



REPUBLIC OF KENYA



KENYA LAW
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**Nyongesa v Republic (Criminal Appeal 95 of 2021)
[2024] KEHC 6178 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL 95 OF 2021**

DK KEMEL, J

MAY 30, 2024

BETWEEN

PIUS JOSEPH NYONGESA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon G.P Omondi in
Bungoma Chief Magistrate's Court S.O No. 130 of 2020 dated 16.9.2021.)*

JUDGMENT

1. The Appellant, Pius Joseph Nyongesa, was charged with an offence of defilement contrary to section 8(1) as read with section (4) of the [Sexual Offences Act](#). The particulars of the offence were that on 29th November 2020 at Bumula Sub-County within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of J.O, a child aged sixteen (16) years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) with the particulars being that at Bumula Sub-County within Bungoma County, he intentionally and unlawfully caused his penis to come into contact with the vagina of J.O, a child aged sixteen (16) years.
2. After a full trial, he was convicted on the main count and sentenced to serve fifteen years' imprisonment which was to commence from the date of his arrest by Hon G. P. Omondi (PM).
3. He was aggrieved by the conviction and sentence and filed the instant appeal. The Appellant later amended his grounds of appeal and sought to appeal only against the sentence. The two grounds raised by the Appellant are that the sentence imposed is harsh and that he is remorseful and seeking mercy and leniency from this court. This simply means that this appeal shall be focused solely on the sentence.



4. Vide directions dated 19th May 2023, this Court directed parties herein to canvass this appeal by way of written submissions. The appellant through his submissions filed on 15th June 2023 submits that the 15 years sentence as meted out by the trial Court be replaced by a lesser sentence. He submitted that during the two years he has been in prison, he has fully reformed and rehabilitated and that the time served ought to be considered as sufficient punishment. He submitted that 15 years sentence for a first offender is very excessive and harsh and that he is remorseful. He relied on the case of *Hezekiah Mwaura Kibe vs Republic* (1976) KLR 118.
5. The Respondent through its counsel opposed the appeal. It was submitted that this Court ought to uphold the law as the same was followed when the Court issued a sentence of 15 years. Learned counsel further submitted that the aim of the sentence was deterrence and to eradicate the society of such predators as the Appellant herein.
6. As regards sentence, it is noted that the Appellant was sentenced to serve 15 years' imprisonment. He has contended that the same is harsh and excessive. The *Sexual Offences Act* created sexual offences of a different nature and wider in scope and imposed more severe sentences. Section 8(1) as read with section 8(4) of the *Sexual Offences Act* provides as follows:

“ 8.

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

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

7. The victim herein was found to be aged approximately seventeen (17) years old after an age assessment was conducted on her and hence the sentence imposed fell within the age bracket.
8. In *Wanjema v Republic* [1971] EA 493, the predecessor of this Court stated that: -

“ [The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

9. The Court of Appeal for East Africa in the case of *Ogolla s/o Owuor v Regina* [1954] 21 270 as follows: -

“ The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.*, [1950] 18 E.A.C.A 147:

“ It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewky*, [1912] C.C.A. 28 T.L.R. 364.”



10. Even though the mechanical nature of mandatory sentences may promise certainty of severity of sentences, it is often at the expense of proportionality and an individualized approach to sentencing which balances between deterrence and the rehabilitation of an offender. In *Daniel Kipkosgei Letting Vs. Republic* [2021] eKLR the Court pronounced itself as follows;

“With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard, we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.”

11. It is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of *the Constitution*. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of *the Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of *the Constitution*. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited. This was well articulated by this Court in *Dismas Wafula Kilwake Vs. Republic* [2019] eKLR as follows;

“Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

12. In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons. The record indicates that the Appellant was given an opportunity to mitigate. Further, a pre-sentence report dated 15.9.2021 confirmed that the appellant does not take responsibility for the offence and is thus not remorseful for the offence. I find the trial court exercised its discretion and passed an appropriate sentence in the circumstances. The circumstances of the offence revealed that the Appellant took advantage of the victim who had suffered from epilepsy and had fallen on the road and ferried her on his motorcycle to his house and defiled her. The victim was obviously affected. A deterrent sentence was necessary in the circumstances due the conduct of the Appellant. Indeed, the sentence imposed was the minimum possible in law. I see no reason to interfere with it.

13. In the result, it is my finding that the Appellant’s appeal lacks merit. The same is dismissed.

It is so ordered.



DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF May 2024.

D. Kemei

Judge

In the presence of:

Pius Joseph Nyongesa Appellant

Miss Kibet for Respondent

Kizito Court Assistant

