and noted that the age of the Appellant was not raised nor taken into account, although it should not be seen that they are trivializing the victim's experience, circumstances of the offence were in no way gruesome, there was no violence or threats meted out to the victim, the whole incident took less than a few minutes, the Appellant is a first offender, he prayed for leniency on grounds that he is the sole breadwinner of his family, he has three children, his wife is unemployed, the wife came to the Appellant's defence terming him a good husband and that since his arrest she has been victimized and molested by relatives and neighbours.
9. Counsel further cited the case of Evans Wanyonyi v Republic (2019) eKLR and submitted that the overall objective of punishment is not only to deter occurrence of unwanted behaviour punishment but is also intended to rehabilitate and reform the offender, the Appellant has served 10 years



imprisonment, this is far more time than any individual takes to finish any course, the Appellant has had more than enough time to learn, contemplate and reform, if 10 years cannot reform and rehabilitate a person, an additional 10 years is no guarantee to rehabilitate him, at this rate the Appellant shall only be released in old age when he will be of no use to his children nor to the society as his youthful productive stage has lapsed the energy to contribute to his children's upbringing, he can only be a liability to his children who due to lack of a fatherly figure have been constrained unfairly, the circumstances of this case warrants for release of the Appellant.

Respondent's Submissions

10. In opposing the Appeal, Counsel for the Respondent submitted that the Appeal is only about age and resentencing but that age assessment on the victim confirmed that she was 16 years old. On the allegation that mandatory sentences were declared unconstitutional, Counsel submitted that this allegation is not true since in the case of *Muruatetu II*, it was stated that the finding does not apply to Sexual Offences. He also cited the case of *Juma Abdalla v R*.

Analysis and determination

11. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of the witnesses (see *Okeno vs. Republic* [1972] E.A 32).

Issues for determination

12. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment. It is clear from the foregoing that this Appeal is only against the sentence. Although Ground 4 of the second Supplementary Grounds of Appeal states that the trial Magistrate erred in convicting the Appellant without appreciating the issue of the age of the complainant, there is absolutely no mention of this issue in the Appellant's Submissions. In any event, the Application upon which the Court granted leave to Appeal out of time was confined solely to the issue of sentence. Belatedly introducing a challenge on conviction after obtaining the leave therefore appears mischievous.
13. Further in any event, the assessment conducted on the complainant placed her age at approximately 16 years. It is this age that the trial Magistrate adopted and not the age of 12 years stated in the Charge Sheet. As will become clear when I hereinbelow analyze the effect of the age of a victim in a case of defilement, this finding of the age of 16 years was favourable to the Appellant as it potentially reduced the severity of sentence that could be imposed on him. I would therefore still summarily reject this ground of Appeal in any event.
14. In view of the foregoing, I find that the issues that arise for determination in this appeal are the following;
 - i. Whether imposition of 20 years imprisonment as being in accordance with the stipulated mandatory minimum sentence was lawful.
 - ii. Whether the period that the Appellant had spent in custody prior to the sentence should be taken into account.
15. I now proceed to analyse and answer the said issues.



i. Whether imposition of 20 years imprisonment as being in accordance with the mandatory minimum sentence was lawful

16. In a charge of defilement, the age of the victim is important for two reasons: (i) defilement is a sexual offence against a child; and (ii) age of the child is also used as an aggravating factor for purposes of determining the sentence to be imposed, the younger the child the more severe the sentence.

17. The charge is provided under Section 8(1) of the [Sexual Offences Act](#) and defined as follows:

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

18. The sentence is then provided under Section 8(2) - (4) of the [Sexual Offences Act](#) as follows:

8(2) - a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

8(3) - 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.

8(4) - 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.

8(4) - 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.

19. In this case, although the Charge Sheet stated the age of the complainant to be 12 years and as a result it is Section 8(3) of the [Sexual Offences Act](#) that was cited in regard to sentence, the age assessment conducted on the complainant placed her age at approximately 16 years. Under Section 8(3), the minimum sentence is 20 years imprisonment. Since no birth certificate was produced, it is this age of 16 years that the Magistrate adopted. Since the Magistrate adopted the age of 16 years, the applicable provision in respect of sentence was Section 8(4) which fixes the minimum sentence to 15 years.

20. As correctly submitted by the Appellant’s Counsel and as I had already observed hereinabove, in imposing the sentence of 20 years, the trial Magistrate’s reasoning was that the law stipulated a mandatory sentence. I therefore understand the Magistrate to have meant that under Section 8(4), she was prohibited from imposing any sentence less than 15 years imprisonment.

