



**Nyongesa v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 678 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E030 OF 2023
DK KEMEL, J
JANUARY 31, 2024**

BETWEEN

GILBERT NYONGESA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the sentence of Hon. Odawo (SRM) in Bungoma Chief magistrate's Court Sexual Offence Case No. 24 of 2022 delivered on 6.9.2022)

JUDGMENT

1. The Appellant herein Gilbert Nyongesa was charged with an offence of defilement of a child contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars are that on diverse dates between 1st November, 2021 and 22nd February 2022 at [particulars withheld] village, Bungoma South Sub- County within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of C N a child aged 13 years. 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 diverse dates between 1st November 2021 and 22nd February 2022 at [particulars withheld] village in Bungoma South Sub County within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of CN a child aged 13 years.
2. After a full trial, he was convicted and sentenced to serve twenty years' imprisonment.
3. Being aggrieved by the sentence, he lodged a petition of appeal on 11.4.2023 wherein he raised the following grounds of appeal: -
 - i. That the sentence be reduced on humanitarian grounds.
 - ii. That he is the sole breadwinner for his poor family.



- iii. That the sentence imposed is harsh and excessive in the circumstances.
- iv. That he be considered for a sentence under probation.
4. The appeal was canvassed by way of written submissions. Both parties have fully filed and exchanged submissions.
5. I have considered the submissions filed as well as the record of the trial court regarding the sentence. It is noted that the Appellant has not challenged his conviction and hence the duty of this court as the first appellate court is to consider whether the trial court in sentencing the appellant considered the appropriate principles. The Appellant's grounds of appeal appear to be mostly mitigation in nature.
6. It is noted that the complainant was at the time of the incident aged about 13 years old. The Appellant had been charged under section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. Section 8 (3) of the Act provides as follows: -

“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”.

The trial court duly noted the Appellant's mitigation. Under the said Act, the sentence provided for is twenty years imprisonment. In the case of *Benard Kimani Gacheru v R [2002]* eKLR the court 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 circumstances of the case are that the appellant defiled the complainant then aged 13 years old who subsequently got pregnant. At the time of testifying in court, the complainant was then several months pregnant. The actions of the appellant in making the young complainant a mother at such an early age must be frowned upon. The young girl's future was definitely messed up. It also transpired that the Appellant had been married to another woman who left him. His conduct seems to be one of impregnating young girls in his area without care. He is thus a danger to the young girls in his village. The sentence imposed is the minimum possible in law and that the appellant's mitigation having been considered, then in see no reason to interfere with the sentence as the trial court did not consider irrelevant factors when it arrived at the sentence.

7. It is noted that the appellant was released on bond and thus the provisions of section 333(2) of the *Criminal Procedure Code* do not apply. I find the sentence imposed by the trial court to be reasonable appropriate and commensurate with the appellant's blameworthiness. I see no reason to interfere with the sentence imposed by the trial court.
8. In the result, it in my finding that the appeal lacks merit. The same is dismissed.

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

**D KEMEI,
JUDGE.**

IN THE PRESENCE OF :-

**Gilbert Nyongesa Appellant
Miss Kibet For Respondent**



