



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Okumu v Republic (Criminal Appeal 134 of 2017)
[2023] KECA 403 (KLR) (31 March 2023) (Reasons)**

Neutral citation: [2023] KECA 403 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 134 OF 2017
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
MARCH 31, 2023**

BETWEEN

JOSEPHAT OKUMU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisii (R N Sitati, J) dated and delivered on May 21, 2012 in High Court Criminal Appeal No 92 of 2011)

REASONS

1. On November 8, 2022, this Court allowed the appeal by the appellant against sentence, sentenced the appellant to time already served, and ordered that he be set at liberty unless otherwise lawfully held. We reserved reasons for our judgment under Rule 34(7) of the [Court of Appeal Rules, 2022](#). We hereby provide the reasons.
2. The appellant, Josephat Okumu, was the accused person in the trial before the Senior Resident Magistrate's Court in Kilgoris. He was charged with the offence of defilement of a girl contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were on May 15, 2010, in Transmara District within Narok County, Jeremiah Nyangau caused his penis to penetrate the vagina of NK, a girl of the age of 12 years. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that of the main charge.
3. The appellant pleaded guilty to the alternative charge. The learned trial magistrate proceeded to sentence him to twenty (20) years imprisonment. Before doing so, the learned trial magistrate sent the appellant for age assessment which showed that he was 18-20 years old. The learned trial magistrate noted that the victim was 13-14 years old and remarked that the "offence committed" was "very serious"



and was “rampant in [the court’s] jurisdiction and need[ed] to be discouraged.” The learned trial magistrate pointed out that there was no excuse whatsoever [for the appellant to have committed the offence] and the best place for such people as the accused (sic) is being behind bars” because “we need to send the right signal.”

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.
5. The High Court (Sitati, J) dismissed the appeal and upheld both the conviction and sentence in a judgment dated May 21, 2012.
6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. When the matter came up for hearing, the appellant clarified that he was only appealing against the sentence imposed by the lower court as affirmed by the High Court. He pleaded with the Court to review the sentence imposed to time already served. He argued that he had pleaded guilty to the offence on the understanding that he would receive the minimum sentence. Further, in his submissions, he pointed to other mitigating circumstances in the case – including the fact that he was youthful and that he had taken responsibility for his actions. He also argued that the difference in age between him and the victim was not disproportionately large.
7. He further argued that the two lower courts did not consider the fact that he was in school when he was sentenced and having already served a term of over eleven (11) years in prison, the objective of his rehabilitation has been met. In this regard, he urged the court to consider the decision in [Korir vs Republic](#), Criminal Appeal No 100 of 2019 [2021] KECA 305 (KLR) and reduce his sentence to the period already served, as he was a first offender who was still young and whose life has been greatly affected by the jail term meted upon him. He contended that he had taken full advantage of the rehabilitation programs offered while in prison and urged the court to be lenient on him.
8. Opposing the appeal on the question of sentence, Mr Okango reminded the Court of its role as a second appellate court, being, to deal with matters of law only. He took cognizant of this court’s recent jurisprudence on unconstitutionality of mandatory minimum sentences under the [Sexual Offences Act](#) in [Joshua Gichuki Mwangi vs Republic](#) [2022] eKLR but argued that whereas this court found it fit and reviewed mandatory minimum sentences given on appeals to lesser sentences, the same only related to cases where the mandatory nature of the said minimum sentence restricted a judicial officer from exercising his discretion to give a lesser sentence. In this case, Mr Okango contended that while the trial court took note of the minimum sentence of ten (10) years, it opted to mete upon the appellant, a deterrent sentence of twenty (20) years on the basis that the offence was very rampant and needed to be discouraged. Thus, the trial court exercised its discretion and as such, the decision in [Joshua Gichuki Mwangi vs Republic](#) [2022] eKLR (*supra*) did not apply. He further contended that there is no demonstration that the trial court exercised its discretion whimsically and urged this court not to interfere with the sentence.
9. This is a second appeal. As rightly stated by the respondent’s counsel, our jurisdiction is indeed limited to a consideration of matters of law only by dint of section 361(1)(a) of the [Criminal Procedure Code](#). It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In [Samuel Warui Karimi vs Republic](#) [2016] eKLR, it was held as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts



below are shown demonstrably to have acted on wrong principles in making the findings.
See *Chemangong vs R*, [1984] KLR 611.”

