



**FO v Republic (Criminal Appeal E023 of 2021)
[2023] KEHC 23406 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E023 OF 2021
WM MUSYOKA, J
OCTOBER 13, 2023**

BETWEEN

FO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia RMCSO No. 86 of 2017, of 31st August 2021)

RULING

1. On 17th July 2023, I delivered a judgment herein, where I upheld the conviction of the appellant herein, but expressed that the sentence was not proper, and required re-visiting. In that regard, I called for a pre-sentence report on the antecedents of the appellant, and the views of the family of the victim and the community.
2. The said report has now been filed. It is dated 2nd October 2023. It confirms that the appellant was in Form 4, at [Particulars Withheld] Secondary School, in 2017, when the offence was committed. He was aged 20 years at the time. The complainant was also a secondary school student in 2017, in Form 1, at [Particulars Withheld] Secondary School, and was aged 15 years old at the time. An age difference of 5 years. The complainant took herself to the home and house of the appellant, according to the proceedings. The report is generally favourable of the appellant. He has no criminal record, and local administration officials described him as polite and obedient, and said he posed no security threat to the community, and his life was not in any danger should he be released back to the community.
3. When the offence was committed, the appellant was a young person, just 20 years old. He had just entered into adulthood, 2 years prior. He must have still been grappling with what adulthood entailed at the time. He must have been in that zone, straddling between being a child and an adult. A zone where, although the law treats the young person as an adult, he would still have the attitude and mindset



of a child, trying to find his space in his new status as an adult. Children would still regard him as one of them, while mature adults would only be grudgingly treating him as an adult.

4. In the case of the appellant herein, he was still in school at age 20, studying, no doubt, in the midst of persons who were minors. That could not assist him at all to adjust to the life of an adult, for, though above 18, he was still a “child” in school, and probably thinking and acting as one. The report highlights that, and the fact that he was still under the care and protection of his parents. The complainant was a secondary school student, just like the appellant. In that school environment, they must have considered themselves agemates, or persons within the same age bracket or age set, hence their relationship. Unfortunately for them, the law is an ass, and that relationship was outlawed.
5. Taking these factors into account, the trial court ought to have dealt with the appellant differently. That he was a young person, just emerging from childhood, and who was still in school, and, therefore, a school-child for all practical purposes. A custodial sentence would not have been appropriate, and the trial court ought to have considered a non-custodial sentence in the circumstances.
6. The appellant was convicted in 2021. He has been in prison custody since then. A community service order may not be appropriate, and I am considering putting him on probation, which would afford a chance for him to be put through counselling by probation officers, to guide him to transit into responsible adulthood, to nudge him towards vocational training, and to facilitate reconciliation, given that that relationship produced offspring.
7. I, accordingly, make a probation order, to be served for 3 years, under the supervision of the Busia County Director of Probation and Aftercare Services. The appellant shall be released forthwith to the Busia County Director of Probation and Aftercare Services. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 13TH DAY OF OCTOBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. FO, the appellant, in person.

Mr. Munialo Godwin, Probation Officer.

Advocates

Mrs. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

