



**Lopuyet v Republic (Criminal Appeal E012 of 2022)  
[2023] KEHC 23170 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23170 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E012 OF 2022  
RB NGETICH, J  
OCTOBER 4, 2023**

**BETWEEN**

**EMUKU LOPUYET ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by judgement delivered on the 28th August, 2021 By Hon. V.O Amboko at Kabarnet Magistrate's Courts in criminal case s/o No.20 of 2020)*

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act No.3 of 2006. The particulars of the offence being that the Appellant on the 19<sup>th</sup> August, 2020 at around 0930hours in Tiaty West Sub- County within Baringo County willingly and unlawfully caused his penis to penetrate into the vagina of a juvenile name CL aged 10 years.
2. The Appellant was also charged with alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual offences Act No.3 of 2006. The particulars of the charge being that on the 19<sup>th</sup> August, 2020 at around 0930hours in Tiaty West Sub- County within Baringo County the appellant willingly and unlawfully caused his penis to touch the vagina of juvenile named CL aged 10 years.
3. The Appellant pleaded not guilty to the charge and the matter was set down for trial with prosecution availing 5 witnesses to prove charges against the Appellant. Upon hearing both the prosecution and defence case, the trial court delivered judgment on the 11<sup>th</sup> August, 2021 finding the appellant guilty. He was convicted and sentenced to serve 20 years imprisonment.
4. Being aggrieved and dissatisfied with the said judgment, filed this appeal on the following grounds: --



- i. That the trial magistrate erred in both law and facts by failing to notice that the charge sheet was defective.
  - ii. That the trial magistrate erred in both law and facts by proceeding to convict and sentence the appellant despite the prosecution's failure to prove the age of the complainant.
  - iii. That the trial magistrate erred in both law and facts by relying on the contradictory statements and evidence given by the prosecution witnesses which was legally inadmissible.
  - iv. That the trial magistrate erred in both law and facts by failing to take into account the appellant's defence before delivering the judgement.
5. The appellant filed supplementary grounds of appeal under section 350(2) of the CPC listing the following grounds: -
- i. That he is a first offender.
  - ii. That the sentence meted upon him was harsh, unjust, unfair and inhuman.
  - iii. That he has been in prison for a long time, he is remorseful, repentant and reformed.
6. The Appellant abandoned appeal on conviction and urged this court to set aside sentence imposed by the trial court.

### **Submissions by the Appellant**

7. The appellant submits that he is contended with the conviction but seeks review of his sentence pursuant to section 362, 364(1)(a) and 365 of the CPC and article 25(c) and 50 p and q of the Constitution of Kenya, 2010 to proportionate term.
8. The appellant submits that he is remorseful, repentant and has reformed; that he has learnt from the incarceration in prison.

### **Analysis and Determination**

9. In view of the fact that this appeal is on sentence only, I wish to consider whether sentence imposed by the trial court was harsh and excessive. It is accepted principle of law that sentencing is a discretion of the trial court and the appellate Court can only interfere with the sentence if it is satisfied the trial court applied wrong principles or the sentence imposed is manifestly excessive depending on circumstances of each case. In the case of Bernard Kimani Gacheru vs. Republic Criminal Appeal No. 188 of 2000 where the court of appeal stated as follows: -

“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.”

10. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. Particulars as captured in paragraph 1 above are that he defiled



a child aged 10 years and under section 8(2) of the [sexual offences Act](#), the penalty offence of defilement of a girl below the age of 11 years is minimum sentence of life imprisonment.

11. Under [Sexual Offences Act](#), sentence for defilement is prescribed based on the age of the victim of the sexual assault; the younger the victim, the more severe the sentence. In this case, the complainant was of the age of 10 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:

“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.”

12. Record show that the trial court was guided by decision of Court of Appeal in the case of [Solomon Limangura Vs Republic](#) [2019] eKLR where the accused was sentenced to serve 20 years imprisonment for defiling an 11-year-old girl. Following the above authority, the trial court sentenced the appellant herein to serve 20 years imprisonment. In the above authority, the court of appeal relied on the case of Muruatetu 1 and stated as hereunder: -

“Guided by the Supreme Court in the Muruatetu decision and persuaded by the case of Christopher Ochieng v R (Supra) and by Dismas Wafula Kilwake decision in relation to sentencing, we are satisfied that the life imprisonment meted upon the appellant cannot stand. We are inclined to intervene and hereby set aside the life sentence imposed on the appellant. We have considered the circumstances of this case and find that the life imprisonment meted on the appellant is harsh and excessive.

We substitute the term of life imprisonment with an imprisonment for a term of twenty (20) years with effect from the date of sentence by the trial court. “

13. Before supreme court directions in Muruatetu 2, the courts applied the decision in Muruatetu 1 in sexual offences and that explains why the appellant herein was sentenced to 20 years imprisonment by the trial court where as section 8(2) provide for life imprisonment. The Supreme Court clarified applicability of muruatetu 1 in the case of Muruatetu 2 on 6<sup>th</sup> July 2021. The appellant was sentenced by the trial court on 19<sup>th</sup> August 2020 which was before supreme court directions of 6<sup>th</sup> July 2021. The trial court did not therefore apply wrong principles at the time of sentencing the appellant herein.
14. The position after directions in Muruatetu 2 is sentence for defilement for a child below 11 years is life imprisonment. The appellant herein benefitted from applicability of Muruatetu 1 at the time of sentence. Ideally sentence herein should be enhanced in view of supreme court clarification. It would however be unfair to interfere with the sentence imposed as at the time of sentence, the Supreme Court had not clarified applicability of the case of Muruatetu 2 and further, no notice of enhancement was served on the appellant. I will not therefore interfere with sentence imposed by the trial court.
15. In respect to period served in remand, I note from the record that in sentencing, the trial court took into account period served by the appellant from 24<sup>th</sup> August, 2020.
16. Final Orders:
  1. Appeal on conviction is marked as abandoned.
  2. Appeal on sentence is hereby dismissed.

**JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET**

**THIS 4TH DAY OF OCTOBER 2023.**



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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Mr. Kemboi - Court Assistant.

Ms Ratemo for State.

Appellant present.

