



REPUBLIC OF KENYA



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

**Gikundi v Republic (Criminal Appeal 138 of 2017)  
[2023] KECA 1646 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KECA 1646 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 138 OF 2017  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
JULY 21, 2023**

**BETWEEN**

**JOTHAM GIKUNDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence of the High Court of Kenya at Meru  
(K.W. Kiarie, J.) dated 26th April 2017 in Criminal appeal No. 51 of 2015)*

**JUDGMENT**

1. The appellant, Jotham Gikundi, was charged before the Chief Magistrate's Court at Maua with defilement of a girl contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, and abduction with intent to confine contrary to section 259 of the Penal Code in respect of the same girl. The particulars of count 1 were that on diverse dates between 4<sup>th</sup> and 11<sup>th</sup> February 2013 in [Particulars Withheld] in Igembe South District within Meru County he intentionally caused his penis to penetrate the vagina of G.K. a girl aged 14 years and 4 months. In count 2, it was alleged that during the same period and place he kidnapped G.K. with intent to secretly and wrongfully confine her. Following trial, the appellant was convicted on each count and sentenced to 20 years and 3 years imprisonment, respectively. The sentences were to run concurrently.
2. The appellant appealed to the High Court at Meru against the conviction and sentence. The appeal was heard by the learned K.W. Kiarie, J. who dismissed it. He upheld the conviction and sentence.
3. Undeterred, the appellant preferred this second appeal to this Court to challenge both the conviction and sentence. In the amended grounds of appeal he urged the Court as follows:-
  1. That the learned appellate judge erred in matters of law by failing to comply with section 333(2) of the *Criminal Procedure Code* (CPC) and Article 50 (2) (p) of *the Constitution*.



2. That the learned appellate judge erred in matters of law by failing to note that the medical report adduced before the trial court does not support the testimony of the complainant.
3. That the sentence is harsh and excessive in the circumstances of this case.
4. That, I beg the honourable court to note that the appellant is now a reformed man.”

He urged this court to allow the appeal, and the sentence to be ordered to commence from his date of arrest, which he said was 13<sup>th</sup> February 2013.

4. When the appeal came for hearing, the appellant informed this Court that he was abandoning the appeal on conviction. He was left with the appeal against sentence. He was unrepresented. The State was represented by Ms. Kitoto who opposed the appeal.
5. The appellant relied on his written submissions in which he indicated that he had been in custody for 2 years 1 month and 10 days while awaiting trial, and that under section 333(2) of the Criminal Procedure Code the trial court ought to have taken into account that period while computing sentence, but that it had not done so. He referred the Court to the decision in *Abamad Abolfadbi Mohammed & Another v Republic* [2018]eKLR, the decision in *Bethwel Wilson Kibor v Republic* [2009]eKLR and the Judiciary Sentencing Policy Guidelines, all of which reiterate the point that a trial court is obligated to take into account the time already served in custody, if the convicted person had been in custody during trial, in determining the amount of sentence to impose.
6. The second issue that was raised by the appellant in his submissions was that the minimum sentence that the trial court imposed under section 8 of the *Sexual Offences Act* No.3 of 2006 was unconstitutional under Articles 27, 28 and 50(2) of *the Constitution* in so far as it deprived the court of its legitimate jurisdiction to exercise discretion while sentencing.
7. Lastly, the appellant pleaded that he had so far served 12 years of the sentence and learned various skills, including attaining Tailoring Grade I, and asked this Court to consider this while dealing with the issue of sentence.
8. Ms. Kitoto’s submissions in response was that 20 years’ imprisonment was the minimum penalty under section 8(3) of the *Sexual Offences Act*, and that the court had imposed the minimum which was therefore neither illegal nor harsh. Learned counsel submitted that because of the inhuman conditions that the appellant had subjected the complainant to, a deterrent sentence was called for, and therefore this Court should not interfere as was being urged.
9. This is a second appeal. Our jurisdiction is limited to considering matters of law only as commanded by section 361 (1)(a) of the Criminal Procedure Code. In *Samuel Warui Karim v Republic* [2016]eKLR, it was noted 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 two courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemagong v Republic* [ ] KLR 64.”
10. To be able to determine the question of sentence in this appeal, we shall summarize the facts of this case as found by the trial court and confirmed by the High Court. The complainant (PW
  1. was born on 8<sup>th</sup> October 1998, and was therefore 14 years and several months at the time of the offence. She was in class seven. On 4<sup>th</sup> February 2013 at 5.00 pm, her mother E.K (PW 2)



