



REPUBLIC OF KENYA



KENYA LAW
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**AMM v Republic (Criminal Appeal 22 of 2022)
[2023] KECA 1007 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 1007 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 22 OF 2022
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
JULY 28, 2023**

BETWEEN

AMM APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(L. Kimaru, J.) dated 15th May 2019 in HC.CR. A No. 178 of 2018)*

JUDGMENT

1. AMM, the appellant herein, comes before this Court by way of a second appeal, his first appeal having been dismissed by the High Court (L. Kimaru J, as he then was) on 15th May 2019.
2. The appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence in respect of which he was eventually convicted and sentenced were that; On diverse dates between January 2009 and 8th December 2011 in Kayole , within Nairobi area province intentionally caused his penis to penetrate the vagina of LN, a girl aged 8 years.
3. After a full trial in which the prosecution called five witnesses, the trial Magistrate, (A. R. Kithinji,) found that the prosecution had proved its case against the appellant beyond reasonable doubt and consequently convicted him on the main count of defilement of a child aged 8 years contrary to section 8(1) of the *Sexual Offences Act*, as read with section 8(3) of the same Act. The trial Magistrate made the following order:

“Pre-sentence report considered, accused sentenced to serve 21 years in jail.”



4. The appellant was aggrieved by the conviction and sentence. He therefore, lodged an appeal in the High Court which was dismissed as already stated earlier in this judgment.
5. In order to contextualize the appeal, we shall give the facts in a summary form. The facts as accepted by the two courts below were that the complainant, LN (PW1) a girl aged 8 years at the time of the incident, would stay at home with her father, the appellant, while her mother would go out to sell porridge. In her testimony she stated that on diverse dates the appellant did bad manners to her, he would lay her down, apply oil on both his penis and her vagina and then defile her. She had tried reporting to her mother what the appellant was doing but the mother did not believe her. She then informed a neighbor who took her to the police where she reported. Her mother went and picked her from the police and took her home. She then ran away from home, after the appellant threatened to beat her for reporting the defilement to the police and went to Dandora, where some children picked her and took her to their home.
6. PW2, Dr. Purity Kajuju testified on behalf of Barbara Salano who is the one who examined the complainant at MSF clinic, in Mathare. She observed that PW1 had pains in her anal area and could not sit or go for a long call without pain. She further testified that PW1's biker had blood stains, the hymen was broken and the vaginal opening enlarged and reddened. PW3, Zephania Kamau, a surgeon at the police headquarters examined the complainant and filled out the P3 form. PW4, PC Ruth Maithya, the investigating officer gave evidence on the reporting of the case and the subsequent arrest of the appellant. PW5 was the government analyst who did the analysis of the body fluids and the DNA analysis.
7. In his defence, the appellant denied committing the offence maintaining that PW1 had a habit of disappearing from home and he had taken her to their rural home to live with the appellant's mother (PW1's grandmother). He testified that it was the grandfather who had tried raping her and thus PW1's grandmother suggested PW1 be returned to Nairobi. According to him, one day PW1 disappeared from home and they reported to the police. One week later he was arrested and accused of committing defilement.
8. The trial court convicted and sentenced the appellant to 21 years in jail, and aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard by L. Kimaru, J (as he then was.) In the judgment dated 15th May 2019, the trial Judge upheld both the conviction and sentence, thus precipitating this second appeal.
9. The appellant lodged a notice of appeal on 6th June 2019 and has proffered the instant appeal by filing an un-dated memorandum of appeal containing 5 grounds. It is instructive to note, that none of the grounds touch on sentencing.
10. When the appeal came up for hearing through the online digital platform, the appellant appeared in person and the State was represented by Mr. Muriithi.
11. The appellant has filed submissions which are undated but have his fingerprint. It is noteworthy that in the submissions, he does not submit on sentencing. During hearing, the appellant abandoned the appeal against conviction and indicated that he was appealing against the sentence only. The appellant prayed to the Court to consider that he is a young person who should be given a second chance in life to reform and rejoin his family.
12. On his part, Mr. Muriithi for the State opposed the appeal and submitted that the appellant was challenging the severity of the sentence which was a question of fact and not law.



13. This being a second appeal, only points of law fall for our consideration by dint of section 361(1) of the *Criminal Procedure Code*. On sentence, it is trite that the severity of a sentence is a factual matter under section 361 (1) of the *Criminal Procedure Code*.
14. From the appellant’s submissions as reproduced above, it is clear that he seeks remission or a lighter sentence than the years that were imposed by the trial court.
15. As already stated earlier in this judgment, the appellant was convicted for defiling a child aged 8 years and sentenced to 21 years’ imprisonment. We note that section 8(2) of the *Sexual Offences Act* provides that a person who commits an offence of defilement of a child aged between eleven years or less shall upon conviction be sentenced to imprisonment for life. In sentencing the appellant to serve a sentence of 21 years, the trial magistrate stated as follows:

“Pre – sentence report considered, accused sentenced to serve 21 years in jail.”
16. The appellant is challenging the severity of the sentence. We note that the appellant was convicted of defilement of a minor who was 8 years old. The law strictly applied, would mean that the appellant should have been handed life imprisonment, but the trial magistrate sentenced him to 21 years. The learned magistrate is very clear in his ruling that in imposing the sentence, he had considered the appellant’s pre – sentencing report.
17. In our view, in the case before us, the appellant was lucky to be handed a 21 years’ sentence. Under the law, he ought to have been sentenced to life imprisonment and if there was a notice to enhance sentence, this would have been a proper case for us to enhance the sentence. For the appellant to try to reduce the sentence through an invocation for mercy or judicial craft, is stretching his luck too far.
18. Consequently, it is our finding that this appeal is without merit and we dismiss the same.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

