



REPUBLIC OF KENYA



KENYA LAW
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**Ekai v Republic (Criminal Appeal 24 of 2018)
[2024] KEHC 1653 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 24 OF 2018
RN NYAKUNDI, J
FEBRUARY 23, 2024**

BETWEEN

SAMUEL EKAI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Conviction and Sentence of Hon. H. Barasa in Eldoret Chief Magistrate's Criminal Case (S.O) No. 88 of 2017 delivered on 6th April 2018)

JUDGMENT

1. The appellant 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 are that on the 11th day of May 2017, at [particulars withheld] area in Wareng district within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ of E.M, a child aged 7 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. Upon considering the evidence and the testimonies of the witnesses, the trial court convicted him of the main charge and sentenced him to life imprisonment. Being aggrieved with the conviction and sentence, the appellant instituted this appeal vide a petition filed on 16th April 2018 premised on the following grounds;
 1. That the trial court erred in law and in facts when it convicted him without appreciating that penetration was proved.
 2. That the trial magistrate failed in his/her legal mandate of evaluating the evidence before it and plainly went wrong in making unbalanced sentence.
 3. That the trial court failed when the age of the complainant was not proved.



4. That the appellant was not accorded a fair trial as envisaged under article 50 of *the constitution*.
3. The appellant filed written submissions on the appeal.

Appellant's Case

4. The appellant submitted that penetration was not proved as from the P3 form, the minor was sent to the hospital on 15th March 2017 and the time and date reported to the police was 13th May 2017 at 0710 hrs. further, that from the details in the form, it is indicated that the approximate age if the injuries and the date of alleged offence is 11th may 2017. He urged that this created a lot of doubt as to whether it was true or false. He cited the case of Timothy Mutua v Republic [1998] eKLR in support of this submission. He maintained that the evidence of the witnesses was that the offence occurred on 11th may 2017 whereas the P3 form indicates that the victim was sent to the hospital on 15th March 2017.
5. The appellant urged that the only proof of the age of the victim was the birth notification serial number which was uncorroborated. Further, that he was not accorded a fair trial as he was not supplied with witness statement. He urged that there were gaps in the prosecution case which creates doubt as to whether he committed the offence or not.
6. He prayed the court allow his appeal.

Analysis & Determination

7. As a first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See Njoroge v Republic [1987] KLR, 19 & Okeno v Republic [1972] E.A, 32.
8. Upon consideration of the petition of appeal, the grounds thereto and the submissions of the appellant, the following issues emerge for determination;
 - a. Whether the offence of defilement was proved beyond reasonable doubt
 - b. Whether the court should interfere with the sentence

Whether the offence of defilement was proved beyond reasonable doubt?

9. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
10. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
 - i. Age of the complainant;
 - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - iii. Positive identification of the assailant.



This was also set out in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

On this question of age, I am content to cite the case of Fappyton Mutuku Ngui v Republic [2012] eKLR where it was held:

... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

11. The victim was a child of tender years whose age was determined by the evidence of the mother who produced a birth notification serial number and a birth notification. The court also observed that she was a minor of tender years before conducting a *voire dire* on her.

PW3 produced the P3 form which showed that the complainant was defiled as the injuries were consistent with defilement. The P3 form stated that there were injuries on her external genitalia which were suggestive of vaginal penetration. I note that the report states that the examination was conducted on 13th May 2017 and that the offence occurred on 11th May 2017. The same is in tandem with the contents of the charge. In the premises, penetration was proved. The accused was identified by both the victim and her mother. Identification was by recognition.

12. I am in agreement with the finding of the trial court that the prosecution proved its case to the required standard.

Whether the court should interfere with the sentence?

13. The trial court sentenced the appellant to life imprisonment. Mandatory sentences in general have, by virtue of emerging jurisprudence, recently been declared unconstitutional. However, the courts have discretion to mete out sentences based on the circumstances of each case. The Court of Appeal in Criminal Appeal no. 84 of 2015 – Joshua Gichuki Mwangi v Republic [2022] eKLR held that;

“We acknowledge the power of the Legislature to enact laws as enshrined in *the Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.”

14. I also take note of the fact that the life sentence was deemed unconstitutional vide Criminal Appeal No. 12 of 2021 – Julius Kitsao Manyeso vs Republic where the Court of Appeal held that the life sentence subjects a prisoner to degrading and inhumane treatment. The term life imprisonment is used in various statute to cover different realities of a crime the important aspect is whether a life sentence is for the remaining period of the convict’s natural life is justified considering the flaws of our criminal justice system. I take note that in my recent visit to prisons one of the convict gave a testimony that serving life imprisonment in Kenya in absence of parole can be equated with torturous death. That it is better for one to even face the death penalty. My understanding of that episode is that the concept of life imprisonment as a mode of sentence is meant to confine a prisoner behind the walls of our



correctional facilities for life until death sets her/him free. That means literally that upon conviction by a trial court and an appeal being dismissed on this point a prisoner shall spend the rest of his or her natural life in prison the possibility of remission of sentence. May be in our jurisdiction that is why *Sexual Offences Act* and the Penal Code life imprisonment as a sentence following a criminal conviction is never specifically defined. Essentially, the word life denotes the life of a human being unless the contrary appears from the context of the law. As the mandatory death penalty was abolished by the Supreme Court in *Muruatetu vs Republic* (2017) eKLR likewise in the case of *Philip Mueke Maingi & 5 Others vs Director of Public Prosecution & AG HC Petition No. E017 of 2021* mandatory minimum sentence under the *Sexual Offences Act* were found to be unconstitutional. Life imprisonment under Section 8(1) & (2) of the *Sexual Offences Act* which remained a mandatory minimum sentence was in the same vein outlawed. The downsize of it life imprisonment as administered without the possibility of release contributed to the over use of imprisonment of sexual offenders convicted of the crime. Therefore, denying the prisoners entitlement of rights as other categories of prisoners imprisoned for terminable terms. The smarter approach in Kenya now is that there are sentences for the trajectory of being underpinned within the province of judicial discretion. The phrase in various penal statutes that denote shall be sentence to imprisonment for life has to be mitigated and varied by the courts judicial discretion. In the case of *S Vs Dodo* 2001 1 SACR 594 the Canadian Supreme Court formulated a test for proportionality to be a fair measure to determine the length of imprisonment which reads;

“The court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentence would have been appropriate to punish, rehabilitate or deter this particular offender... The other purposes which may be pursued by the imposition of punishment, in a particular the deterrence of other potential offenders, are thus not relevant at this stage of the enquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves.

At the level of an appeals court, the test to interfere with sentence is clearly outlined in the case of *Shadrack Kipchoge Kogo v Republic* CR. 253 of 2003 and here the court held:

“Sentence is essentially an exercise if the trial court to interfere, it must be shown that in passing the sentence, the court and for this court to interfere, it must be shown that in passing the sentence, the court looked into account an irrelevant factor 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.”

15. The logical corollary of the principles is that like should be treated alike under the right to equality and free from discrimination in Art. 27 of *the Constitution*. The exercise of broad discretion calls upon this court to interfere with life imprisonment sentence and have it substituted with a custodial sentence of 30 years taking into account the provisions of Section 333(2) of the CPC. To this end the appellant shall be entitled to the credit period spent in pre-trial detention to warrant an early release upon serving the appropriate sentence within the sentencing regime in our legal system. The committal warrant shall take into account the appellant was arraigned in court on 15.5.2017 and in terms of computation that becomes a relevant period.
16. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 23RD DAY OF FEBRUARY, 2024

In the Presence of:



Appellant in person

Mr. Mugun for the State

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R. NYAKUNDI

JUDGE

