



**VO v Republic (Criminal Appeal E021 of 2022)
[2024] KEHC 4229 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E021 OF 2022
WM MUSYOKA, J
APRIL 26, 2024**

BETWEEN

VO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the sentence by Hon. Tina Awino Madowo, Resident Magistrate, RM, in Busia CMCSO No. E046 of 2020, of 6th April 2022)

JUDGMENT

1. The appeal herein arises from the conviction and sentence of the appellant in Busia CMCSOC No. E046 of 2020, where the appellant had been sentenced to 20 years' imprisonment.
2. From the petition of appeal on record, dated 19th May 2022, and filed herein on 20th May 2022, the appellant appeals only against the sentence, and not the conviction, on grounds that the sentence is harsh and excessive, he is a first offender, and he has a young family.
3. Is the sentence excessive? I do not think so. The conviction and sentence were based on section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, where the victim of the sexual assault is a minor aged between 12 and 15, the penalty should be no less than 20 years. The hands of the trial court were tied, and upon conviction, the court awarded the lowest possible sentence in the circumstances. The trial court cannot be faulted in the manner it exercised discretion in the circumstances.
4. The sentence was imposed after the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), which pronounced mandatory sentences unconstitutional, and which was subsequently clarified in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ), that it did not apply to sexual offences. However, the principle in *Francis Karioko Muruatetu & another v Republic*



[2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) was followed in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), which declared the mandatory minimum sentences, under the *Sexual Offences Act* unconstitutional, and extended discretion to trial courts, to impose sentences other than those prescribed in the Act. It appears that the trial court did not follow those 2 High Court decisions. Perhaps, the court was unaware of them, or the same were not brought to its attention.

5. As the 2 decisions have opened the doors for exercise of discretion, I will apply them in this appeal, to re-visit the sentence that was imposed on the appellant herein.
6. From the trial court record, I note that the appellant was given a chance to make a statement in mitigation, which he utilized, by saying that his wife had died, leaving him with 2 children. At the next appearance, he said his child had passed away. In the 2 occasions that he made statements in mitigation, he did not express any remorse, for he continued to deny the offence. The prosecution, however, described him as a first offender. His statement in mitigation was consistent with the pre-sentence report placed on record, dated 24th June 2022.
7. I will take into account the fact that he is a first offender, he is a young person, who is already a widower, left with 2 children to take care of. I will exercise discretion, and reduce his 20-year sentence to 10 years' imprisonment. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 26TH DAY OF APRIL 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. VO, the appellant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

