



**GK v Republic (Criminal Appeal 134 of 2016)
[2021] KECA 232 (KLR) (3 December 2021) (Judgment)**

Neutral citation: [2021] KECA 232 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 134 OF 2016
DK MUSINGA, MSA MAKHANDIA & F SICHALE, JJA
DECEMBER 3, 2021**

BETWEEN

GK APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence of the High Court of Kenya at Kakamega
(Ruth N. Sitati, J.) dated 27th January, 2016 in HC. CR. A. No. 55 OF 2011)*

JUDGMENT

1. Perhaps a time has come to interrogate the efficacy of the law on sexual offences and in particular, Parliament's intent when it enacted section 8 of the *Sexual Offences Act*, (the Act). It is necessary to consider whether the sanctions imposed by the Act have adequately deterred over the years, if at all, the streak of perennial sexual atrocities committed against young children in the wake of the advancing principles on mandatory sentences prescribed under statute since the Supreme Court decision in *Francis Karioko Muruatetu & Another v. Republic [2017] eKLR*.
2. GK, the appellant, preferred this second and perhaps last appeal arising from the judgment of the High Court at Kakamega (Sitati, J.) in High Court Criminal Appeal No. 55 of 2011. By that judgment, the High Court dismissed the appellant's first appeal in its entirety. The appellant was initially charged before the Principal Magistrates' Court at Vihiga with one count of defilement of a fourteen (14) year old girl contrary to section 8(1) as read with (3) of the *Sexual Offences Act*. The particulars were that on 28th June, 2009 at [Particulars Withheld] Village in [Particulars Withheld] sub location, Vihiga District, the appellant intentionally and unlawfully penetrated by his genital organ namely, penis, into the genital organ namely, vagina, of MM, a girl aged 14 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.



3. The facts, albeit in summary form, were that on 28th June, 2009 at around 12.00 noon. MM, (PW1) a girl aged 14 years, while in the company of her seven (7) year old sister, JK (PW3), went to collect firewood from their grandfather's farm when the appellant, a distant uncle known to them, approached them from behind and grabbed PW1 by the neck and warned her not to scream. (PW3) screamed and fled right after the appellant slapped her. The appellant then dragged PW1 into a nearby maize plantation where he defiled her. According to her, this was her first sexual encounter and it was an excruciating experience no doubt. The appellant then disappeared into the maize plantation, having accomplished his mission. Meanwhile, PW3 rushed back home to report the incident to their mother, MJ., (PW2) who rushed to the scene to save PW1. By the time she was reaching the scene she found PW1 having put on her clothes and was walking back home. Along the way, PW1 narrated to PW2 her ordeal under the hands of the appellant. Upon examining PW1, she immediately took her to Vihiga District Hospital for treatment since she was bleeding from her private parts. PW3 and PW1 thereafter proceeded to Mbale Police Station where they reported the incident and recorded their statements against the appellant on the same day. The Investigating Officer, PC Nahashon Kibos (PW5), based at Mbale Police Station on the same day received the complaint from PW1 and issued her with a P3 form. Charles Laparmorijo, (PW6) a clinical officer based at the Vihiga District Hospital examined PW1 on the material day and found that her hymen was broken along with bruises on her labia majora and labia minora. Further laboratory tests also revealed that the samples taken from PW1 confirmed presence of pus cells, red blood cells and spermatozoa in her private parts, meaning that she had been involved in a sexual activity.
4. The appellant was subsequently apprehended by Solomon Luvai Chanda (PW4), the village elder, 5 days after the incident. Consequently, the appellant was arraigned before the Principal Magistrates' court and he pleaded not guilty to the charges. The case thereafter proceeded to full trial. At the conclusion of the prosecution case as summarized above, the appellant elected to give unsworn evidence when placed on his defence. He stated that he was arrested by (PW4) on 30th June 2009 on the pretext that the chief wanted to see him. The appellant accompanied PW4 to Mbale Police Station where he was locked up and later charged with the offence. He further stated that PW1 was like a sister to him and he could not have committed such an offence on her and that he even used to work in their home.
5. In the end, the trial magistrate found that the prosecution had proved its case against the appellant and convicted him for the offence and ultimately sentenced him to 20 years' imprisonment.
6. Aggrieved by both the conviction and sentence, the appellant lodged an appeal in the High Court of Kenya at Kakamega on grounds that the trial court: imposed a manifestly harsh sentence without regard to the 2 years the appellant had served in remand; considering an invalid P3 Form; relying purely on circumstantial evidence that was insufficient to sustain the charge; and for relying on children's testimony without considering whether they understood the importance of an oath. The appellant further complained that the charge was defective and consequently the sentence could not stand as the age of the complainant was not ascertained.
7. The High Court upon hearing the appeal found it devoid of merit and dismissed it in its entirety as already stated.
8. That dismissal in turn provoked this appeal before us. The appellant laments that the High Court considered invalid medical evidence in arriving at its conclusions; disregarded the 2 years he had served in remand prior to imposing manifestly harsh and excessive sentence; denying him the right to a fair hearing; disregarding evidence adduced in favour of the appellant's case; disregarding the necessity to



