



**Tudo v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 1792 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E007 OF 2023
AC MRIMA, J
FEBRUARY 28, 2024**

BETWEEN

DAUDI TUDO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. K. Kenei, (Senior Resident Magistrate) in Kapenguria Senior Principal Magistrate's Court Sexual Offences Case No. E006 of 2022 delivered on 11th August, 2023)

JUDGMENT

Background:

1. Daudi Tudo, the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 17th November, 2021 and 13th January 2022 at West Pokot County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of N. C., a child aged fourteen (14) years old.
2. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that between the said dates and in the same place, the Appellant intentionally and unlawfully touched the buttocks, anus, breasts and vagina of N. C., a child aged fourteen (14) years old.
3. The Appellant faced a second count of Kidnapping/abducting with intent to confine contrary to Section 259 of the *Penal Code*. The particulars of the offence were that on 17th day of November 2021 at West Pokot County with intent to cause N. C. to be secretly and wrongfully confined, confined the said N. C.



4. The Appellant pleaded not guilty to the offences. He was tried and was eventually convicted of the offences defilement and kidnapping, abducting with intent to confine. He was sentenced to 15 years' imprisonment on the offence of defilement and to 7 years' imprisonment on the offence of kidnapping.
5. The sentences were to run consecutively. As such, the Appellant was sentenced to a total of 22 years in prison.

The Appeal:

6. Aggrieved by the sentence, the Appellant lodged the instant appeal. He impugned the sentence arguing that it was extremely harsh and that the sentences were instead to run concurrently.
7. Parties disposed of the appeal by way of written submissions. According to the Appellant's undated submissions, the Appellant expounded on the above grounds.
8. The Respondent on its part relied on its written submissions dated 1st November, 2023. It opposed the appeal in arguing that the offence was properly founded and sentence was not only lawful, but also appropriate.
9. The State urged for the dismissal of the appeal.

Analysis:

10. This being an appeal against sentence, the Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
11. I have considered this matter with caution and care. The trial Court was careful in the manner it conducted the sentencing proceedings. It then delivered a detailed and well-reasoned ruling. Several relevant decisions were cited.
12. The Court considered several parameters including the nature of the offence, the mitigation, among other relevant factors prior to sentencing the Appellant. Of importance is the fact that the Appellant was initially charged with defiling the victim in Sexual Offence Case No. E006 of 2022. When he was released on bond, he went ahead to impregnate the same victim and he was charged in Sexual Offence Case No. E004 of 2023.
13. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.
14. This Court does not see how the sentencing proceedings are to be impugned.



15. On the submission that the sentences in Sexual Offence Case No. E006 of 2022 do run concurrently, the attention of this Court is drawn to the law on the subject.
16. Sections 12 and 14 of the *Criminal Procedure Code*, Cap. 75 of the Laws of Kenya and Section 37 of the *Penal Code*, Cap. 63 of the Laws of Kenya provide for instances where sentences may run consecutively and concurrently.
17. Sections 12 and 14 of the *Criminal Procedure Code* provides as follows: -
 12. Any Court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.
 14.
 - (1) Subject to subsection (3), when a person is convicted over one trial of two or more distinct offences, the court may sentence him for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that punishments shall run concurrently.
 - (2) In the case of consecutive sentences, it shall not be necessary for the Court, by the reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent impose on conviction of a single offence, to send the offender for trial before a High Court.
 - (3) Except in case to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences-
 - a. of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or
 - b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.
 - (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.
18. Section 37 of the *Penal Code* provides as follows: -

37. Sentences when cumulative:

Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless



the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.

19. Delineating the legal considerations guiding the concurrent and consecutive sentences, the Court of Appeal in *Peter Mbugua Kabui v Republic* [2016] eKLR, where the Court referred to *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, *Ondieki v R* 1981 KLR 430, and in *Nganga v R*, 1981 KLR 530, the Court stated as follows: -

..... the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

20. In *B.M.N. v Republic* Criminal Appeal No. 97 of 2013 [2014] eKLR the Court of Appeal dealt with a similar situation and pronounced itself as follows: -

(15) As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

21. From the foregoing, it is imperative to understand what the phrase ‘same transaction’ means. In *William Kimani Ndichu v. Republic* [2015] eKLR, the Court of Appeal referred to *Rex v Saidi Nsubuga s/o Juma and Another* (1941) 8 EACA 81 and to *Nathani v R* (1965) EA 777, where the meaning of the phrase “same transaction” was defined as follows: -

If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.

22. Returning to the matter at hand, there is no doubt that the offence of defilement was committed between 17th November 2021 and 13th January 2022 and the offence of kidnapping with intent to confine was committed on 17th November 2021. Therefore, the Appellant kidnapped the victim on 17th November 2021 and confined her where he engaged into sex with her between the said 17th November 2021 and 13th January 2022.
23. To this Court, the acts of kidnapping and defiling the victim were so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction.
24. The Appellant’s plea that the sentences in the two offences do run concurrently is, therefore, tenable in the circumstances of this case. This was a case where the sentences were to instead run concurrently and not consecutively. As such, the appeal on the sentences is successful.

Disposition:

25. Drawing from the above discussion, it is apparent that the appeal fails.



26. In the end, the following orders do hereby issue: -

- a. The appeal on the sentences succeeds.
- b. The sentence of 15 years' imprisonment and that of 7 years' imprisonment shall instead run concurrently and not consecutively.
- c. The sentences shall run from the date of sentencing, that is on 11th August 2023, since the Appellant committed another sexual offence with the victim [and was subsequently convicted] when he was placed on bond/bail pending trial.
- d. The file is marked as Closed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 28TH DAY OF FEBRUARY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Daudi Tudo, the Appellant in person.

Mr. Mokaya, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Juma/Hellen – Court Assistants.

