



**Osio v Republic (Criminal Appeal E033 of 2023)
[2024] KEHC 855 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E033 OF 2023
RE ABURILI, J
JANUARY 29, 2024**

BETWEEN

CALEB OTIENO OSIO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence by the Hon. N. Yalwala on the 13.7.2023 in the Senior Principal Magistrate's Court at Maseno in Sexual Offences Case No. 37 of 2019)

JUDGMENT

Introduction

1. The appellant herein Caleb Otieno Osio was charged with one count of the offence of rape contrary to section 3 (1) (a) & (b) and 3 of the [Sexual Offences Act](#) as well as another charge of defilement contrary to section 8 (1) (2) of the [Sexual Offences Act](#). The appellant also faced the alternative charge of committing an indecent act with an adult contrary to Section 11 (a) of the [Sexual Offences Act](#).
2. The particulars of the offence were that on the 30th day of May 2019 at East Seme Location in Seme sub-county within Kisumu County, he unlawfully and intentionally caused his penis to penetrate the vagina of RAO, without her consent.
3. The trial court after considering the evidence adduced by the prosecution as well as the appellant's defence found that the prosecution had proved their case beyond reasonable doubt against the appellant on the first count of rape. The trial court further found that the prosecution proved their case against the appellant on the second count of defilement contrary to section 8 (1) (3) of the [Sexual Offences Act](#).



4. The trial court sentenced the appellant to serve a prison term of 10 years on the 1st Count and 20 years on the 2nd Count respectively. The trial court further directed that the sentences were to run consecutively on account of the fact that the offences were personal in nature.
5. Aggrieved by the trial court's finding, the appellant filed his petition of appeal on the 15th August 2023 based on the following grounds:
 - i. That the Hon. Court be pleased to independently oversee the conduct of the lower court's proceedings.
 - ii. That the Hon. Court be pleased to subject the sentence of 10 years and 20 years imposed to run concurrently.
 - iii. That the Hon. Court be pleased to indulge the provisions of sentencing policy guidelines 2016.
 - iv. That the Hon. Court be pleased to consider that the executed decision of the trial court "over punishes" the appellant.
 - v. That the honourable court be pleased to consider that no tendered previous criminal record as expressed by the prosecution, save for the one at hand.
 - vi. That the Hon. Court be pleased to consider consolidating the sentence in line with judicial reduction hence Article 50 (2)(p) of the Constitution 2010.
 - vii. That the Hon. Court be pleased that the sentence imposed would inevitably ruin my future and life, thus a young man.
 - viii. That the court be pleased to invoke Article 165 (3) of Constitution of Kenya 2010 and or minimize the same proportionately.
 - ix. That I wish to be present during hearing of this appeal and/or be supplied/furnished with the trial court proceedings in order to stall more mitigating aspects.
6. The appellant submitted before this court that he was only appealing against the sentences running consecutively and prayed that the sentence imposed do run concurrently.
7. In response the respondent through Mr. Onanda sSenior Principal Prosecution Counsel ubmitted that they had no issue with the sentence being considered concurrently. He urged the court to look at the sentencing guidelines and exercise discretion considering the appellant's prayers. He further submitted that a sentence of 20 years would be sufficient to cover both offences.

Analysis and Determination

8. I have considered the grounds of appeal and the submissions by the appellant and the prosecution counsel. Sentencing is the discretion of the trial court, having regard to the mitigations and circumstances of each case.
9. 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”



10. Similarly, in the case of *Wanjema v Republic* (1971) E.A. 493 the court stated that:

“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.”

11. The Supreme Court in the *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR petition gave the following guidelines when this court will be considering the applicants’ application for re-sentencing:

“[71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender;
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant.

(72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25. Guideline Judgments

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

12. It is apparent from the Judgment that although the Supreme Court referred to murder cases, the same can also be applied in other cases where the law provides for a mandatory minimum sentences, including the instant case and especially where the penalty section uses the term liable to....



13. The Judiciary Sentencing Policy Guidelines, 2016 (“the Guidelines”) provide 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.
14. The above guidelines have been reiterated in various cases including the case of *Republic v Karakacha* (Criminal Case 24 of 2020) [2023] KEHC 18737 (KLR) (21 June 2023) (Sentence).
15. The appellant pleaded before this court that all he wanted was that his sentences run concurrently and not consecutively.
16. On the 1st Count of rape, the punishment prescribed for the offence of rape in section 3 (3) of the *Sexual Offences Act* is a term which shall not be less than ten years but which may be enhanced to imprisonment for life. I thus find the sentence of ten years’ imprisonment that was meted herein was lawful.
17. On count 2 of defilement of a child age 13 years old, the *Sexual Offences Act* at section 8(3) provides for “liable to imprisonment for a term not less than twenty years” upon conviction of the offence of defilement of a minor aged between twelve and fifteen years. I similarly find that the sentence of twenty years’ imprisonment meted herein was lawful.
18. I however observe that the accused was a first offender and despite the mitigations, the trial court imposed the mandatory minimum sentences which though lawful but are mandatory in nature. For a while now since the Francis Karioko Muruatetu decision, courts have been frowning on mandatory sentences unless circumstances call for such sentences to be meted out, because such sentences deprive the court of discretion in sentencing having regard to mitigations and circumstances of each case and also deny the convicts the opportunity to mitigate. In this case, the appellant was a first offender and has only appealed against sentence. The offence committed against mother and child are heinous. He has urged the court to consider a less severe sentence as contemplate in Article 50(2) (p) of *Constitution* by either reducing the sentences and or ordering that the consecutive sentences imposed do run concurrently.
19. I have considered all the above and in my view, whereas the sentences imposed are lawful, the same are mandatory minimums. I exercise discretion and set aside the mandatory minimum sentences as imposed and substitute them with eight years imprisonment in count one and ten years imprisonment in count two and order that the sentences shall run concurrently as the offences were committed at the same place and time.
20. Signal to issue.
21. The lower Court file to be returned with a copy of this judgment.



22. This file is closed.

23. I so order

Dated, Signed and Delivered at Kisumu this 29th Day of January, 2024

R.E. ABURILI

JUDGE