10. However, even on a second appeal, the severity of sentence is a matter of law here by dint of the jurisprudence spawned by the famous Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic*, Petition No 15 of 2015. The net impact of that jurisprudence, as interpreted by two High Court decisions on constitutional petitions to wit *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J, as he then was) and *Edwin Wachira & 9 Others vs Republic* consolidated with petition No 88 and 90 of 2021 (Mativo J, as he then was) is that the mandatory minimum sentences prescribed by the statute in sexual offences are unconstitutional for impermissibly stripping away judicial discretion in sentencing. Upon consideration, we formed the opinion that this was a proper case to review, as a matter of law, the sentence imposed by the trial court and affirmed by the High Court. We did so because we are persuaded that, first, the sentencing occurred in the pre-Muruatetu period and, hence, treated the minimum sentence prescribed by statute as mandatory. Second, in view of this new jurisprudence, we formed the view that the two courts did not properly consider the mitigating factors while weighing them against the objective seriousness of the offence in order to come up with an individualized sentence which the appellant was entitled to. We think that this failure, which led to a disproportionate sentence, rises to the threshold that invites review on second appeal.
11. The Supreme Court, in *Francis Karioko Muruatetu & Another vs Republic*, Petition No 15 of 2015, set out the following guidelines with respect to sentencing:

“ [71] ...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

 - a. age of the offender;
 - b. being a first offender;
 - c. whether the offender pleaded guilty;
 - d. character and record of the offender;
 - e. commission of the offence in response to gender- based violence;
 - f. remorsefulness of the offender;
 - g. the possibility of reform and social re- adaptation of the offender;
 - h. any other factor that the Court considers relevant.”
12. From our reading of the record and as admitted by the Prosecution Counsel, there were no aggravating factors in the present case. On the other hand, there were at least six significant extenuating factors which the sentencing court should have considered.
13. First, the appellant expressly pleaded guilty to the alternative charge; and did so at the earliest opportunity. He should have received credit for doing so. A sentence which is imposed by a sentencing court upon a plea of guilty by an accused person must take in to account the triple benefits of a guilty plea: that it lessens the impact on the victim; saves the victim and witnesses from having to give evidence at trial; and saves judicial time and resources. The rationale behind awarding credit for guilty pleas is to recognize these benefits to the Criminal Justice System and the victim. These benefits are maximized where, such as here, the guilty plea is entered at the earliest opportunity.



14. Second, the appellant was of extreme youth at the time he committed the offence. While the sentencing court ordered for an age assessment and confirmed that the appellant was a very young adult of between 18 and 20 years old, the court did not consider the mitigating qualities of extreme youth in crafting the sentence. A sentencing court ought to consider as a mitigating factor where there are youth-related factors to an offence and the offence reflects youthful immaturity, impulsivity and youthful failure to appreciate risks and consequences. Further, youthful offenders are generally considered to have greater prospects for rehabilitation because their traits are “less fixed” and their actions less likely to be evidence of irretrievable depravity.
15. Third, without diminishing the objective seriousness of the offence it being a sexual offence, the court failed to consider the relative difference in age between the victim and the appellant. The appellant was 18-20 years old while the victim was 13-14 years old. Therefore, there was no significant disparity between the appellant and the victim.
16. Fourth, the appellant expressed remorse – and the court noted that the remorse and regret were genuine.
17. Fifth, while the crime was objectively serious, in its commission, the appellant did not manifest depravity, coercion, cruelty or intimidation of the victim.
18. Finally, the appellant was a first offender.
19. Taking all these mitigating factors into consideration and noting that there was not a single aggravating factor, the appellant was entitled to no more than the minimum sentence indicated in the statute – which our recent jurisprudence treats as no more than judicial guidelines anyway - see *Joshua Gichuki Mwangi vs Republic* [2022] eKLR and *Dismas Kilwake case*. It was definitely a misdirection, in the specific circumstances of this case, to double the minimum sentence prescribed in the statute where there were no aggravating circumstances and there was evidence of significant mitigating factors.
20. In view of these reasons, this Court considered this a fit case to review the sentence imposed. We, therefore, substituted the sentence of twenty (20) years imprisonment with a sentence equal to the time already served (which was a little more than eleven years) and ordered that the appellant be set at liberty unless otherwise lawfully held. Those, then, are the reasons for our decision rendered on 8th November, 2022.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH, 2023.

P O KIAGE

.....

JUDGE OF APPEAL

F TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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



DEPUTY REGISTRAR

