



**Mutai v Republic (Criminal Appeal E077 of 2022)
[2024] KEHC 14419 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E077 OF 2022
HI ONG'UDI, J
NOVEMBER 20, 2024**

BETWEEN

COLLINS KIPROTICH MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment delivered by Hon. Kefa – Principal Magistrate on 20th May, 2022 in Nakuru Chief Magistrate’s Court (S. O.) No. E014 of 2022)

JUDGMENT

1. Collins Kiprotich Mutai the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that the appellant between 14th September, 2020 and 16th January, 2021 at an unknown time within Bomet county wilfully and intentionally caused his penis to penetrate the vagina of SC a child aged 14 years.
2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars being that within the same period as in the main count he unlawfully and intentionally touched the private parts namely vagina, breasts and buttocks of SC a child aged 14 years.
3. He denied both counts and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The appellant gave an unsworn defence. After the full hearing the trial court found the appellant guilty and convicted him of the main count and sentenced him to twenty (20) years imprisonment.
4. Aggrieved by both the conviction and sentence he filed this appeal on 15th November, 2022 citing nine (9) grounds of appeal. He however filed amended grounds of appeal alongside his submissions. The following are the amended grounds:



- i. That the learned trial magistrate erred in law and fact by failing to appreciate that the mandatory nature of the sentence imposed by section 8(3) of the sexual offences, act has since been declared unconstitutional.
 - ii. That the learned trial magistrate erred in law and fact by pronouncing an excessive sentence that was not reflective of the circumstances of the case.
 - iii. That the defence of the appellant was not considered as required as per law.
5. The appeal was disposed of by writing submissions

The appellant's submissions

6. The appellant in his submissions reminded the court of its duty as a first appeal court as stated in the cases of *Okeno V Republic* (1972) EA 32; *Peters v Sunday Post* 9 (1958) E.A 424 among others.
7. He further submitted that following the Supreme Court decision in *Francis Karioko Muruatetu & another V Republic* Petition No. 16 of 2015 the court did away with minimum mandatory sentences which it found to be unconstitutional. He further referred to the *Kisumu Court of Appeal* case of *Dismas Wafula Kilwake V Republic* 2018 eKLR over the same issue.
8. Its his submission that the sentence against him is excessive. He cited the case of *Santa Singh V State of Panjab* (1976) 4 SCC 190 and *Joram Ogolla s/o Owuor V Republic* (1954) 24 EACA 70 in support. He also referred to the Kenya Judiciary Policy Sentencing guidelines whose objectives are: Retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation. He urged that he had been in prison for four (4) years and that to him is sufficient deterrence. He also indicated that his period in custody prior to sentence was not considered.

The respondent's submissions

9. These were filed by M/s Emma Okok – Principal Prosecution Counsel for the respondent. The same are dated 7th October, 2024. She opposed the appeal. It is her submission that from the evidence on record all the elements for proof of defilement were established. i.e penetration, age of the minority and identity of the appellant as the culprit.
10. Counsel submitted that the appellant in his unsworn defence stated that PW2 had framed him because of a dispute between them following the destruction of PW2's soap by his cattle. PW2 admitted there was such an incident but denied it having anything to do with the charge against the appellant.
11. On sentence counsel referred to the provisions of section 8(3) of the *Sexual Offences Act* and the recent decisions in *Republic V Mwangi*; *Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* Petition No. E018 of 2023 [2024] KESC 34 (KLR). She thus submitted that twenty (20) years was the minimum sentence provided for by the law and should be adhered to by the court while sentencing. She however noted that the period the appellant had been in custody during trial had not been catered for as per section 333(2) of the Criminal Procedure Code. She requested that it be covered.

Analysis and determination

12. Upon careful consideration of the evidence on record, grounds of appeal, and both parties submissions – I find the issues for determination to be whether the charge of defilement was proved and whether the sentence meted against the appellant should be disturbed.



13. Section 8(1) of the *Sexual Offences Act* defines Defilement as:
 1. “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”, while section 8(3) provides for the sentence by stating thus:
 - 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.
14. Were the three ingredients of age, penetration and identification established? PW1 (S.C) told the court she was 14 years old, her mother (PW2) said she was born on 5th September, 2006, the P3 From (P.EXB1) & PRC Form (P.EXB2) show the date of birth as 5th September, 2006 and finally the birth certificate (P.EXB3) confirms the date of birth to be 5th September, 2006. That being the position it shows that the complainant (PW1) was at the time of the alleged offence aged 14 years plus 4 months. Age was therefore proved.
15. The evidence by PW1 is that she started relating with the appellant in May 2020. After a while the appellant visited her at her parents’ home. Her brother Gideon fought with him. The next day the appellant persuaded her to go away with him which she did. They stayed together as husband and wife, sharing one bed, and engaging in sex. One day a police officer came and rescued her and she was taken to Shangiroyi police station together with the appellant.
16. PW2 confirmed that after the rescue she took PW1 to Njoro sub county hospital for examination. PW3 who examined the minor confirmed that PW1’s hymen was missing and the penetration was not recent. Penetration was thus proved.
17. All that the appellant stated in his unsworn defence was that he was framed by PW2. PW4 No. 1106020 P. C Evans Kiarie confirmed that a report had been made by PW1’s parent at Mauche police station of the missing child, in September, 2020. They later received a report from PW1’s father (now deceased) who informed them of the whereabouts of PW1. Police officers from Bomet assisted and on 17th January, 2021 they arrested the appellant who was found living with the minor.
18. The evidence by PW1 PW2 and PW4 is so overwhelming. Instead of talking about “fabrication” the appellant should have told the court what he had been doing with PW1 (a child aged 14 years) from September, 2020 to mid-January, 2021. He never did that. The child was found to have engaged in sex and the person concerned was none other than the appellant. The appellant was found red handed living with the minor.
19. I therefore find that the evidence of PW1, PW2 and PW4 all support the evidence on identification. The appellant was properly convicted by the trial court.
20. Coming to sentence the minimum sentence provided for this offence under the *Sexual Offences Act* is twenty (20) years imprisonment. As clearly stated by the Supreme Court in the recent decision in Petition No. E018 of 2023 [2024] KESC (supra) the law on minimum sentences for sexual offences has not been amended. This court therefore confirms the minimum sentence passed against the accused.
21. I note from the record that the appellant first appeared in court on 20th January, 2021. He was convicted and sentenced on 20th May, 2022. During all this time he was in remand custody. The trial in sentencing did not make any reference to section 333(2) of the Criminal Procedure Code. This is acknowledged by the Respondent herein.
22. The upshot is that the Appeal lacks merit and is dismissed. There shall however be an order that the sentence runs from the date the appellant first appeared in court for plea which is 20/01/2021. The conviction and sentence are thus upheld.



23. Orders accordingly.

**DELIVERED DATED AND SIGNED THIS 20TH DAY OF NOVEMBER, 2024 IN OPEN COURT
AT NAKURU**

H. I. ONG'UDI

JUDGE

