



**Lubano v Republic (Criminal Appeal E027 of 2023)
[2024] KEHC 752 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E027 OF 2023**

**DK KEMEL, J
JANUARY 31, 2024**

BETWEEN

BRIAN WAFULA LUBANO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence of Hon. P. Y. KULECHO (PM) in Webuye Senior
Principal Magistrate's Court Sexual Offence Case No. E 030 OF 2021 delivered on 19.4.2021)*

JUDGMENT

1. The Appellant herein Brian Wafula Lubano was charged with an offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on diverse dates between 5th July, 2021 and 6th July, 2021 at [particulars withheld] Sub-location, Namarambi Location in Webuye East Sub-County, within Bungoma County, intentionally and unlawfully caused his penis to penetrate into the vagina of A.K. a child aged seven and half years.
2. The prosecution called six witnesses in support of its case.
3. A.K (PWI) was the complainant who testified that on 5.7.2021 at around 7.00 am, she was on her way to school in company of her colleagues when they met a certain man with dreadlocks. That the man requested her to follow him but she declined whereupon he seized her and carried her on his shoulders to a certain house where he ordered her to sit on a sofa set. She testified that the man removed her uniform and her underpants and also removed his trouser and innerwear and then inserted his penis into her vagina. She added that the man later locked her in the room and went away but came back later at around lunch time and released her to go home but warned her not to reveal to anyone what had happened or else he would kill her grandmother. She testified that the same thing took place the following day with the usual warning not to reveal the incident to anyone. She later informed her class teachers who alerted her grandmother to visit her school. She was later escorted to hospital for medical



- checkup and while on the way she spotted the suspect and she informed her grandmother that it was the guy who had been waylaying her on her way to school. She later led police to the place where the suspect lived and was promptly arrested. She also participated in an identification parade where she positively picked out the suspect.
4. CAA (PW2) testified that the complainant is her granddaughter who was born on 1.1.2014. She stated that the complainant left for school on the two days of the incident as usual and came back around lunch time but that she did not mention anything about what had happened to her. Upon learning about the incident, she escorted the minor to hospital for checkup where the doctors confirmed that she had been defiled . She stated that the minor pointed out the home of the perpetrator as well as his description.
 5. MNK (PW3) a teacher at [particulars withheld] Primary school testified that she interrogated the complainant who informed her that a certain person had been waylaying her while on her way to school and then defile her.
 6. No. 244785 PC Joan Mutekesi (PW4) testified that she investigated the case and accompanied the minor to the place where the suspect lived and who was pointed out by the minor . She stated that she arrested the suspect after he was positively identified through an identification parade. She produced the identification parade form as an exhibit.
 7. Letizia Mbalo (PW5) testified that the complainant was examined at Webuye County Hospital by her colleague on 19.7.2021 and that she had been familiar with his handwriting and signatures. She produced the treatment note, PRC form as well as P3 form as exhibits. She confirmed that the complainant had been defiled due to the missing hymen.
 8. Barasa Wycliffe (PW6) testified that she is a clinician at St Bakita Mission hospital. That he examined the complainant who had lacerations on the vaginal wall and that the hymen was broken. She produced the treatment note as exhibit.
 9. The Appellant was subsequently put on his defence. He elected to give a sworn evidence. He testified that he is a resident of Makuselwa and a boda boda operator. He added that he had a tender to drop four pupils to school every day. He denied the charges.
 10. The learned trial magistrate later found the appellant guilty of the main charge and duly convicted him and thereafter sentenced him to serve thirty (30 0 years' imprisonment .
 11. The Appellant being aggrieved, has lodged the present appeal against sentence only. He raised the following grounds of appeal:
 1. That he is a first offender.
 2. That he is remorseful for the offence committed.
 3. That he is the only breadwinner for his family.
 4. That the sentence of 30 years is excessive and harsh.
 5. That the sentence be reduced on humanitarian grounds.
 6. That the sentence be substituted with a sentence under probation.
 7. That the Appellant's mitigation was not considered by the trial court.
 12. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submission.



13. I have considered the evidence adduced before the trial court as well as the submissions. It is not in dispute that the appeal is only against the sentence imposed and not on conviction. The Appellant's grounds of appeal appear to be mostly mitigation in nature. The issue for determination is whether the sentence imposed by the trial court is excessive so as to warrant an interference.
14. This being a first appeal, the role of this court is to evaluate the evidence presented before the trial court and come up with its own independent conclusion as to whether or not to uphold the judgement and sentence of the trial court. See *Okeno v R* [1972] EA 32. As the appeal does not challenge the conviction, then my duty is only to consider whether the sentence imposed is commensurate with the nature of the offence and the appellant's blameworthiness.
15. The Appellant had been charged with an offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. Section 8 (2) of the said Act provides as follows:-

“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”.
16. The complainant was at the time of the incident aged about seven and half years old as per the certificate of birth produced as exhibit one. The sentence that ought to be imposed should be life imprisonment. The Appellant's mitigation was duly considered by the learned trial magistrate. It is noted that following the decision of the Supreme Court of Kenya in *Francis Karioko Muruatetu & 2 Others v R* [2017] eKLR there has been a paradigm shift regarding the imposition of minimum sentences and that the courts have had a lee way to receive mitigating circumstances of offenders before passing an appropriate sentence. This position has been taken a notch higher such as in Petition Numbers EO17 of 2021 at Machakos and Petition No. 97 of 2021 at Mombasa by Justices Odunga and Mativo (as they then were). In the case of *Jared Koita Injiri v R* [2019] eKLR , the Court of Appeal reduced a sentence of life imprisonment in a charge of defilement to 30 years' imprisonment.
17. Being guided by the above authority, I am of the view that the Appellant's sentence of 30 years' imprisonment is reasonable when looked at from the harm that he caused to the complainant who was still a minor and whose life has been psychologically scarred and traumatized. In the case of *Benard Kimani Gacheru v R.* [2002] EKLR it was held that sentence is a matter that rests in the discretion of the trial court and that the same must depend on the facts of each case.
18. It is noted that the trial court, while sentencing the Appellant did not factor the period spent in custody as provided for under section 333 (2) of the *Criminal Procedure Code*. The Appellant was arrested on 11.12.2021 and that he remained in custody throughout the trial. I find that the sentence of 30 years' imprisonment will be ordered to commence from that date.
19. In the result, the appeal on sentence only succeeds to the extent that the sentence of 30 years imprisonment shall commence from the date of arrest namely 11.12.2021.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY, 2024

D. KEMEI,

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR



In the presence of :-

Brian Wafula Lubao Appellant

Miss Kibet for Respondent

Kizito Court Assistant

