Nyongesa v Republic (Criminal Appeal E015 of 2024)
[2025] KEHC 11962 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 11962 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E015 OF 2024

MS SHARIFF, J

JUNE 30, 2025

BETWEEN

LEVIS JUMA NYONGESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on 3rd April 2022, at around 11.00 a.m. in (Particulars withheld) Village a, Bisunu Location within Bungoma West Sub-County in Bungoma County, he intentionally caused his penis to penetrate the vagina of S.N.W a child of 13 years.

2. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section11(1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 3rd April 2022, at around 11.00 a.m. in (Particulars withheld) Village a, Bisunu Location within Bungoma West Sub-County in Bungoma County, the Appellant herein intentionally and unlawfully touched the vagina of S.N.W a child aged 13 years with his penis.

3. The Prosecution called Four (4) witnesses in support of its case and in his defense, the Appellant gave a sworn testimony, but did not call any witness.

4. The trial Court after considering the evidence adduced by both parties found that the Prosecution had proved their case against the Appellant beyond reasonable doubt on the main charge and the Appellant was convicted and sentenced to Fifteen (15) years imprisonment.

5. Aggrieved by the sentence, the Appellant filed his Petition of Appeal filed, in which he raised the following grounds of appeal:

a. That he is a first offender.

b. That the sentence of 15 years as meted out upon him is rather too harsh and excessive as per the circumstances.

c. That he is a family man with siblings who rely on him as a daily bread winner,

d. That this Court be pleased to consider reducing the sentence imposed on humanitarian grounds.

e. That this Court makes a declaration that the tie he spent in remand awaiting trial be considered.

f. That he wishes to adduce more grounds at the hearing thereof.

6. He prayed that this Court allows his appeal in its entirety.

7. The appeal was canvassed by way of written submissions. The record only bears the Appellant's written submissions while the Respondent submitted orally. The only issue for consideration is whether the sentence meted upon the appellant was harsh.

8. The duty of a first appellate Court is to re-evaluate and re-assess the evidence afresh and draw its own conclusions while taking into account the fact that unlike the trial Court, it neither saw nor heard the witnesses testify. See Okeno v R. (1972) E.A. 32.

9. Given that the appeal is against the sentence, I will not set out the evidence of the parties.

Whether the sentence meted out of the Appellant was harsh and excessive

10. The Appellant has impugned the judgment of the trial Court in imposing a sentence of 15 years' imprisonment. As stated above, the Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*. The section provides that:

> " (1)A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (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.

11. On my perusal of the lower Court proceedings, on 21st November 2023, the trial Court proceeded to sentence the Appellant to Fifteen (15) years imprisonment. It is thus clear that the Appellant was given a chance to mitigate hence it cannot be said that his right to mitigation was violated and the Court took cognizance of the pre-sentence report.

12. It has been stated time and again that sentencing is a discretionary exercise by the trial Court, and that an Appellate Court will not necessarily interfere with the sentence meted out, unless it is demonstrated that the trial Court acted on some wrong principles or overlooked some material facts. For instance, in Bernard Kimani Gacheru vs. Republic (2002) eKLR; the Court of Appeal stated:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy

and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist."

13. The issue before me is not a novel issue. The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) addressing minimum sentences prescribed by section 8 of the *Sexual Offences Act* had this to say:

> "66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in the Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

14. The upshot of the above is that this appeal fails as the Court finds no justification for interference with the sentence that was imposed upon the Appellant by the trial court.

15. In the result, the appeal is devoid of any merit. It is dismissed.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Ms Kibet for the Respondent

Appellant (virtually)

Peter Machoni – Court assistant