21. In respect to an Appellant Court’s mandate when invited to Review sentence, in the case of Shadrack Kipkoech Kogo - vs - R, Eldoret Criminal Appeal No. 253 of 2003, the Court of Appeal stated as follows:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”

22. One cannot discuss the issue of mandatory sentences in Kenya without mentioning the case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR (commonly referred to as Muruatetu 1). It had been interpreted by many that the decision was authority to the effect that, just like in cases of murder, those who were convicted of sexual offences and whose sentences were passed on the basis that



the trial Courts had no discretion but to impose the said mandatory sentences are now at liberty to petition the High Court for orders of resentencing in appropriate cases.

23. However, in *Francis Kariuki Muruatetu & Another vs Republic: Katiba Institute & 5 Others (Amicus Curiae)* (2021) Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola SSJJ) (otherwise referred to as *Muruatetu 2*), the Supreme Court has now clarified that its directions given in *Muruatetu (1)* regarding the unconstitutionality of mandatory sentences was limited only to cases of murder and do not necessarily extend to sexual offences (see also *Juma Abdalla v Republic*, Court of Appeal Criminal Appeal No. 44 of 2018 (2022) KECA 1054 (KLR) (7 October 2022)).
24. It is however also true that emerging jurisprudence is to the effect that in spite of mandatory sentences having been stipulated by some statutes, including the *Sexual Offences Act*, nevertheless the Courts are free to exercise judicial discretion while imposing sentences. The emerging view, which I wholeheartedly embrace, is that the Courts cannot be constrained to impose the provided sentences if the circumstances do not demand it.
25. For the above proposition, I refer to the recent Court of Appeal decision in *Joshua Gichuki Mwangi Mwangi v R*, Criminal Appeal No. 84 of 2015, Nyeri in which the Court quoted its earlier decision in *Dismas Wafula Kilwake v Republic* [2019] eKLR and stated as follows:

“..... Being so persuaded, 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)”
26. In light of the foregoing and insofar as the trial Magistrate believed that his hands were tied in respect of the sentence that he could impose, I find that he took into account an irrelevant factor and therefore applied a wrong principle. The Appellant is therefore entitled to a re-sentence hearing.
27. Having found as such, this Court has the discretion to either send back this matter to the trial Court for re-sentence hearing or in the alternative, to re-consider the issue by itself and determine the same. Considering the period of time that has lapsed since the matter was determined by the trial Court, I do not find it convenient nor just to refer the matter back to the trial Court for sentence re-hearing. I will therefore proceed to determine the issue and re-examine whether the circumstances of this case justify a reduction of the sentence or whether to outrightly release the Appellant from prison.
28. In this case, I take into account the circumstances of the offence and also the sentencing guiding principles and also authorities on this issue. I wholly agree and reiterate that it is inexcusable for an adult grown up man to initiate and engage in sexual activities with a minor moreso where force or violence is threatened or actually used. I also note that although the Appellant still denies having committed the offence, there was overwhelming evidence against him. The Appellant therefore deserved a stiff sentence. Nevertheless, I note from the charge sheet that the Appellant was 38 years old when he was arrested in November 2012. At the moment, about 10 years later, he should therefore be about 48



years. Although he may have already lost the bulk of his productive age while in custody, I believe that he still has a role to play in the society including participating in the lives of his children just as every other parent would wish to do. I believe that having already served a period of more than 10 years in custody, the Appellant has now learnt his lesson and has been substantially rehabilitated. In the circumstances, I am persuaded to alter the sentence downwards. Accordingly, I hereby reduce the 20 years imprisonment sentence to 15 years.

ii. Whether the time spent in custody should be factored in sentence

29. Section 333(2) of the Criminal Procedure Code provides as follows:

“Subject to the provisions of section 38 of the Penal code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

30. In *Ahamad Abolfathi Mohammed & Another v Republic*, [2018] eKLR, the Court of Appeal stated as follows:

“By dint of section 333 (2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

31. It has not been challenged that the Appellant remained in custody throughout the trial. Indeed, I have not come across any evidence indicating that the Appellant was at any time released on bond or bail during the trial. Since Section 333(2) of the Criminal Procedure Code is couched in mandatory terms and since this Court has now set aside the 20 years imprisonment and substituted it with a sentence of 15 years imprisonment, the period spent in custody must be factored in the sentence.

32. From the Charge Sheet, I note that the Appellant was arrested on 19/11/2012 and arraigned on 21/11/2012 when he took plea. The matter thereafter went through the trial after which the Appellant was convicted and sentence delivered on 19/04/2013. The period between arrest and sentence is therefore about 5 months. This period ought to be therefore factored and reduced from the 14 years prison sentence that this Court has now imposed.

Final Orders

33. In the end, I issue the following orders:

- i. The conviction is upheld.



- ii. On sentence, I hereby set aside the sentence of 20 years imprisonment imposed by the trial Court and substitute it with a sentence of 15 years imprisonment.
- iii. The 15 years prison sentence now imposed shall be computed as from the date of the Appellant's arrest as appears in the Charge Sheet, namely, 19/11/2012.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023

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WANANDA J. R. ANURO

JUDGE

