



REPUBLIC OF KENYA



**Onsongo v Republic (Criminal Appeal 157 of 2018)
[2023] KECA 625 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 625 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 157 OF 2018
F SICHALE, FA OCHIENG & LA ACHODE, JJA
MAY 26, 2023**

BETWEEN

LEVY ONSONGO APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the judgment of the High Court of Kenya at Kitale,
Chemitei J, dated 11th April 2018) IN HC. CRA NO. 38 OF 2017)*

JUDGMENT

1. The appeal before us is a second appeal emanating from the judgment of Chemitei, J dated April 11, 2018 in which Levy Onsongo (the appellant herein), had initially been charged at the Chief Magistrate's Court at Kitale with the offence of defilement contrary to Section 8 (1) (3) of the [Sexual Offences Act](#) No 3 of 2006
2. The particulars of the offence were that on July 20, 2015, at [Particulars Withheld], he intentionally caused his genital organ namely, penis to penetrate into the genital organ namely, vagina of MA a girl aged 12 years.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of Section 11 (1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally touched the genital organ namely, vagina of MA a child aged 12 years.
4. The appellant denied the charge after which a trial ensued with the prosecution calling a total of 6 witnesses. In a judgment delivered on April 13, 2017, Hon VO Adet (the then Senior Resident Magistrate at Kitale) convicted him of the main charge and sentenced him to 20 years' imprisonment.



2. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on April 11, 2018, Chemitei, J found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.
3. Unrelenting, the appellant has now filed this appeal and probably the last appeal vide a Memorandum of Appeal dated April 27, 2018, raising 6 grounds of appeal.
4. Subsequently thereafter, the appellant filed what he called amended grounds of appeal on February 21, 2022, raising 3 grounds of appeal as follows:
 1. That the first appellate judge erred in law by upholding the trial court's decision yet failed to appreciate that the appellant was not subjected to a fair trial as provided under article 49 (f) (I) (ii) of the Constitution mandated under article 23 (1) in relevance to article 165 of the Constitution of Kenya, 2010.
 2. That the learned judge erred in relying on unreliable medical inferences.
 3. That the learned appellate judge erred in upholding my conviction and sentence but failed to note that the charge and key elements of defilement were not proved in evidence according to the set laws.”
5. When the matter came up for plenary hearing on February 13, 2023, the appellant appeared in person and briefly orally highlighted his written submissions filed in Court on February 21, 2022 and abandoned his appeal on conviction. He further submitted that he was 17 years old and a student at the time of the commission of the offence and that the age assessment that was conducted showed that he was 17 years.
6. Miss Kiptoo learned counsel for the State on the other hand while opposing the appeal relied on her written submissions dated November 23, 2022 and submitted that as far as sentence was concerned, the same was legal and fair considering the circumstances of the case.
7. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of section 361 (1) (a) of the Criminal Procedure Code, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr Appeal No 149 of 2006 (UR) this Court rendered itself thus on this issue:

... This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”
8. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under Section 361 of the Criminal Procedure Code:

Only matters of law fall for consideration and the court 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 also *Chemagong v Republic* [1984] KLR 213).”
9. In the instant case and the appellant having abandoned his appeal on conviction, we find it unnecessary to evaluate the evidence that was proffered at the trial or the other grounds of appeal advanced by the appellant since the appellant's appeal lies squarely on sentence.



10. Turning to sentence, the appellant was charged with the offence of defilement contrary to the provisions of Section 8 (1) (3) of the *Sexual Offences Act* and sentenced to 20 years' imprisonment which is the minimum sentence provided for in the *Act*.
11. The appellant in submissions before us and while urging us to reconsider the sentence submitted that he was 17 years old at the time of the commission of the offence and a student and that further the age assessment that was conducted on him showed that he was 17 years.
12. We have carefully gone through the record and nowhere did either the trial court or the High Court order that the appellant be taken for age assessment. Similarly, the appellant's contention that he was 17 years old was not supported by any evidence and neither did he raise this issue both before the trial court and the High Court. Additionally, his contention that he was a student is contradictory since in his defence he stated that he was a *boda boda* rider.
13. Be that as it may, the jurisprudence that has been emerging from this Court recently is that the imposition of minimum sentences under Section 8 of the *Sexual Offences Act* interferes/fetters the discretion of the Court in sentencing and imposing an alternative sentencing in an appropriate case and is to a large extent an affront on the doctrine of separation of powers.
14. This Court in *Dismas Wafula Kilwake v Republic* [2019] eKLR, while considering minimum sentences provided for under Section 8 of the *Sexual Offences Act* stated thus:

Being so persuaded, we hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the Court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.” (Emphasis ours).
15. It is trite law that imposition of sentence is at the discretion of the trial court which discretion must obviously be exercised judiciously and depending on the facts and circumstances of each case. We have considered the circumstances under which this offence was committed and we do not consider the same to be aggravated.
16. Accordingly, we are inclined to exercise our discretion in favour of the appellant to reduce the sentence which we hereby do and substitute the sentence of 20 years' imprisonment meted out on the appellant with a sentence of 15 years' imprisonment to run from the date of sentencing in the trial court.
17. The appellant's appeal only succeeds to that extent. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF MAY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG



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JUDGE OF APPEAL
L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

