



**AWW v Republic (Criminal Appeal 259 of 2019)
[2024] KECA 300 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KECA 300 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 259 OF 2019
HM OKWENGU, JM NGUGI & JM MATIVO, JJA
MARCH 15, 2024**

BETWEEN

AWW APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgement of the High Court of Kenya at Bungoma (Abida -Aroni J. as she then was) Dated 24th March 2016 in HC. Criminal Appeal No. 206 of 2012)

JUDGMENT

1. The appellant was originally convicted and sentenced to serve 20 years’ imprisonment in Chief Magistrate’s Criminal Case No. 352 of 2012, Bungoma for the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act*, 2006. He was accused of defiling a 12 year old girl. He appealed against both conviction and sentence in the High Court of Kenya, at Bungoma in Criminal Appeal No. 206 of 2012. His appeal was heard and dismissed by Abida-Aroni, J. (as she then was) for want of merit. The appellant is now before us for a second appeal in which he is only challenging the sentence.
2. In his self-drawn memorandum of appeal the appellant pleads with this Court to grant him a lenient sentence while giving consideration to the fact that he is very remorseful for the offence he committed, he has mended ways with the persons he wronged, he is now reformed and he has since even learnt new life skills while in prison.
3. When the appeal came up for hearing before us on 13th March 2024, the appellant relied on his one page written submissions.
4. Mr. Oyiembo, learned Senior Assistant Director of Public Prosecutions, opposed the appeal. In his written submissions, counsel maintained that taking into account all the facts, the sentence of 20 years was commensurate to the grave nature of the offence, that the complainant, a cousin to the appellant



suffered grievous harm and she was in hospital for 3 days. Furthermore, even if the period the appellant was in remand is taken into account the sentence of 20 years was not excessive.

5. We have considered the appeal and the party's submissions.

Regarding sentence, section 361(1)(a) of the *Criminal Procedure Code* provides that severity of sentence is a matter of fact; and this Court cannot hear a second appeal on a matter of fact. Similarly, under section 361(1)(b), the Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court, unless the trial court had no power to pass the sentence in the first place. This was not the case here.

6. It is noteworthy that the minimum sentence provided for defilement of a child aged between twelve and fifteen years under section 8(3) of the *Sexual Offences Act*, is the 20-year imprisonment. That was the sentence imposed upon the appellant. The question is whether, the issues raised in this appeal are questions of law. The appellant is citing failure to apply section 333(2) of the *Criminal Procedure Code*. That is a question of law meriting this Court's interrogation.

7. The sentence passed against the appellant is the minimum mandatory sentence provided under the law. The constitutionality of mandatory minimum sentences under the *Sexual Offences Act* has been the subject of several decisions of the High Court and this Court. The High Court in *Mainigi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) and *Edwin Wachira & Others v Republic*, Mombasa Petition No 97 of 2021 declared minimum mandatory sentence unconstitutional. Both decisions decried the absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, and, depriving an accused person the right to be heard in mitigation. Whether the sentence imposed was the appropriate sentence in the circumstances of this case is a matter of law.

8. The appellant faults the two courts below for failing to apply section 333 (2) of the *Criminal Procedure Code*. Section 333(2) of the *Criminal Procedure Code* provides 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).

9. It is clear from the proceedings that the appellant was arrested on 13th February 2012. He appeared in court on 15th February 2012. He was convicted and sentenced on 20th November 2012. In passing the sentence, the learned magistrate while imposing the sentence stated as follows:

Sentence

“Record and mitigation considered. The accused is sentenced to serve 20 years as per Law provided.”

10. There is nothing on record to show that the trial court took into account the period the appellant was in custody in total disregard of section 333(2). (See in *Abmad Aboifathi Mohammed & another v Republic* [2018] eKLR). He is

entitled as a matter of law to have the period he was in custody factored in computing his jail term.

11. It is also clear to us that the 20-year sentence imposed upon the appellant is the minimum sentence provided under the law. It matters not that the trial Court considered his mitigation. The High Court affirmed the decision.



12. We have considered the gravity of the offence, the circumstances under which the offence was committed, the pain and injury inflicted on the victim, and we are satisfied that the sentence of 20 years is commensurate with the offence. We however order that in computing the prison term of 20 years, the period the appellant was in custody shall be considered. This appeal only succeeds to the said extent.

DATED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF MARCH, 2024

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.

