



**Wanjala v Republic (Criminal Appeal 195 of 2019)
[2024] KECA 208 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KECA 208 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 195 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 29, 2024**

BETWEEN

CLEOPHAS WANJALA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma, (L.A. Achode, J.) Signed and Dated 31st October, 2018 at Nairobi. Delivered and Signed at Bungoma, (SN Riechi, J) on 20th November, 2018 in HCCRA No. 203 of 2015)

JUDGMENT

1. The appellant Cleophas Wanjala, was tried and convicted by the PM’s Court at Kimilili of the offence of defilement of a 16-year-old girl. In accordance with Section 8(4) of the *Sexual Offences Act*, he was sentenced to serve 15 years imprisonment on 9th November, 2015. His appeal to the High Court against conviction and sentence was dismissed on 20th November, 2018.
2. He has now filed an appeal before us from the decision of the High Court in regard to sentence only. According to his memorandum of appeal he is praying that his prison sentence be reduced as he has been in prison for the last 9 years.
3. During the plenary hearing of the appeal, the appellant was present in person, while Mr. Oyiembo from the office of Director of Public Prosecutions was present for the respondent. The appellant reiterated that his appeal is against sentence only. Mr. Oyiembo has conceded the appeal against sentence, given the fact that the appellant was only 19 years old and the complainant was 15 years old at the time the offence was committed.
4. We have considered the appeal against sentence and the submissions made by the appellant in support. We note that during sentencing the appellant was treated as a first offender, and stated in his mitigation



that he was an orphan. Although the trial magistrate recorded that he had considered the mitigation of the appellant, he did not give any reasons as to why he imposed the sentence of 15 years imprisonment. Thus, there is nothing to demonstrate that the trial magistrate exercised his discretion. It would appear that the trial magistrate was swayed by the fact that 15 years imprisonment was the minimum sentence provided under Section 8(4) of the *Sexual Offences Act*, which is the penal section in regard to the offence that the appellant was charged with.

5. The age of the appellant and the complainant and the age difference reveals that this was a case of two teenagers in a boy- girlfriend relationship, in which the two engaged in consensual sex for which the appellant, the older of the two, was held responsible. We appreciate that the appellant did not use any force.
6. Given the circumstances, we are not persuaded that the trial magistrate properly exercised his discretion in sentencing. The appellant has been in prison for the last 9 years, and we think he has been sufficiently punished and rehabilitated. We therefore allow the appeal against sentence, set aside the sentence of 15 years imprisonment that was imposed on the appellant, and substitute thereto a period equivalent to the time that the appellant has already served. This means that the appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

