



REPUBLIC OF KENYA



**Omondi v Republic (Criminal Appeal E025 of 2023)  
[2024] KEHC 16024 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16024 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E025 OF 2023  
JN KAMAU, J  
DECEMBER 17, 2024**

**BETWEEN**

**JOSEPH MAGOMERE OMONDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon M. Ochieng (PM) delivered at Hamisi in  
Principal Magistrate's Court in Sexual Offence Case No 50 of 2020 on 10th September 2021)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. He was convicted by the Learned Trial Magistrate, Hon M. Ochieng (PM), on the charge of defilement and sentenced to fifteen (15) years imprisonment.
3. Being dissatisfied with the said Judgment, on 17<sup>th</sup> August 2023, he lodged the Appeal herein. His Petition of Appeal was undated. He set out five (5) grounds of appeal.
4. In his Written Submissions dated 29<sup>th</sup> December (sic) and filed on 10<sup>th</sup> January 2024, he pointed out that he had withdrawn his Grounds of Appeal. He set out three (3) Amended Grounds of Appeal therein. The Respondent's Written Submissions were dated 2<sup>nd</sup> May 2024 and were filed on 2<sup>nd</sup> July 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Amended Grounds of Appeal and parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted. All the Amended Grounds of Appeal Nos (1), (2) and (3) were dealt together as they were related.
8. The Appellant placed reliance on the case of *Elied Waweru Wambui vs Republic* [2019] eKLR wherein the court therein rallied for legislative amendment of the *Sexual Offences Act* by opining that it was unreasonable to assume that teenagers and maturing adults in the sense employed by English House of Lords in *Gillick vs West Norfolk and Wisbeck Area Health Authority* (1985) 3 All ER 402 did not engage in and often sought sexual activities with their eyes fully open.
9. He submitted that in England, for instance, only sex with persons less than the age of sixteen (16) years was criminalised and that the sentences were less stiff compared to those in Kenya. In this regard, he relied on the book, *Archbold Criminal Pleading Evidence Act and Practice* (2002) p1720 but did not highlight the part that he was relying upon.
10. He further referred this court to the case of *Edwin Wachira & 9 Others* Petition No 97 of 2021 (eKLR citation not given) where it was held that the appellant's conviction was not safe given the full circumstances of the case and the sentence and its mandatory minimum nature was harsh and excessive.
11. He submitted that the Complainant, YAI, (hereinafter referred to as "PW 1") who was sixteen (16) years at the time of the commission of the offence herein admitted to the Trial Court that she consented to the sexual intercourse because he was her friend and during their stay together, they had sexual intercourse. He pointed out that that consent was held immaterial and he was sacrificed for it.
12. He contended that it was unkind to punish him with a lengthy sentence in a case where both the victim and the offender saw no wrong in doing the act and that the evidence on record showed that they had a child who was three (3) years old. He pleaded with the court to consider that he was a young man of twenty-one (21) years old at the time of the incident. He urged the court to reduce his fifteen (15) years imprisonment sentence to the time he had already served so that he could join the community and take care of his child.
13. On its part, the Respondent submitted that the Appellant's sentence was proper and lawful. It urged the court not to interfere with the same as it was clear that he was an adult who took advantage of a sixteen (16) year old and the effect of the offence was long lasting. It added that the physical effect was even worse.
14. It was categorical that the Trial Court took into account the Appellant's mitigation and it played a role in the rendition of the sentence.



15. Notably, the Appellant herein was sentenced under Section 8(4) of the *Sexual Offences Act*. The same provides as follows: -

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”

16. This court noted the Appellant’s argument that PW 1 was sexually active and/or agreed to have sexual intercourse with him was immaterial as under the Kenya law, sexual relations with a person under the age of eighteen (18) years was unlawful and prohibited by the law. This court could not therefore fault the Trial Court for having sentenced him to fifteen (15) years imprisonment as that was lawful.

17. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6<sup>th</sup> July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

18. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

19. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.

20. However, in a decision that was delivered on 12<sup>th</sup> July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

21. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant’s sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

22. Having said so, this court was mandated to consider the period he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

23. The said Section 333(2) of the Criminal Procedure Code stipulates that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).



24. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

25. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.

26. The Appellant was arrested on 4<sup>th</sup> November 2020. He was released on bond on 20<sup>th</sup> November 2020. He therefore spent sixteen (16) days in custody before his conviction.

27. A perusal of the proceedings showed that the Trial Court did not consider the said period while sentencing him. This period therefore ought to be taken into consideration while computing his sentence.

### **Disposition**

28. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Amended Grounds of Appeal dated 29<sup>th</sup> December (sic) and filed on 10<sup>th</sup> January 2024 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

29. However, for the avoidance of doubt, it is hereby directed that the period between 4<sup>th</sup> November 2020 and 19<sup>th</sup> November 2020 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

30. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 17<sup>TH</sup> DAY OF DECEMBER 2024**

**J. KAMAU**

**JUDGE**

