



**Chondo v Republic (Criminal Appeal 8 of 2023)  
[2024] KEHC 16886 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 16886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CRIMINAL APPEAL 8 OF 2023  
F WANGARI, J  
MARCH 15, 2024**

**BETWEEN**

**AMANI MOHAMED CHONDO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Judgement of the Trial Court, Hon. Joy Mutimba, Resident Magistrate in Msambweni SRMCSO No. E062 of 2021 dated 29<sup>th</sup> March 2023.
2. The Appellant was charged with 2 counts of defilement contrary to Section 8(1) & (3) of the [Sexual Offences Act](#) No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#), 2006. He was also charged with the third count of subjecting a child to early child marriage contrary to Section 14 as read with Section 20 of the Children's [Act No. 8 of 2001](#).
3. The particulars of the first and second counts were respectively that on 17<sup>th</sup> and 18<sup>th</sup> August 2021 at around 0400hrs, at [Particulars Withheld] in Kibokoni Location of Mombasa County intentionally and unlawfully caused your penis to penetrate the vagina of SMJM, a child aged 15 years, and that on 17<sup>th</sup> and 18<sup>th</sup> August 2021 at around 0400hrs, at [Particulars Withheld] in Kibokoni Location of Mombasa County intentionally and unlawfully caused your penis to penetrate the anus of SMJM, a child aged 15 years.
4. On the 3<sup>rd</sup> count, the particulars were that on 16<sup>th</sup> August 2021, at [Particulars Withheld], Lungalunga Location of Kwale County, jointly with others not before court subjected SMJM to be married to himself a practice that is likely to affect negatively the SMJM's life, health and social welfare as a child aged 15 years.



5. The Accused person was arraigned in court and he denied the charges. A plea of not guilty was consequently recorded.
6. The Trial Magistrate, Hon. J. Mutimba, RM considered the case and rendered the Judgement on 29<sup>th</sup> March 2023. The Court found the Appellant guilty and convicted him of the offence. The Appellant was also sentenced to 51 years imprisonment.
7. The Appellant, aggrieved, lodged this Appeal.
8. The Appellant preferred 4 grounds. On the face of it, this Appeal is against sentence only. It is lamented that the sentence was unfair, harsh, excessive and failed to consider the period spend in custody. Largely, the Appellant challenges the imprisonment term of 51 years.

### **Evidence**

9. At trial, PW1, the minor testified that she was 15 years old. She told the court that her mother arranged for her early marriage to the Appellant and indeed on 16<sup>th</sup> August 2021, against her will, she was taken away to be married to the Appellant.
10. It was her case that the Appellant inserted his penis both to her anus and vagina and defiled her. That he had locked her in his house between 17<sup>th</sup> and 18<sup>th</sup> August 2021 when the unlawful acts were committed.
11. PW2 was the Clinical Officer. He confirmed that there were bruises to the labia and scratch marks to the anal region. He produced the P3 Form whose degree of injury was indicated as maim.
12. PW3 testified that he was the Investigating Officer. He testified that the results of the investigations pointed to the Appellant as offender and they arrested him.
13. The Appellant also testified. It was his case that he did not even know the Complainant.
14. I note that the complainant's mother was also charged and convicted on the offence of subjecting a child to early child marriage contrary to Section 14 as read with Section 20 of the Children's *Act No. 8 of 2001*. The Trial Court convicted and sentenced her to 12 months imprisonment with an option to pay Kshs. 50,000/= fine. On her part, she did not appeal.
15. Directions were given for parties to file submissions. I have not seen any submissions filed by either parties.

### **Analysis**

16. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as she did.
17. As earlier observed, this Appellant did not clearly plead any Ground of Appeal as against conviction. The Petition of Appeal details how the conviction to imprisonment of 51 years was harsh and unfair. All the four paragraphs thereof are about the sentence imposed by the Trial Court.
18. Even though the Appellant prayed to this court to quash the conviction and set aside the sentence, this was clearly not supported by the Grounds in Petition of Appeal. Nonetheless, I will endeavor to deal with both conviction and sentence to proffer a conclusive decision in this Appeal.



19. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

20. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

21. I note that the complainant testified that she was a minor aged 15 at the time of the alleged defilement. The Complainant identified the Appellant by recognition. The prosecution also proved both vaginal and anal penetration to the required standard.

22. It was held by the Court of Appeal in *Moses Nato Raphael vs. Republic* [2015] eKLR as doth:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in *Miller v. Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

23. On my reevaluation, I am in congruence with the finding of the Trial Court that the intentional and unlawful penetration was proved and the Appellant was the person who caused the said penetration, hence the offence. The evidence of PW2, the clinical officer confirmed the unlawful act.

24. I consequently have no reason to interfere with the finding of the Trial Court on conviction.

25. On sentence, the Trial Court imprisoned the Appellant to 20 years on the first count, 30 years on the second count and 1 year on the third count; all without the option of a fine. The sentences were to run concurrently taking into consideration the time spent in the remand.



26. In any case the sentence should be proportional. The Court of Appeal in the case of Thomas Mwambu Wenyi – vs- Republic (2017) eKLR stated as follows: -

“A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and hat the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence”.

27. I have perused the pre-sentence report. I am also alive to the Sentencing Guidelines. The Supreme Court has propounded them in Francis Karioko Muruatetu & Another v Republic (2017) eKLR. The following are guidelines with regard to mitigating factors before sentencing.

- (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

28. I am well guided that the Trial Court was not wrong in imposing a custodial sentence. I agree with the reasoning of the Trial Court that the family members and the community from which the Complainant came tremendously let her down and can no longer be trusted with mentoring her.

29. Therefore, the sentence of 20 years was in my view justifiable. However, the sentence of 30 years for the second count was in my view excessive. The offences arose out of the same transaction. I reduce the sentence of 30 years to 20 years. I will not disturb the sentence of 1 year on the third count.

30. In the circumstances, I make the following Orders:

- i. The Appeal on conviction is dismissed.
- ii. The sentence of 20 years on the 1<sup>st</sup> count is upheld.
- iii. The sentence of 30 years on the second count is set aside and replaced with 20 years' imprisonment.
- iv. The sentence of 12 months on the third count is upheld.
- v. The sentences shall run concurrently taking into account the time spent in remand.
- vi. Right of Appeal 14 days.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of: -



M/S Mwaura S.C for state

Appellant p.i.p

Barile, Court Assistant

