



REPUBLIC OF KENYA



**Musembi v Republic (Criminal Appeal E102 of 2022)
[2023] KEHC 23591 (KLR) (Crim) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E102 OF 2022**

GL NZIOKA, J

OCTOBER 5, 2023

BETWEEN

MANGALA MUSEMBI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the decision in Chief Magistrate Court at Makadara in Criminal Case No. S/O. 76 of 2018, delivered on 8th October, 2021, by Hon E. Kimayo Suiter, Principal Magistrate)

JUDGMENT

1. By a memorandum of appeal dated October 19, 2021, the appellant appeals against the decision of the trial court rendered vide criminal case No S/O 76 of 2018 in the Chief Magistrate's Court at Makadara.
2. The grounds of appeal are stated in the subject memorandum of appeal as follows: -
 - a. That the learned Magistrate in her judgment, conviction and sentence erred in law and facts in failing to fairly, properly and/or justly analyze the evidence adduced by the appellant herein before him.
 - b. That the learned Magistrate in her judgment, conviction and sentence erred in law and facts in failing to fairly, properly and/or justly scrutinize and analyze the evidence adduced by both the appellant and the prosecution before her to enable her make a fair and just judgment for both parties.
 - c. That the learned Magistrate in her judgment, conviction and sentence erred in law and facts in failing to scrutinize and analyze the credibility of the evidence adduced before her by the prosecution to enable her make a fair and just decision.



- d. That the learned Magistrate in her judgment, conviction and sentence erred in law and facts in failing to scrutinize and analyze the credibility and integrity of the prosecution witnesses in consideration of the period the alleged offence was committed before the same was taken to court for prosecution.
 - e. That the appellant was never granted a fair audience by the honourable court in the sense that he was not represented by a legal counsel.
 - f. That further grounds may be adduced at the hearing of the appeal.
3. The appellant consequently prays for the following orders: -
- a. That the judgment, conviction and sentence of the Magistrate Hon E. Kimayo Suiter, Principal Magistrate delivered on October 8, 2021, in No S/O 76 of 2018, be set aside and/or quashed.
 - b. That the appellant be acquitted.
4. However, at the hearing of the appeal, the appellant abandoned the appeal on conviction as evidenced by the proceedings of July 19, 2022 and opted to pursue the appeal on sentence alone. As such the decision herein relates to sentence per se.
5. Be that as it were, I note that the appellant was charged with the offence of defilement contrary to section 8(1)(2) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence are that the accused on the April 29, 2018, at [Particulars withheld] slums in Industrial Area within Nairobi County, intentionally caused his penis to penetrate the anus of FO a child of 7 years old.
6. Similarly, the appellant was charged in the alternative count, with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence are that the accused person on April 29, 2018 at [Particulars withheld] slums in Industrial area within Nairobi County, intentionally touched the anus of FO a child aged 7 years old.
7. The prosecution called a total of seven (7) witnesses in support of its case while the defence called four (4) witness. At the conclusion of the case, the appellant was subsequently found guilty on the main count and convicted accordingly. He was then sentenced to serve a custodial period of fifteen (15) years imprisonment.
8. The appeal herein was disposed of vide filing of submissions. The respondent sought for time to file submission but at the time of writing the decision herein, the respondent had not filed any submission.
9. Be that as it may, in considering the appeal I note that the offence which the appellant was convicted is provided for under section 8(1) of the [Sexual Offences Act](#) No 3 of 2006. The said provisions states that: -
- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.
10. The sentence for the subject offence is provided for under section 8(2) of the Act as follows: -
- (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.
11. It therefore follows that, the sentence herein meted of fifteen (15) years in the 2021 and in particular following the decision in [Francis Karioko Muruatetu & another v Republic; Katiba Institute & 4 others](#) (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), is lawful and/or legal. As such there is no room for review thereof.



12. However, I note that prior to sentencing the appellant, he offered by telling the court that he was fifty-four (54) years old and has a family of three (3) children who depend on him. It is indicative that prior to pronouncing the sentence, the court stated that, his mitigation had been considered.
13. Further, as regards the provisions of section 333(2) of the *criminal procedure code*, I note from the court record that, the appellant was arrested on April 29, 2018 and arraigned in court on May 3, 2018. He was granted bond of Kshs 300,000 with one surety of like amount. On June 19, 2018, he was released on bond. Therefore, he was in custody for a period of one (1) month and (16) days. The afore provisions of section 333(2) requires a period spent in custody be considered in sentence, as such I do order that period of one (1) month and sixteen (16) days be captured as part of the sentence.
14. The upshot of the aforesaid is that, save for the aforesaid application of section 333(2) the appeal otherwise fails in its entirety. The appellant is informed of his right of appeal within fourteen (14) days.
15. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 5TH DAY OF OCTOBER, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of: -

Appellant: present virtually

Ms Gikonyo for the Respondent

Ms Ogutu: Court Assistant