comply with the forensic report; and failing to comply with the provisions section 204 of the *Criminal Procedure Code*.

9. At the hearing of the appeal the appellant appeared in person. When called out, the appellant immediately informed us that he was no longer pursuing the appeal on conviction. Instead he only wanted us to consider the appeal against sentence. Accordingly, we will confine this judgement to the question of sentence.
10. At the plenary hearing and in support of his appeal against sentence, the appellant pleaded that since he had already served 13 years of his sentence, this Court should be pleased to reduce the residual term of his sentence to the term so far served. Prior to sentence he had served 2 years in remand which both courts failed to take into account in arriving at the appropriate sentence.
11. In opposing the appeal, Ligami Shitsama, learned Prosecution Counsel for the respondent submitted, whilst relying on the case of Francis Karioko Muruatetu & Another v. Republic (supra), that whereas the Supreme Court observed that “the mandatory nature of the death sentence as provided for under section 204 of the Penal Code is unconstitutional ”and in line with the resentencing guidelines provided thereof, the trial court indicated in its ruling that throughout the trial, the appellant showed no remorse and failed to supply any proof that he is a reformed man. To the respondent, therefore, all that was a display of a cruel man who grabbed an opportunity to ruin the life of an innocent young girl. Hence the respondent submitted that irrespective of the 2 years the appellant remained in remand, the term of 20 years’ imprisonment was well deserved and merited.
12. The provisions of section 8 of the *Sexual Offences Act* which are relevant to this appeal are as follows;
 8. A person who commits an act which causes penetration with a child is guilty
 - (1) of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
 - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(emphasis provided)
13. The law is no longer rigid with regard to minimum mandatory sentences and will take into account the peculiar circumstances of each case. This has been the import of the courts since the Supreme Court decision in Francis Muruatetu , supra.
14. Not left out either, is this Court’s decision in *Dismas Wafula Kilwake v Republic [2018] eKLR* in which it was held as follows;

Since the enactment of the *Sexual Offences Act*, the above provisions have been interpreted and applied by all the levels of the courts as imposing mandatory minimum sentences. The effect is that irrespective of the circumstances under which the offence is committed and irrespective of any mitigating circumstances, the Act purports to tie the hands of the courts, so that in all cases they must pass the same sentence predetermined by the legislature, based only on the age of the victim.



We have no doubt in our minds that the legislature has the power and legitimate interest to signal the seriousness of an offence by prescribing stiff penalties. The issue however, that is raised in this ground of appeal is whether the legislature can legitimately tie the hands of the judiciary by prescribing rigid and mandatory sentences in all cases without any regard to peculiarities of each individual case.”

15. The common vein running through the principles set out in the Muruatetu and Dismas cases, (supra), is “the mitigating circumstances and the peculiarities of each individual case”, This Court in *Athanus Lijodi v Republic [2021] eKLR* citing with approval the holdings in Dismas Wafula Kilwake case, (supra) observed thus:

“On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu’s case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance =Evans Wanjala Wanyonyi v Republic [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited.”

16. Turning to the instant appeal, we note as both the trial court and the High Court did, that the appellant to this very moment has failed to demonstrate any remorse, aside from the fact that he has served at least 13 years of his sentence. A sentence is not just for the community, but also for the victim and the appellant. It must address the justice of the case while trying to balance the expectations of these three.
17. The grave nature, harm and post-trauma involved in defilement cases cannot be gainsaid. Considering that the appellant was an uncle to the complainant and has not demonstrated any remorse for the act nor any reform, we are not persuaded to interfere with the sentence imposed by the trial court and confirmed by the 1st appellate court. The appeal fails and it is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE–MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

