



**Gituamba v Republic (Criminal Appeal 9 of 2013)  
[2024] KECA 967 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 967 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 9 OF 2013  
FA OCHIENG, GWN MACHARIA & WK KORIR, JJA  
JULY 26, 2024**

**BETWEEN**

**SAMUEL KIHARA GITUAMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of the High Court of Kenya at Nakuru (A. Emukule, J.) dated 8th June 2012 in HCRA No. 96 of 2011)*

**JUDGMENT**

1. This is a second appeal from the judgement of Emukule, J. dated and delivered on 8<sup>th</sup> June 2012 in Nakuru Criminal Appeal No. 96 of 2011. The learned Judge upheld the decision of the Chief Magistrate’s Court (Hon. H.O. Barasa RM) in Criminal Case No. 83 of 2010 on both conviction and sentence imposed on Samuel Kihara Gituamba, the appellant.
2. The appellant was charged in the Chief Magistrate’s Court at Nakuru in Criminal Case No. 83 of 2010 with the offence of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#). The particulars of the offence were that on the 9<sup>th</sup> day of June 2010, at [particulars withheld] Centre at Bahati in Nakuru North District of the then Rift Valley Province, the appellant, unlawfully and intentionally did an act which caused penetration by inserting his genital organ, namely penis into the anus of JCN, a boy aged 4 ½ years.
3. Before the trial court, the prosecution relied on the evidence of six witnesses in support of its case. PW1, the complainant, testified that on 9<sup>th</sup> June 2010 he was visiting his uncle, one Kanyoro and the appellant found him in the house. The appellant then removed his shorts before defiling him through the anus. According to PW1, it was not the first time that the appellant had defiled him.



4. PW2, SK recounted that on 9<sup>th</sup> June 2010, the appellant came to visit him at his home. At about 2.00 p.m. they left together for the shopping centre but moments later, the appellant returned to the house. PW2 followed the appellant after a while. When he got home, he peeped through the window and saw the appellant lying on top of his nephew, PW1. He then shouted which prompted the appellant to hide under the bed. PW1 opened the door and upon PW2 inspecting him, he noted that he had defecated on himself and was in pain. Together with his brother's wife, PW3, they took PW1 to hospital and reported the matter to police. In her testimony, PW3, MNN, the aunt to PW1 corroborated the evidence of PW2. PW5, GWC, the mother to PW1 on the other hand recounted how his brother, PW2 called her on 9<sup>th</sup> June 2010 and informed her that her son had been defiled.
5. PW4, Dr. Samuel Onchere, Senior Medical Officer at the then Nakuru Provincial General Hospital examined PW1 on 10<sup>th</sup> June 2010. He observed that the anal orifice was inflamed which may have been as a result of sodomy. He adduced in evidence P3 Form and Post Rape Care Form in this regard.
6. PW6, PC Willis Mukungu of Ndongori Police Station was the investigating officer. He basically summarized the prosecution case, and also preferred the charges against the appellant.
7. In his defence, the appellant gave a sworn testimony and denied committing the offence. His defence was that on the material day when the offence occurred, he was in the farm from morning until 3.00 p.m. He then proceeded to Ndongori Centre where he stayed until 6.00 p.m. before leaving for home where he stayed with his mother until 9.00p.m. when he retired to bed. At around midnight, he was awoken by police officers who escorted him to Ndongori Police Station. His defence was that previously, he had had an altercation with PW1's family which he reported to the police. As a result, PW1's family trumped up the charges against him. He called two witnesses in support of his defence, being DW2 and DW3.
8. DW2, Grace Wangui Gituamba, the appellant's mother testified that on the material day, together with the appellant and DW3 spent the day until 3.00 p.m. in the farm. She thereafter took her sick child to hospital and she came back home at 6.30 p.m. She was woken up at around 1.00 a.m. by some three men claiming that her son had defiled PW1. The men started beating up the appellant and he was later escorted to Bahati Police Station.
9. DW3, Mary Nyambura Gituamba, the appellant's sister corroborated the evidence of DW2. She additionally stated that when her mother took her younger sibling to hospital, she was left at home with the appellant.
10. In her judgement of 11<sup>th</sup> April 2011, the learned trial Magistrate found the appellant guilty of the offence and sentenced him to life imprisonment.
11. Dissatisfied with the decision of the trial court, the appellant lodged an appeal to the High Court at Nakuru in Criminal Appeal No. 96 of 2011. In his judgement dated and delivered on 8<sup>th</sup> June 2012, Emukule, J. found no merit in the appellant's appeal and he upheld both the conviction and sentence.
12. Further aggrieved, the appellant has preferred the instant and perhaps the last appeal to this Court. Unfortunately, his memorandum of appeal does not form part of the record of appeal documents. We have derived the grounds upon which the appeal is premised from paragraph 5 of his submissions dated 18<sup>th</sup> January 2024 where he reiterated the grounds of appeal. They are: that the learned Judge erred in failing to note that the charge sheet was defective within the meaning of section 214 (1) of the *Criminal Procedure Code*; that both the trial and High courts erred in finding that his arrest was sufficient ground to sustain a conviction; that PW1 was not subjected to a voir dire examination; that



