



**Ongony v Republic (Criminal Appeal 126 of 2015)
[2021] KECA 81 (KLR) (22 October 2021) (Judgment)**

Neutral citation: [2021] KECA 81 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 126 OF 2015
HM OKWENGU, RN NAMBUYE & F SICHALE, JJA
OCTOBER 22, 2021**

BETWEEN

WALTER OKALLO ONGONY APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu (H. K. Chemitei, J) dated 2nd March, 2015 in HC.CR. A. No. 16 of 2014)

JUDGMENT

1. Walter Okallo Ongony the appellant herein was tried and convicted by the Resident Magistrate’s Court at Bondo, of two counts of defilement contrary to section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. In the first count, he was alleged to have defiled a girl aged 14 years and in the second count, he was alleged to have defiled a girl aged 13 years old. He was sentenced to serve 20 years’ imprisonment in regard to each count, and the sentences ordered to run concurrently.
2. He appealed to the High Court against his conviction and sentence, and his appeal was dismissed. He is now before us on a second appeal, which appeal is limited to sentence only. It is the appellant’s plea that he committed the offence when he was a young man, and that during the time he has spent in prison, he has undergone various rehabilitation programs, has reformed and is remorseful. He contends that the sentence that was imposed on him was the mandatory sentence and therefore unconstitutional.
3. The appellant has filed written submissions in which he cites the case of *Francis Karioko Muruatetu & anor vs Republic [2017] eKLR*, in which the Supreme Court held that the mandatory death sentence deprives the Court of its legitimate jurisdiction to exercise discretion in imposing an appropriate sentence, taking into account relevant aspects and record of each accused person. He further relies on *Christopher Ochieng vs Republic [2018] eKLR*, and maintains that the discretion of the court to mete out a sentence that is commensurate with the circumstances of this case was curtailed by the mandatory



minimum sentence that was imposed upon him. He pleads that he is a first offender and is remorseful for the offence committed, and seeks for an opportunity to be reintegrated back to the society. While in prison, he has undergone vocational training and graduated successfully in painting and polishing, and therefore seeks a chance to start life afresh. He therefore urges the Court to reconsider the sentence that was imposed upon him.

4. The appeal was opposed by the Director of Public Prosecutions (DPP) who filed written submissions. It was submitted that although the Court had ability and power to review the sentence, the circumstances in which the appellant committed the offence did not justify the Court interfering with the sentence. This is because he subjected two minors to a horrible ordeal by defiling them throughout the night. That although the appellant had been in custody for 7 years, he had defiled 2 minors and the 20 years imposed upon him was to run concurrently. The Court was therefore urged to dismiss the appeal.
5. We have considered this appeal and the written submissions that were filed by the parties. Under section 361 of the *Criminal Procedure Code*, a second appeal to this Court is restricted to matters of law only, and the Court cannot hear an appeal on a matter of fact. Under that section, severity of sentence is a matter of fact. Secondly, this Court cannot hear an appeal against sentence except where the sentence has been enhanced by the High Court or the subordinate court had no power to pass the sentence that was imposed.
6. In this case, the appellant having been convicted under section 8(3) of the *Sexual Offences Act*, the trial court had the discretion to impose a term of not less than 20 years. Although section 8(3) provides a minimum sentence, the authority of the Supreme Court in *Francis Karioko Muruatetu vs Republic* (supra) does not provide that the sentence is illegal, but gives the Court the discretion to impose a sentence that is less than the minimum provided in that section, provided that the circumstances before the court justifies the exercise of such discretion in sentencing.
7. In this case, the appellant was convicted of defiling two minors. His sentence was ordered to run concurrently, which meant that instead of serving 40 years for the two offences, he was to serve only 20 years. In our view, the circumstances of this matter does not justify the Court interfering with the sentence that was imposed by the trial court. The trial court properly considered the circumstances before him and took into account the mitigation of the appellant. In the circumstances we find no merit in this appeal. It is accordingly dismissed.

Those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL



I certify that this is a truecopy of the original.

Signed

DEPUTY REGISTRAR

