



**Tudo v Republic (Criminal Appeal E009 of 2023)
[2024] KEHC 1783 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E009 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. E004 of 2023 delivered on 11 th 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(4) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 24th August, 2022 and 23rd January 2023 at Miskwony Location within West Pokot County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of NC, a child aged sixteen (16) 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, breasts and vagina of NC, a child aged sixteen (16) years old.
3. The Appellant pleaded not guilty to the offences. The trial began and mid-way the Appellant changed plea. The charges were again read out to him and he admitted impregnating the complainant. He also admitted to the facts of the case and was eventually convicted on his own plea of guilty. He was sentenced to 15 years' imprisonment.



The Appeal:

4. Aggrieved by the sentence, the Appellant lodged the instant appeal. He impugned the sentence arguing that it was extremely harsh and that the sentence and another sentence arising from a conviction in respect of a different sexual offence do run concurrently.
5. Parties disposed of the appeal by way of written submissions. According to the Appellant's undated submissions, the Appellant expounded on the above grounds.
6. 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.
7. The State urged for the dismissal of the appeal.

Analysis:

8. 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.
9. 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.
10. 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.
11. 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.
12. This Court does not see how the sentencing proceedings are to be impugned.
13. On the submission that the sentences in Sexual Offence Case No. E006 of 2022 and Sexual Offence Case No. E004 of 2023 do run concurrently, the attention of this Court is drawn to the law on the subject.
14. 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.



15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. Returning to the matter at hand, there is no doubt that the offence of defilement in Sexual Offence Case No. E006 of 2022 was committed between 17th November 2021 and 13th January 2022 and that in Sexual Offence Case No. E004 of 2023 was committed between 24th August 2022 and 23rd January 2023. There is no way one can imagine that the offences were committed in the same transaction.

21. The Appellant’s plea that the sentences in the two criminal cases do run concurrently is, therefore, untenable in the circumstances of this case.

22. The Appellant was, rightly so, sentenced.

Disposition:

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

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

- a. The appeal fails and is hereby dismissed.
- b. 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.

