



**Nabiriki v Republic (Criminal Appeal E033 of 2023)  
[2024] KEHC 754 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 754 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E033 OF 2023**

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

**BETWEEN**

**CALEB WAKHUNG NABIRIKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the sentences of HON.D. ONYANGO (SPM) in Kimilili Senior Principal Magistrate's Court Sexual Offence Case No. 10 of 2018 dated 18.5.2018)*

**JUDGMENT**

1. The Appeal herein is against the sentence of Hon.D. Onyango (SPM) in Kimilili Senior Principal Magistrate's Sexual Offence Case No. 10 of 2018 wherein he faced a charge of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on the 29<sup>th</sup> day of April 2017 in Bungoma Sub-County within Bungoma County, unlawfully and intentionally caused his penis to penetrate the vagina of DNW. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006 with the particulars being that on the 29<sup>th</sup> day of April 2017 in Bungoma Sub County within Bungoma County, intentionally and unlawfully did cause his penis to come into contact with the vagina of DNW a girl aged 17 years.
2. The Appellant pleaded guilty to the charges and was consequently convicted and sentenced to serve 15 years' imprisonment.
3. The Appellant is aggrieved by the sentences and has filed the following grounds of appeal.
  - i. That the 15 years' imprisonment is harsh and should be reduced.
  - ii. That the period spent in remand before conclusion of his case be considered.



- iii. That he has since reformed while in prison and has acquired several skills and certificates.
- iv. That he is a first offender and seeks to be given another chance in life.
4. The Appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.
5. I have given due consideration to this appeal and the submissions as well as the record of the lower court. It is noted that the Appellant does not challenge his conviction but on the sentence. Hence, the duty of this court as a first appellate court is to consider whether the trial court is sentencing the appellant considered the appropriate principles of sentencing.
6. It is noted from the record of the trial court that the complainant was aged 17 years old at the time of the incident. The Appellant was charged under section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006. Section 8 (4) of the Act provides as follows: -

“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”.

The trial court duly noted the appellant’s mitigation. Under the Act, the sentence provided for a minimum of fifteen years’ imprisonment. In the case of [Benard Kimani Gacheru -vs- 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. The circumstance of the case are that the appellant befriended the complainant and had sex with her on several occasions and that the complainant later got pregnant and later gave birth to a baby boy in January 2018. It was after the delivery of the child that the Appellant was pursued, arrested and charged. The actions of the appellant in putting the complainant in the family way must be frowned upon by the society. A pre- sentence report dated 18.5.2018 was filed by the Probation department for the trial court’s consideration. The same indicated that the appellant was not suitable for a non-custodial sentence and that he was a cunning and mischievous person and who was untruthful. The report further indicated that the father of the complainant had returned her back to school and was worried about the Appellant interfering with the complainant’s schooling. It is clear that the Appellant has ruined the future of the complainant. I find the sentence imposed by the trial court to be reasonable, appropriate and commensurate with the appellant’s blame worthiness. I see no reasons to interfere with the sentence imposed by the trial court as the said court did not take into consideration irrelevant facts. In any case, the sentence imposed is the minimum possible in law after consideration of the Appellant’s mitigation.

7. The Appellant has also sought to rely on section 333 (2) of the [Criminal Procedure Code](#) for the purposes of consideration as he had remained in custody during his trial. Upon perusal of the record, it is noted that the Appellant was arrested on 9.2.18 and he remained in custody until 18.5.2018 when he was sentenced. Hence, the period spent in custody must be factored. To that extent, the trial court’s sentence will be interfered with.
8. In the result, the appeal succeeds only to the extent that the sentence will commence from the date of arrest. The sentence of 15 years imprisonment is upheld and that the same shall commence from the date of arrest namely 9.2.2018.

**DATED AND DELIVERED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF JANUARY 2024**

**D. KEMEI,**

**JUDGE.**



**In the presence of :-**

Caleb Nabiriki Appellant

Miss Kibet for Respondent

Kizito Court Assistant