- the learned Magistrate erred in convicting him as an adult whereas he was then a minor; and that the life sentence was harsh and excessive in the circumstances.
13. In his written submissions, the appellant addressed each of the grounds of appeal citing numerous judicial authorities and provisions of the law. In urging us to uphold both the conviction and sentence, the prosecution too, in its submissions dated 8<sup>th</sup> March 2024 responded to each of the grounds of appeal and equally cited several judicial authorities and provisions of the law.
  14. At the plenary hearing, the appellant appeared in person while learned counsel Mr. Omutelema, a Senior Assistant Director of Public Prosecutions appeared for the respondent. It is then that the appellant orally submitted that he was no longer appealing against his conviction but on the sentence alone. He submitted that having been in custody for 14 years, he has learnt his lesson and he is reformed. He urged that the life sentence be reduced to twenty years. Mr. Omutelema on the other hand, asked the Court to mete a sentence whose duration can be determined. He proposed 30 years from the life sentence.
  15. We have considered the record of appeal, the respective oral and written submissions and the law. The appellant having conceded that the issue of his conviction is no longer in contention, means that what we are left to determine is whether the life sentence meted out on him should be commuted to a determinate sentence.
  16. On 9<sup>th</sup> June 2010, JCN then aged 4 ½ years old paid a visit to his uncle after his tiring day at school. Perhaps, he hoped that unwinding at his uncle's home will bring him the much-needed repose to rejuvenate. We can only speculate. However, the events of the day, left indelible physical and psychological scars on him. JCN recounted that this was not the first time that the appellant had defiled him, a testament that he will, for the rest of his life, be traumatised by the heinous assault meted to him by the appellant. No doubt in our minds, a deterrent sentence is called for in the circumstances.
  17. The conviction was based on section 8 (2) of the *Sexual Offences Act* which provides as follows:

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.
  18. In principle, sentencing is a discretionary exercise by the trial court. An appellate court such as this one, will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in *Bernard Kimani Gacheru vs. Republic* (2002) eKLR stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
  19. As recent as 12<sup>th</sup> July 2024, the Supreme Court in *R vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) (2024) KESC 34 (KLR) (12<sup>th</sup> July 2024) (Judgment) affirmed mandatory minimum sentences provided for under the *Sexual Offences Act*. The Court held that imposing the mandatory minimum sentences does not, of itself, deprive the



sentencing court power to exercise judicial discretion. In the present case, the appellant at first appeal did not challenge the constitutionality of the sentence meted by the trial court. Although in mitigation he prayed for leniency since he is the one who takes care of his old mother, our hands are tied by the law. We then arrive at the inescapable conclusion that the life sentence imposed was lawful, and we thus uphold it.

20. In the end, we find that the appeal lacks merit and is hereby dismissed in its entirety.

21. Orders according.

**DATED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF JULY 2024.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**F. W. NGENYE – MACHARIA**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

