



**SOO v Republic (Criminal Appeal 171 of 2017)
[2022] KECA 1295 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1295 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 171 OF 2017
W KARANJA, F TUIYOTT & JM NGUGI, JJA
NOVEMBER 23, 2022**

BETWEEN

SOO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Homa Bay (D.S. Majanja, J) Dated 19th October, 2015.in Hccr 4 of 2015)

JUDGMENT

1. If not held for any other lawful reason, SOO (the appellant, will have his freedom today thanks to the final order we shall presently make.
2. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006(the Act). He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of said Statute. We need not set out the particulars of the offence.
However, it is enough to note that the complainant was aged 16 years at the time of the alleged offence.
3. After trial, he was convicted on the alternative charge and sentenced to serve 10 years' imprisonment. Dissatisfied with the conviction and sentence, he appealed against the decision of the subordinate court.
4. In a twist that must have shocked the appellant, Majanja, J “allowed” the appeal to the extent that the original conviction for indecent assault was substituted for defilement and the appellant was sentenced to 15 years' imprisonment. His “success” was more costly than a pyrrhic victory!



5. The appellant is now before us on a second appeal. To be gleaned from the memorandum of appeal filed on 11th September 2020 is that the appeal is only against sentence. This was indeed reiterated by the appellant at plenary hearing today.
6. The submissions made in support of the appeal reads like a statement in mitigation.
In brief, the appellant says he was a young man of 18 years at the time he committed the offence and is remorseful. He states that his stay in incarceration has been a time of reflection, reformation and rehabilitation. He gives instances of reform; an award of Diploma certificates from Emmanuel Bible School, and Lamp and Light Bible Correspondence. He has acquired skills in carpentry and joinery.
7. Mr Okango, learned Prosecution Counsel was gracious in his response. He conceded to the appeal. He thought the imposition of an enhanced sentence after the substituted conviction to be without a basis because as there was no cross appeal nor was the appellant given notice (written or oral) of the possibility of a more severe sentence.
8. On our part, we have enough reason to reduce the sentence imposed even without discussing the legality of the sentence imposed by the first appellate court. We are now post the Supreme Court decision in *Francis Kariokio Muruatetu and another vs Republic* [2017] eKLR and the application of its rationale to the sentences under the *Sexual Offences Act* reached in the High Court decision of *Philip Mueke Maingi Vs DPP* [2022] eKLR. A position long held by this Court. There is opportunity to relook at the sentence from the prison that the prescribed minimum term of 15 years is not indeed the minimum sentence available for the offence for which the appellant was finally convicted.
9. When we do so, we think the term served by him to be sufficient punishment for his youthful indiscretion. He has served 8 ½ years. We count this period from 15th May, 2014 as the appellant was in custody even during trial. We have considered that he is remorseful and has reformed. While it can never be an excuse for him to have defiled a minor, and we cannot possibly trivialize the seriousness of the offence, we think that the three year age difference between the victim and the appellant being of ages 16 years and 19 years old respectively at the time of the offence is somewhat a comfort to us the sentence we have imposed is proportionate punishment for his transgression.
10. Ultimately, we reduced the sentence of 15 years' imprisonment to the term already served. The appellant shall be released forthwith unless held for some other lawful reason.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF NOVEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