allowed her to go and get a book from her friend. She (PW 1) did not find the friend. On her way back home she met a man who was a stranger. He talked to her in Kiswahili, asking her to follow him to his house. She told him she could not. He grabbed her by the hand. She screamed but the place had bars and many drunkards. No one bothered to help. She was dragged into a wooden house with iron sheets roof. There was no one in the house. The man locked her in the house and left her there. The house had a window. She tried to open it without success. It was now dark. The house had a bed and no chairs. She was sitting on the bed. The man returned about midnight. He lit a globe, removed her clothes in the midst of resistance. He removed his clothes. He put off the light and defiled her. She screamed in pain but there was no assistance. He ejaculated in her and slept. She slept. When she woke up the man had hidden her clothes and had left, locking her in here. She could not get her clothes. She could hear women talking outside. She cried for help but no one came to her aid. She remained there without food. The man returned at midnight with a soda and cake which he gave to her. She asked for her clothes but he did not respond. He defiled her twice. They slept. When she woke up, he was not there. This routine went on until 11<sup>th</sup> February 2013 when policemen came and knocked the door, calling his name “Gikundi”. He opened the door, and attempted to escape. He was, however, arrested and the two taken to the police station. PW 1 was enabled to ring her mother who had been looking for her. Police had received information that led to the arrest. When police arrived, the man retrieved her clothes from a sack under the bed. Throughout the period, PW 1 was relieving herself in a jerry can which the man would go to empty. She would be kept without food sometimes for two days. She was taken to Maua General Hospital for treatment. Medical evidence revealed she had been sexually penetrated, and infected. The man found with PW 1 was the appellant.

11. The appellant’s unsworn defence that he had been framed was rejected.
12. These are the circumstances that led to the appellant being sentenced to 20 years for defilement, and 3 years for abduction. Under section 8(3) of the *Sexual Offences Act*, 20 years was the minimum penalty. The trial court considered the appellant’s mitigation and the fact that he was a first offender.
13. On appeal, the learned Judge observed as follows:-

“The sentence meted out in count one was the bare minimum. The circumstances of the case would have called for a stiffer sentence. In second count the maximum is 7 years. He was sentenced to serve three years’ imprisonment. This is very lenient.”
14. The sentences were confirmed, nonetheless.
15. The issues that the sentence of 20 years was unconstitutional, or that it deprived the trial court of its discretion in sentencing, were not raised during the appeal to the superior court. Neither was the issue that the trial court had not taken into consideration the period that the appellant was in custody while awaiting his trial. The only complaint was that the sentence was harsh and excessive in the circumstances. We are unable to deal with issues that were not raised before the High Court.
16. Before we can interfere with a sentence, it has to be demonstrated that the sentence meted out was illegal or unlawful; or that there was any material factor that the sentencing court overlooked or there was any immaterial factor, that was taken into consideration; or that the sentence was based on wrong principle or that the sentence imposed was manifestly excessive or manifestly low (*Joseph Mureithi Kanyitav Republic* [2017]eKLR).
17. We have considered the sentence imposed by the trial court, and confirmed by the High Court. For the offence in count one, this was the minimum penalty provided by section 8(3) of the *Sexual Offences*



*Act.* As was observed by the High Court, the circumstances under which the offence was committed called for a much stiffer sentence. But the court restrained itself from interfering with the sentence. We have not found any justifiable reason to vary the sentence in any way.

18. In conclusion, we dismiss the appeal against the sentence. The 20 years' imprisonment for count one is hereby confirmed.

**DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JULY, 2023**

**W. KARANJA**

**JUDGE OF APPEAL JAMILA MOHAMMED**

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

**JUDGE OF APPEAL**

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

**Deputy Registrar**

