



**DS v Republic (Criminal Appeal E021 of 2021)
[2024] KEHC 244 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E021 OF 2021
CM KARIUKI, J
JANUARY 25, 2024**

BETWEEN

DS APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of Honourable P N Gichohi Chief Magistrate delivered on 9th November 2021 in the Chief Magistrate Court at Nyahururu SOA Case No. E016 of 2020)

JUDGMENT

1. The Appellant was charged with offence of defilement contrary to section 8(1) as read with section 8(3) of *Sexual Offence Act* No. 3 of 2006 and was sentenced to twenty (20) years imprisonment.
2. He was aggrieved by the trial court verdict thus lodged instant appeal and set out seven (7) grounds namely
 - i. That, am a man at my early age of my life and twenty-one [21] years old and twenty (20) years in prison will totally ruin my entire life and beg this honourable court to give me one more chance to build my life and be ambassador of anti crime.
 - ii. That, I beg this court to consider and treat me as first offender that was convicted with no plea of guilty and being not conversant to cases I was unable to defend myself and I turn to the mercies of this honourable court.
 - iii. That, I was born of single parent in a humble family where we depend on daily wages to survive I being key player.
 - iv. That, I pray this honourable court to consider giving me non-custodial sentence so that I can serve the sentence as well as build my future and too enlighten others about the consequence of crime as well sexually offences repercussion.



- v. That, my honour at my knees I wish to be present at the time of my mitigation hearing.
 - vi. Other grounds shall be adduced during hearing
3. The parties were directed to canvass appeal via submissions
- Appellant Submissions
- a. That he had earlier tendered his mitigation and still on his knees and remorseful before this Honourable court as he beg for leniency.
 - b. That have learned that ignorance has no defense in any given situation and plead to this court as first offender that he is not before this court to justify his deeds but to pray for second chance in his life.
 - c. That his live now lies on the hands of this court since its verdict will determine his future.
 - d. That he assure this honourable court that the same will not happen in his life again.
 - e. That he beg this honourable court to reduce his sentence to the period he have served as convicted prisoner and also the period he has spent in remand totaling two (2) years and one month.
 - f. That he will submit and much obliged with the decision of this honourable court and he will appreciate any positive move towards his sentence that will make his collect his life back.

Respondent Submission

4. The Appellant was charged with the offence of Defilement Contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.
5. Particulars being that on diverse dates between 8th and 13th day of October 2020 at [particulars withheld] area in Baringo County intentionally caused his penis to penetrate the vagina of LMK a child aged fourteen (14) years.
6. The prosecution called a total number of six witnesses and when the appellant was placed on his defence, he merely denied the offence and on critical analysis the entire evidence tendered in court, the Appellant was convicted and was on 9/11/2021 sentenced to 20 years imprisonment pursuant to Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 which prescribes the sentence.
7. Upon being dissatisfied with the whole of the said judgement, the Appellant preferred an Appeal as against conviction and sentence and enumerated several grounds in the Petition of Appeal.
8. However, vide his short submissions filed on January 16, 2023, the Appellant appears to have abandoned Appeal against conviction but has sought to challenge the sentence.
9. He has essentially sought reduction of the sentence and the court to consider the two years and one month period he has served as a prisoner and also the time he spent in Remand.
10. To start with, Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 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”.



11. Hence the Trial Magistrate's hands were tied by virtue of that punishment section which was rightly applied.
12. On the issue of computation of the period the Appellant was in remand to be catered for in the final sentence, I do submit that the Appellant was presented to court at the first instance on the 22.10.2020 when the plea was taken, he remained in custody until the 9/11/2021 when the sentence of 20 years was pronounced being a period of one year and 16 days, which period we are not objected to being reduced from the total number of years he was sentenced.
13. However, based on the decision in the case of *Joshua Gichuki Mwangi -vrs - Republic* in the Court of Appeal Criminal Case No. 24 of 2015 at Nyeri, the Appellate Court outlawed the mandatory sentences provided for in Sexual Offences and on respect to the instant case, the complainant was aged 14 years and the Appellant was sentenced to 20 years as provided for Under Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 which sentence is directly affected by this court of Appeal decision.
14. In the premises and based on the chronology of events, the Court can then exercise its direction based on the said Nyeri Court of Appeal decision and reduce the sentence appropriately based on the circumstances under which the offence was committed.
15. In the alternative, the Court can refer the matter back to the Chief Magistrates Court for resentencing.

Issues, Analysis and Determination

16. The court has gone through the record. First the accused filed homemade grounds of appeal then filed mitigation as his submissions. He was unrepresented.
17. There were unsettled issues in the matter vide the court records.
18. On accused age it was doubtful whether he was 18 at the time he allegedly committed the offence. He was saying he was about seventeen (17) the probation report annexed copy of immunization card alleged gathered during making post-conviction report indicated appellant was born on 15/7/2000 and offence committed between 8th and 13th October 2020 suggesting he may have been 18 years.
19. The examination reports by doctor dated 13/10/2021 indicated accused was apparently 18 years.
20. Thus, contradict the card report as he may have been below 18 when he allegedly committed the offences in July 15, 2000 on and above the contradiction the trial court in the judgment makes a finding.

Page 49. "There is no evidence to corroborate evidence of victim as alleged people said to be with her were not called.
21. Earlier on judgment page 47 noted:

"the evidence of Clinical Officer indicates that there was no evidence of defilement ,lit means there as no penetration. Though old broken hymen was noted.
22. The court however went ahead to invoke the provisions of section 124 (Proviso) of *Evidence Act* to say it believed the victim and convicted the appellant despite having found that many in view of the doubt corroboration was needed.
23. The contradiction for the victim's and Clinical Officers findings ought to have benefited the Appellant as it is trite law that where there is doubt in prosecution case, the benefit is credited on the accused side.
24. In the premise that the totality of evidence did not support conviction on offence of defilement.



25. In view of the above findings I find it apt to quash the proceedings and set aside the proceedings. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 25TH DAY OF JANUARY 2024

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C KARIUKI

JUDGE

