



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mutua v Republic (Criminal Appeal 48 of 2018)  
[2023] KEHC 23082 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23082 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL 48 OF 2018  
RB NGETICH, J  
OCTOBER 4, 2023**

**BETWEEN**

**SULEIMAN KIPLAGAT MUTUA ALIAS HUSSEIN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(BEING AN APPEAL AGAINST THE CONVICTION AND SENTENCE  
FROM THE JUDGMENT OF HONOURABLE V.O. AMBOKO (RM)  
DELIVERED ON 24TH SEPTEMBER, 2018 AT KABARNET PRINCIPAL  
MAGISTRATE'S COURT CRIMINAL CASE S/O NO. 13 OF 2018)***

**JUDGMENT**

1. The appellant was charged with two counts of the offence of defilement. Count 1 is the offence of defilement contrary to section 8(2) of the *Sexual offences Act* No. 3 of 2006. The particulars of the charge in count 1 is that on diverse dates in the month of March and early April, 2018 in Baringo Central sub-county within Baringo county the accused unlawfully and intentionally cause his penis to penetrate the vagina of JN a girl aged 11 years in contravention of the said Act.
2. Alternative charge to count one is the offence of indecent act with a child contrary to section 11(1) of the *sexual offences Act* No.3 of 2006. The particulars being that on diverse dates during the month of March 2018 and early April 2018 in Baringo Central sub-county within Baringo county, the accused willingly and unlawfully caused his penis to touch the vagina of JN a girl aged 11 years in contravention of the said Act.
3. Count 2 is 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 charge being that on diverse dates in the month of March, and early April, 2018 in Baringo Central sub-county within Baringo county, the accused



- willingly and unlawfully caused his penis to penetrate the vagina of FM a girl aged 9 years in contravention of the said Act.
4. Alternative charge to count 2 is the offence of indecent act with a child contrary to section 11 of the *sexual offences Act* No. 3 of 2006. The particulars of the charge being that on diverse dates during the month of March 2018 and early April 2018 in Baringo Central sub-county within Baringo county, the accused willingly and unlawfully caused his penis to touch the vagina of FM a girl aged 11 years in contravention of the said Act
  5. The appellant denied all the charges and the case proceeded for full trial with the prosecution calling 5 witnesses in support of their case and upon the close of the prosecution's case, the court found that the prosecution had established a prima facie case against the accused who was then placed on his defence. The accused gave unsworn statement and availed 2 other witnesses to support his case. By the judgment delivered on 24<sup>th</sup> September, 2018, the Trial Court found the accused guilty of the two counts of offence, and convicted him on both counts of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual offences Act* No. 3 of 2006. On the 24<sup>th</sup> day of September, 2018, after considering the mitigation of the accused the trial court sentenced the accused, to life imprisonment in count 1, the sentence for count 2 was held in abeyance.
  6. The appellant being aggrieved and dissatisfied with the conviction and sentence, filed this Petition of Appeal on October 8, 2018 challenging conviction and sentence on the following grounds:
    - i. That the prosecution evidence was far below the threshold of proof.
    - ii. That the defilement and penetration were not proved at all.
    - iii. That the medical evidence was too shoddy and did not implicate him.
    - iv. That the identification of the Appellant was improper.
    - v. That facts and every element were a sham and contradictory.
    - vi. That the entire prosecution evidence especially complainants were fabricated lies which hold no water at all.
    - vii. That the prosecution's case was not investigated.
    - viii. That appellant's rights were violated on arrest.
    - ix. That the important witnesses were not summoned to clear doubts.
    - x. That the prosecution evidence was inconsistent with *the constitution*.
  7. Directions were given for the Appeal to proceed by way of written submissions. However, when the matter came up for hearing on the July 6, 2023, the Appellant informed the court that he was not challenging conviction. He said he has been in prison for a period of 5 years. He said he has reformed and prayed to be released to go and assist his family.

### **Respondent's Submissions**

8. In response, the State Counsel Ms Ratemo submitted that the Appellant was convicted under the *Sexual offences Act* for defiling a minor who was 9 years old. She stated that the *sexual offences Act* provides mandatory minimum sentence under section 8(1) as read with section 8(2) which provides a minimum sentence of life imprisonment where the child is below the age of 11 years.



9. Counsel stated that the complainants in this case were aged 9 and 11 years respectively and both testified before court explaining what transpired and submitted that the sentence was the mandatory minimum sentence and the court cannot exercise discretion; she urged this court to dismiss the appeal on sentence be dismissed.

### **Analysis And Determination**

10. The appellant having abandoned appeal on conviction, the remaining issue for determination by this court is whether the sentence imposed was harsh and excessive. Record show that the Appellant was sentenced to serve life imprisonment. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of *Mbogo & another v Shah* (1968) 1 EA 93 as follows:-

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

11. In the case of *Shadrack Kipkoech Kogo v 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 (see also *Sayeka v R.* (1989 KLR 306).”

12. Further in the case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR the court of appeal restated 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 states is shown to exist.”

13. The two offences against the appellant were under section 8 (1) of the *Sexual Offences Act* with sentence provided under Section 8 (2) is mandatory life imprisonment. The trial court imposed the mandatory life imprisonment on the appellant. In mitigation before the trial court, the appellant said he is a first offender and is unwell suffering from epilepsy and is married with a young family.
14. The trial court herein imposed life imprisonment as provided by Section 8 (2) of the *Sexual Offences Act*. The Court of Appeal in Malindi Criminal Appeal No 12 of 2021 Between *Julius Kitsao Manyeso v Republic* declared the sentence of life imprisonment to be unconstitutional, Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die.



15. I am alive to the fact that the appellant herein took advantage of the vulnerability of the two minors aged 11 and 9 years respectively and defiled them. Whereas I agree with the court of appeal that life sentence is unconstitutional, I am of the view that the appellant deserves deterrent sentence. I am therefore inclined to set aside life sentence and impose 25 years imprisonment for each count.

**16. Final Orders: -**

1. Appeal on conviction is hereby marked as abandoned.
2. Appeal on sentence is allowed. Life sentence is set aside for each count and appellant is sentenced to 25 years imprisonment for each count.
3. The two sentences to run concurrently.
4. Period served in remand to be reduced from the sentences imposed in order 2 above. Sentences to start from date the appellant was arrested.

**JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 4<sup>TH</sup> DAY OF OCTOBER 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Mr. Kemboi - Court Assistant.

Ms Ratemo for State.

Appellant present.

