



REPUBLIC OF KENYA



KENYA LAW
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**Muiruri v Republic (Criminal Appeal 19 of 2016)
[2024] KECA 460 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 460 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 19 OF 2016
F SICHALE, FA OCHIENG & WK KORIR, JJA
APRIL 12, 2024**

BETWEEN

SMITH MUIRURI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (M. Odero, J.) dated 8th June 2015 in H.C.CR.A. No. 78 of 2014)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on 2nd March 2013 in Naivasha Municipality, within Nakuru County, the appellant intentionally and unlawfully caused his genital organ (penis), to penetrate the genital organ (vagina), of TWN a girl, aged 10 years.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
4. At the end of the trial, the appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#), and he was sentenced to 40 years' imprisonment. Being aggrieved, the appellant appealed to the High Court. Upon re-evaluation of the evidence before the trial court, the appellant's sentence was enhanced to life imprisonment.
5. The prosecution's case was that; the complainant boarded a matatu at 8:00 am on 2nd March 2013 to go visit her aunt. However, the vehicle did not reach its destination as it turned around and left the complainant at the bus stop. While the complainant was standing at the stage, the appellant lured her into his house by promising to give her Kshs. 1,000/- and a phone. When they arrived at his house, the



appellant pushed the complainant into the house, covered her mouth, removed her pants, and lowered his trousers. The appellant then rubbed saliva and jelly on the complainant's vagina. He then put her on the bed and defiled her by placing his penis into her vagina.

6. PW1 and PW3 were the appellant's neighbours. They heard the complainant's cries and called a man who broke the door to the appellant's house. They entered and found the appellant naked on the bed, in the act of defiling the complainant.
7. The matter was reported to the police who arrested and detained the appellant. He was later charged in court with the offence of defilement.
8. The complainant was medically examined and the report confirmed that there was penetration.
9. Put to his defence, the appellant in his sworn testimony denied having defiled the complainant.
10. On appeal before the High Court, the appellant abandoned his appeal on conviction and only sought to have the sentence of 40 years reduced. The learned prosecution counsel informed the court that the sentence was below the mandatory sentence. However, the appellant indicated that he still wished to pursue his appeal against the sentence.
11. The learned Judge held that the appellant was caught in the act of defiling the complainant, medical evidence confirmed that there was penetration, and the birth certificate indicated that the complainant was 10 years old. Consequently, the learned Judge held that the conviction was sound.
12. The learned Judge held that the law provides for a mandatory minimum sentence upon conviction under Section 8(2) and the trial court had no discretion in the matter. The learned Judge held that the sentence of 40 years was illegal and had no basis in law. Therefore, the appellant's sentence of 40 years was set aside and substituted with the mandatory minimum sentence of life imprisonment.
13. Being dissatisfied with the judgment, the appellant lodged the appeal herein in which he raised the following grounds:
 - a) the appellant was held in custody for more than 24 hours in violation of Article 49(2) (1)(ii) of *the Constitution*.
 - b. the appellant was denied a fair trial in violation of Article 50(2) (b) of *the Constitution*.
 - c. the learned Judge erred in failing to hold that the clinical officer could not discern whether the hymen was freshly torn or old; and that the birth certificate was forged.
 - d. the prosecution case was not proved beyond any reasonable doubt.
 - e. the appellant's defence was overlooked.
 - f. the learned Judge erred in enhancing the appellant's sentence to life imprisonment."
1. When the appeal came up for hearing on 28th November 2023, the appellant was present in person, whereas Ms. Kisoo learned prosecution counsel was present for the respondent. The parties relied on their respective written submissions.



2. The appellant submitted that there was no conclusive medical evidence that could have linked him to the offence. He was held for more than 24 hours before being arraigned in court hence his constitutional rights were violated.
 3. The appellant submitted that the birth certificate produced in evidence was fake and questionable and that various issues were in contravention of the law.
 4. Opposing the appeal, the respondent submitted that the issue of whether the appellant was accorded his right to a fair trial was an afterthought, and it was raised before this court for the first time.
 5. The respondent submitted that the ingredients of defilement as provided for under Section 8(1) and as was held in the case of *Kyalo Kioko v Republic* [2016] eKLR, as being age, proof of penetration, and identification were proved.
 6. The respondent pointed out that the appellant's defence was considered at pages 54 - 56 of the record of appeal and held to have no chance of success against the prosecution case.
 7. The respondent relied on the provisions of Section 354(3)(b) of the *Criminal Procedure Code* in submitting that the High Court has the power to enhance a sentence. However, the court also must ensure that the appellant appreciates that the appeal may result in an enhancement of sentence. In this instance, the appellant was not warned, and no notice of enhancement was filed to that effect. The respondent submitted that the sentence of 40 years imposed by the trial court be reinstated due to the aggravated circumstances of this case.
 8. This is a second appeal. Section 361(1) of the *Criminal Procedure Code* enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”
22. We have carefully considered the record of appeal, the written submissions by both parties, the authorities cited, and the law. The issue for determination is whether or not we should interfere with the enhanced sentence against the appellant.
 23. It is common ground that the appellant abandoned his appeal on conviction before the High Court. It follows that all the issues raised by the appellant on conviction are being raised before this court for the first time on a second appeal.
 24. In the case of *John Kariuki Gikonyo v Republic* [2019] eKLR, the court held that:

“Similarly from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such



as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her” This Court when faced with a similar issue in *Alfayo Gombe Okello*

v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:
“...the issue was not raised since the trial began and was only raised

25. It follows therefore that this court sitting as a second appellate court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.

26. In the case of *Peter Kibia Mwaniki v Republic* [2010] eKLR, the court stated thus:

“Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter...By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit.”

27. Section 8(1) of the *Sexual Offences Act* provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

28. As regards the sentence meted against the appellant, Section 8(2) of the *Sexual Offences Act* provides that:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

29. Based on this provision of the law, the learned Judge enhanced the appellant’s sentence to life imprisonment but failed to warn him of the possibility of the sentence being enhanced under Section 361(1) of the *Criminal Procedure Code*.

30. In the case of *Christopher Ochieng v Republic* [2018] eKLR stated thus:

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the



Supreme Court’s decision in Francis Karioko Muruatetu & Another –v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.”

31. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the Court from exercising any discretion, regardless of whether or not the circumstances so require.
32. The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of the mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case which is at hand.
33. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, we are persuaded that the appropriate sentence in the circumstances is 30 years’ imprisonment.
34. Following the appellant’s decision to abandon his appeal on conviction at the first appellate court, we uphold the conviction by the trial court. We set aside the sentence of life imprisonment and substitute it with a sentence of 30 years’ imprisonment. The

said sentence shall run from 20th March 2014 being the date when the appellant was first sentenced. This direction is informed by the fact that the appellant was granted bail pending trial.

Orders accordingly

Dated and delivered at Nakuru this 12th day of April, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

