



REPUBLIC OF KENYA



KENYA LAW
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**Karani v Republic (Criminal Appeal 249 of 2019)
[2024] KECA 299 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KECA 299 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 249 OF 2019
HM OKWENGU, JM MATIVO & JM NGUGI, JJA
MARCH 15, 2024**

BETWEEN

EDWIN WABOMBA KARANI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the judgment of the Bungoma High Court (L.A Achode, J., as she then was) in Bungoma High Court Crim. App. No. 235 of 2016 in an appeal from Webuye SPM Court's Sexual Offence Case No. S/0640/2016)

JUDGMENT

1. This is a second appeal by the appellant, Edwin Wabomba Karani, against the judgment of the Bungoma High Court (L.A Achode, J., as she then was) in Bungoma High Court Crim. App. No. 235 of 2016 in an appeal from Webuye SPM Court's Sexual Offence Case No. S/0640/2016. The appeal is against sentence only.
2. In the magistrate's court, the appellant was tried and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, 2006. The complainant in the charge was a 13 year old boy. The incident happened on the 7th July, 2015 in Bungoma East District within Bungoma. The complainant, a 13 years old boy with chronic epilepsy, went to a neighbor's house to get sisal fibres to make ropes. Instead of availing him the sisal fibres, the appellant, who was known to him, got hold of him and carried him into the sugar plantation where he sexually assaulted him by sodomizing him.
3. Upon conviction, the appellant was sentenced to serve twenty (20) years imprisonment. His appeal to the High Court was unsuccessful on both conviction and sentence. Before this Court, the appellant raises two grounds of appeal both aimed at the sentence:



- a. First, he argues that he was sentenced to a mandatory sentence under the *Sexual Offences Act* which, he says, is unconstitutional because it denied the trial court discretion to fashion an individualized sentence for him.
 - b. Second, the appellant argues that both the trial court and the High Court failed to take into consideration the time that he was in custody during the pendency of his trial. He urges us to factor that period in when computing his sentence.
4. The state filed written submissions in opposition to the first ground of appeal, and Mr. Oyiembo appeared during the oral hearing of the appeal. During the hearing, the appellant was in person and relied on his written submissions in which he expounds on the two grounds above.
 5. The state is not opposed to the second ground of appeal. However, it insists that the sentence given in the present case is commensurate with the objective seriousness of the offence. Mr. Oyiembo pointed out that both the tender age of the survivor; as well as the fact that he was known to be epileptic were aggravating factors. The state urged us to preserve the sentence as imposed by the trial court and affirmed by the High Court.
 6. As the second appellate court, our jurisdiction is quite circumscribed. It is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact over which there are concurrent findings of the two courts below. For purposes of this section, severity of sentence is defined as a matter of fact. See *Samuel Warui Karimi vs. Republic* [2016] eKLR.
 7. However, as the appellant correctly points out, this appeal falls for our consideration owing to the shift in our jurisprudence on the imposition of mandatory minimum sentences prescribed in the *Sexual Offences Act*. That shift has established a jurisprudential trajectory that has declared as unconstitutional the mandatory minimum sentences in the *Sexual Offences Act* to the extent that they bereave sentencing courts of discretion to impose an appropriate sentence based on the circumstances of the offence, offender and victim. See, for example, in *Maingi & 5 others vs. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and *Edwin Wachira & Others vs. Republic – Mombasa Petition No. 97 of 2021*. To this extent, therefore, the failure of a sentencing court to exercise discretion is a matter of law properly before this Court on second appeal.
 8. In the case at hand, the state concedes that the two courts below did not exercise discretion in imposing the sentence of twenty years imprisonment. However, the state insists that even if the two courts had exercised discretion, they would have imposed the same sentence due to the aggravating circumstances in this case.
 9. We agree. In the present case, in addition to the objective seriousness of the case due to the fact that the victim was a child of tender years, there are two aggravating factors: the first one is the vulnerability of the victim – a fact known to the appellant. The victim suffered from a life-long disorder known as epilepsy. Yet, the appellant took advantage of that vulnerability to sexually assault him. Second, the depravity with which the appellant carried out the offence: failing to lure the young man to his devious wiles, he used brute force to subdue him; and then violently sodomized him. In the circumstances of this case, therefore, the twenty (20) years imprisonment sentence is deserved and is commensurate with the gravity of the offence.
 10. The appellant, however, succeeds on the second ground. The record shows that he was in custody between the date of his arraignment on 9th July, 2015 and 23rd November, 2015 when he was released on bond. He was, again, remanded on 15th April, 2016. By dint of section 333(2) of the *Criminal Procedure Code*, these periods should be discounted from his sentence. Consequently, the period



between 9th July, 2015 and 23rd November, 2015 shall be counted as part of his sentence while his sentence shall be computed to begin on 15th April, 2016. Those shall be the orders of the Court. The appellant's appeal is otherwise dismissed.

11. Orders accordingly.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

