



**CJN v Republic (Criminal Appeal 47 of 2019)
[2023] KECA 1450 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1450 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 47 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
NOVEMBER 24, 2023**

BETWEEN

CJN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at
Bungoma, (Sitati, J.) dated 26th February, 2019 in HCCRA No. 75 of 2018)*

JUDGMENT

1. The appellant herein, CJN, is a husband, a father to twelve children, and a grandfather to quite a few. It is in his last role that he found himself living with MN, a girl only nine (9) years of age. MN's mother is the appellant's daughter. That strong familial relationship, it would appear, was not sufficiently instinctive for the appellant to have a predilection to protecting MN. The opposite appears to be true: on 9th day of July 2016 at his home in [Particulars Withheld] village within Bungoma County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MN.
2. This was the charge that the appellant faced when he was arraigned at the Chief Magistrate's Court at Bungoma in Criminal Case No. 1765 of 2016: defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006. He pleaded not guilty to the charge. A fully-fledged trial ensued in which MN testified in graphic detail how the appellant, her own grandfather, defiled her.
3. MN told the trial court that the appellant arrived home at night when her grandmother was not present having gone to a nearby home for a matanga. After serving the appellant with food, the appellant forced MN to go sleep in his bed. While there, he removed her clothes and defiled her. She screamed in pain and the appellant hit her and told her to be quiet. He persisted in the action even as MN screamed some more. He then repeated the offending action in the morning.



4. MN had the courage to tell the grandmother when she came back home what had happened only to be disappointed: the grandmother counselled her to keep the defilement a secret. It took further courage for MN to tell her mother, the appellant's daughter, what had happened. The mother took action: she reported the matter to the Police and took MN for medical examination. Things took the legal course and the appellant ended up facing the defilement charge.
5. Still, the appellant pleaded not guilty hence forcing a trial in which six witnesses testified. At the end of it, he was convicted. The learned magistrate, after considering his mitigation, sentenced him to twenty-five (25) years imprisonment.
6. The appellant was dissatisfied with the conviction and sentence and appealed to the High Court. In a judgment dated 26th February, 2019, the High Court (Sitati, J.) affirmed both the conviction and sentence.
7. The appellant is further dissatisfied by the High Court judgment and is before us with a second appeal. This time, however, he has confined his appeal only to the issue of sentence. The entirety of his appeal is found in his grounds of appeal which he has enumerated, verbatim, as follows:
 1. That this appeal is against the 25 years imprisonment only.
 2. That the appeal is not seeking to review the evidence on record or challenging or the appellant is not contesting his conviction of 25 years imprisonment but humbly requesting for the reduction of the 25 years imprisonment.
 3. That the sentence of 25 years imprisonment is harsh, excessive and disregarding punishment requesting this Hon. Court to set aside the 25 years imprisonment and in its place pass a more lenient sentence.
 4. That the appellant is currently aged 59 years old, a first offender and fully rehabilitated having acquired life support skills, remorseful and left behind 12 children whom are currently helpless praying for courts leniency on sentence reduction.
 5. That I was the sole bread winner of my family which depends on me. My parents are deceased. The prolonged sentence of 25 years imprisonment subjects them to severe suffering hence thus praying for the reduction of the 25 years imprisonment.
8. During the plenary hearing, the appellant confirmed that he only wished to appeal against the sentence. He urged us to have mercy on him, referring to himself as the "prodigal son" akin to the one whose story is told by Jesus in the Bible (see the Holy Bible, Luke 15:20-24). He has now seen the light, he told this Court; and is ready to go back to the society on a clean slate.
9. The State is opposed to the appeal. Ms. Mwaniki, learned State counsel, submitted that the appeal by the appellant is one against severity of sentence – an impermissible remit for this Court by dint of section 361 of the *Criminal Procedure Code*. Counsel submitted that the trial court had exercised discretion in sentencing the appellant to a prison term lower than the statutory minimum stipulated in section 8(2) of the *Sexual Offences Act* after hearing his mitigation. The High Court affirmed that decision even pointing out that the appellant had been fortunate to have received punishment which is lower than the stipulated statutory minimum. The State also pointed out the aggravating circumstances in the case which, it submitted, make this an inappropriate case for interfering with the sentence imposed by the two courts below.
10. As the respondent suggests, our remit as a second appeal court is quite circumscribed. Our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only



and not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See *Samuel Warui Karimi v Republic* [2016] eKLR.

11. In the present case, it is readily obvious that the trial court took into consideration the aggravating and extenuating circumstances before pronouncing itself on the appropriate sentence. As the State counsel pointed out, the trial court went below the stipulated statutory minimum in a clear indication of exercise of discretion in sentencing. When the High Court considered the appeal against sentence, the learned Judge expressed herself strongly in the following words:

What about sentence? Should this court interfere with the same. The principles that govern an appellate court's power to interfere with sentence imposed by a trial court are now clear. An appellate court can only do so if the sentence is either too harsh or too lenient in the circumstances. In the instant case, the offence for which the appellant was convicted should have drawn a sentence of imprisonment for life; but he was given only 25 years. In sentencing the appellant, the trial court considered the fact that the appellant was a first offender and that he was 55 years old, with 12 children and had asked for Mercy. The trial court also noted that though the offence called for life Sentence upon conviction, but everything considered he would sentence appellant to 25 years imprisonment. In the circumstances, I find no justification for interfering with the learned trial magistrate's discretion and reasoning. The appeal on sentence also fails.

12. We, too, find no justification at all in interfering with the discretion exercised by the trial magistrate as reviewed de novo by the learned Judge. It is clear that they exercised their discretion judicially and judiciously. Both courts considered the extenuating circumstances balanced against the objective seriousness of the offence: defilement of a girl of very tender years. If we considered the aggravating circumstances present in the case – that the girl of tender age who was violated was the appellant's own grand-daughter; that the offence occurred in a place the young girl called home; that the appellant used force; and that there was evidence that this was not the first time the appellant was violating the survivor – it quickly becomes obvious that the sentence imposed in this case cannot rationally be reviewed downwards. It is for this reason that we dismiss the appellant's appeal against sentence.

13. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

