



REPUBLIC OF KENYA



KENYA LAW
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**Obongo v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 854 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E002 OF 2023
RE ABURILI, J
JANUARY 29, 2024**

BETWEEN

VICTOR ODHIAMBO OBONGO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence by the Hon. C.L. Yalwala on the 29.12.2022
in the Principal Magistrate's Court at Winam in Criminal Case No. E018 of 2020)*

JUDGMENT

Introduction

1. The appellant herein Victor Odhiambo Obongo was charged with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between July 9, 2020 and December 3, 2020 in Kisumu West sub-county within Kisumu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of EA, a girl aged 11 years old.
2. The trial court after considering the evidence adduced by the four prosecution witnesses and three defence witnesses including the appellant herein, found that the prosecution had proved all the elements of the offence of defilement and convicted the appellant accordingly. The trial court also found that the complainant was slightly above 11 years old and sentenced the appellant under section 8 (1) as read with section 8(3) (3) of the *Sexual Offences Act*, to serve fifteen years imprisonment. This was after considering the appellant's mitigation as well as the Victim Impact Assessment Report.
3. Aggrieved by the conviction and sentence, the appellant filed his petition of appeal on the January 27, 2023 setting out the following grounds of appeal:



- i. That the learned trial magistrate erred in law and in fact in convicting the appellant when the evidence tendered before court was not sufficient to support a conviction of the offence of defilement.
 - ii. The learned trial magistrate erred in law and fact by rejecting the appellant's evidence in defence.
 - iii. The learned trial magistrate erred in law and in fact in imposing a harsh and excessive sentence on the appellant which was not informed from the facts and circumstances unique to the case.
4. When this appeal came up for directions on the mode of disposal, after admission to hearing, the appellant orally submitted that he wanted the court to reduce the sentence imposed on him so that he could go back to his family. He therefore withdrew his appeal against conviction and the court accepted the withdrawal. It was his submission that he thought the minor was 18 years old as she was working in a hotel and that he only learnt of her age when he involved himself sexually with her.
 5. The appellant further submitted that he was intimate with the minor but did not help her procure the abortion as alleged in her evidence. He further submitted that he was 25 years old and had a wife and 2 children who lived with his parents and that his parents had since died and thus the children and wife were all alone.
 6. In response to the submission on sentence reduction, the Prosecution counsel on behalf of the respondent submitted that the sentence imposed was commensurate to the offence and that it should be upheld.

Analysis and Determination

7. I have considered the fact that the appellant withdrew his appeal against conviction and the submissions by the appellant and the prosecution counsel. The punishment prescribed for the offence of defilement where the victim is aged between 11 years old and below is a mandatory life sentence. In this case, the trial court observed that the victim was slightly above 11 years so he convicted the appellant to serve 20 years imprisonment which is the minimum mandatory prison term where the victim is found to be aged 12 to 15 years.
8. The charge sheet clearly stated that the minor was aged 11 years and the birth certificate produced showed that the victim was born on 12/5/2009. The offence was committed between 9/7/2020 and December, 2020 meaning by May 2020, the minor was only aged 11 years and 2 months. For that reason, it is not correct to say that the minor fell in the category of the victims over 11 years old. As long as the minor had not attained 12 years, she would still be in the age bracket of 11 years and below. For that reason, this court must correct the trial court record which I hereby do. I set aside the finding on the age of the victim and substitute it with a finding that where the minor is aged 11 years and below and has not attained the age of 12 years when the offence was committed against her, then the charge would be under section 8(1) as read with section 8(2) of the *Sexual offences Act*.
9. In this case, however, I would not interfere with the section under which the appellant was convicted because despite a birth certificate being produced in evidence showing that the victim was born on 12/5/2009, the probation Officer's report as filed, dated 12/1/2023 shows that the minor was born in 2007 hence she was aged 13 years. In addition, the appellant despite claiming that he was aged 25 years old, he was aged 30 years old as at the time that he committed the offence.
10. In his mitigation, the Appellant pleaded for leniency saying that he was an orphan who had siblings who relied on him. That he was 25 years old and that he thought the minor was 18 years as he found



her working in a hotel. However, the evidence on record is clear that he took the minor from her home and took her to where he lived in Nyamasaria and even procured an abortion thereby terminating her pregnancy which was poorly done thereby risking her life. The appellant is a first offender and has a wife and very young children who depended on him.

11. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously.

12. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant fact or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

13. Similarly, in the case of *Wanjema v Republic* (1971) E.A. 493 the court stated as follows;

“An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

14. Section 8(1), (3) of the [Sexual Offences Act](#) provides as follows:

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

(3) 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.

15. In this case, the appellant is a 30 year old man and obviously took advantage of a 13-year-old school going girl and perhaps put to rest all her ambition for further studies and career. The effect of the offence on the minor are long lasting and the psychological effect is even worse. She became addicted to his sexual encounters and kept running away from her home to his residence to have sex with him during Corona19 period and whenever she did not find him, she had sex with his friend who lived nearby which was very dangerous for her because she never used any protection. As at the time of sentencing in the lower court, she was already pregnant by another man and she asked that the appellant be forgiven because she loved him and that he had a young family, saying that whatever had happened had happened and that she was not interested in going back to school. I find the minor to have been naïve and was taken advantage of during Covid 19 pandemic in 2020.

16. The sentence of fifteen (15) years imprisonment that was meted herein was lenient noting that it is not the mandatory minimum under section 8(3) of the [Sexual Offences Act](#). However, having considered the circumstances under which the offence was committed, the fact that the appellant was a first offender and he has withdrawn his appeal against conviction thus admitting that he committed the offence and seeks for leniency; and taking into account the objects and purposes of sentencing as contained in The Judiciary Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary, which provides that sentence imposed must meet the following objectives in totality:

(a) Retribution: To punish the offender for his/her criminal conduct in a just manner.



- (b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.
 - (c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 - (d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.
 - (e) Community protection: To protect the community by incapacitating the offender.
 - (f) Denunciation: To communicate the community's condemnation of the criminal conduct.
17. The above Guidelines were reiterated in *Republic v Karakacha* (Criminal Case 24 of 2020) [2023] KEHC 18737 (KLR) (21 June 2023) (Sentence).
 18. Considering the appellant's responsibilities to third parties who are very young children, I hereby exercise discretion and set aside the fifteen years imprisonment imposed on the appellant and substitute it with ten (10) years imprisonment.
 19. The appellant was arrested on 3/12/2020 and released on bond on December 10, 2020. the sentence shall be calculated taking into account the nine (9) days that he spent in custody prior to being released on bond.
 20. Signal to issue.
 21. The lower court file to be returned forthwith with copy of judgment.
 22. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

