



**AK v Republic (Criminal Appeal E021 of 2024)
[2025] KEHC 4916 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E021 OF 2024**

**JR KARANJA, J
APRIL 25, 2025**

BETWEEN

AK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon. S. M. Mokuia Chief Magistrate delivered on 22nd January 2024 in CMCR SO No. 120 of 2020)

JUDGMENT

1. The Appellant, AK, was convicted and sentenced to fifteen [15] years imprisonment by the Chief Magistrate at Kapsabet for the offence of defilement, Contrary to Section 8[1] as read with Section 8[2] of the Sexual Offences Act. It was alleged that on the 13th July 2020 at Nandi East, Nandi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of GJ, a child aged fifteen [15] years old.
2. Being dissatisfied with the conviction and sentence the Appellant preferred the present appeal. The Petition of appeal filed herein was amended vide the amended grounds of appeal filed herein on 3rd April, 2024, thereby rendering the appeal being that on sentence only.
3. In that regard, the Appellant complains that the sentence of fifteen [15] years imposed upon him was harsh and excessive considering that he was a first offender who was remorseful deserving of leniency on the basis of the mitigation factors alluded to in this appeal and forming part of the grounds of appeal.
4. At the hearing of the appeal the Appellant appeared in person while the Respondent appeared through the Learned Prosecution Counsel, Ms. Asiyo. In his oral submissions, the Appellant took a different trajectory by appealing the sentence on the basis that he was a minor aged seventeen [17] years old at



the time of the offence. He stated that the fact was communicated to the trial court and a report by the probation officer was in his favour.

5. Despite the new trajectory taken by the Appellant, the State/ Respondent conceded the appeal on the basis of the age of the Appellant which was placed at the age of seventeen [17] years at the time of the medical examination conducted on the Appellant for purposes of the police medical report [P3 form] and confirmed by the probation report which was presented in court.
6. In that regard, the Respondent relied on the decision of the High Court at Homa Bay in a Petitioner No. 1 of 2017, *POO v DPP* and contended that the Appellant ought to have been sentenced under the *Children Act*.
7. Having given consideration to the appeal and its main ground on the element of the Appellant's age at the time of the offence vis-à-vis the sentence of fifteen [15] years imprisonment. Also, having considered the Respondent's concession to the appeal, this court may state that the fact that the Respondent conceded the appeal did not remove the Appellant's obligation to establish his grounds of appeal.
8. This being an appeal on sentence, the principles applicable were clearly set out in the case of *Diego v Republic* [19987] KLR 621, where it was stated that the Appellate Court can only interfere where the trial court in assessing the sentence acted on wrong principles or has imposed a sentence which was manifestly inadequate or manifestly excessive.
9. Upon conviction by the trial court, the Appellant was sentenced to 15 years imprisonment for the main count of defilement under Section 8[3] of the *Sexual Offences Act*, which provides that: -

“ 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.”
10. The Complainant [PW2] herein was aged fifteen [15] years old which meant that the sentence imposed upon the Appellant was actually less than the sentence of not less than twenty years prescribed under the aforementioned provision of the Law.
11. Be that as it may, prior to the impugned sentence being meted out against the Appellant, he was accorded an opportunity to mitigate and in that regard he brought to the attention of the court that he was of the age of seventeen [17] years at the time of the offence. He sought leniency and stated that the Complainant was since married.

He therefore prayed for a non-custodial sentence.
12. The trial court having considered the mitigation factors referred the matter to the probation office for a pre-sentence report which was to be presented in court on 5th February 2024, but the date kept on changing until the 18th March 2024 when the report was presented in court and duly considered by the trial court.
13. The matter was thereafter fixed for 20th March 2024 for sentencing when the trial court imposed upon the Appellant the sentence of fifteen [15] years imprisonment after noting that the pre-sentence report contained nothing to demonstrate that the Appellant was under age as alleged.
14. However, having perused the record of the trial court this court took the position that there was clear demonstration from the proceedings and indeed the presentence report that the Appellant was of the age seventeen [17] years or thereabout at the time of the offence on the 13th July 2020.



15. The police medical report [P3 form] which was tendered in evidence by a Clinical Officer [PW4] showed that the Appellant was seventeen [17] years old at the time he was medically examined on 15th July 2020, a day or two after the occurrence of the offence.

The pre-sentence report indicated that the Appellant was aged twenty [20] years old when the report was compiled on 21st February 2024.

16. All the factors foregoing clearly demonstrated that the Appellant was indeed about seventeen [17] years old at the time he committed the offence. He was a minor or child for all intents and purposes as defined in Section 2 of the *Children Act* to wit:-

“Child means an individual who has not attained the age of eighteen years.”

17. It would therefore follow that the Appellant ought to have been sentenced as a child in conflict with the Law under the Children Act. This mode of sentencing is clearly acknowledged under Section 8[7] of the *Sexual Offences Act* which provides that: -

“where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction sentence the Accused person in accordance with the provisions of the *Borstal Institution Act* [Cap 92] and the *Children’s Act* 2001 [No. 8 of 2001].”

18. As provided under Article 53[2] of the Constitution a child’s best interests are of paramount importance in every matter concerning the child and under Article 53 [1] [f] of the *Constitution* it is provided that every child has the right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time and separate from adults and in conditions that take account of the child’s sex and age.

19. For all reasons foregoing it becomes clear why the Respondent conceded, and rightly so, to this appeal which is therefore allowed to the extent that the sentence of fifteen [15] years imprisonment is hereby set aside and substituted for a probation term of three [3] years as recommended by the probation officer in the pre-sentence report dated 21st February 2024 and filed herein on 4th March 2024 and in accordance with Section 239[1] of the Children’s Act [Cap 141 Laws of Kenya]

Ordered accordingly.

DELIVERED AND DATED THIS 25TH DAY OF APRIL 2025

HON. J. R. KARANJAH,

JUDGE

