



**Mukhwana v Republic (Criminal Appeal E017 of 2023)  
[2024] KEHC 11337 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11337 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CRIMINAL APPEAL E017 OF 2023  
AC MRIMA, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**SAMUEL MUKHWANA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal on sentence by Hon. Kipchumba Kenei, Senior Resident Magistrate in Kapenguria Principal Magistrate's Court Criminal Case No. 1928 of 2015 delivered on 25th October, 2023)*

**JUDGMENT**

1. The Appellant herein, Samuel Mukhwana, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. He denied the offence and a trial was held where he was found guilty as charged, convicted and sentenced to life imprisonment.
2. The Appellant filed an appeal being High Court at Kapenguria Criminal Appeal No. 19 of 2016. The appeal was dismissed.
3. The Appellant later filed a Constitutional Petition where the life sentence was set-aside and the Appellant was ordered to be re-sentenced.
4. On 25<sup>th</sup> October, 2023, the Appellant was re-sentenced to 40 years imprisonment.
5. The Appellant lodged the instant appeal against the re-sentencing.
6. In his submissions, the Appellant claimed that the sentence was very harsh. He prayed for a lesser sentence.
7. The State opposed the appeal by filing written submissions.



8. This Court is the first appellate Court.
9. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
10. Section 8(2) of the *Sexual Offences Act* provides as follows: -

Any person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
11. Being cognizant of the recent decision by the Supreme Court of Kenya in *Petition No. E018 of 2023 Republic -vs- Joshua Gichuki Mwangi*, the Appellant was, rightly so, sentenced to life sentence by the trial Court in the first instance. The sentence of 40 years imprisonment now in place runs contra the Supreme Court decision.
12. In this appeal, the prosecution vehemently argued that the sentencing Court did not have discretion to hand down any other sentence other than the one in Section 8(2) of the *Sexual Offences Act*; being life imprisonment.
13. In line with the decision in *Republic -vs- Joshua Gichuki Mwangi* case (supra), the sentence of 40 years imprisonment cannot stand. The Respondent's argument wins the day.
14. The appeal on reducing the sentence, therefore, fails and the sentence is accordingly enhanced.

**Disposition:**

15. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
16. Consequently, the following final Orders hereby issue: -
  - a. The Appeal against the sentence by the Appellant is hereby dismissed.
  - b. The sentence of 40 years' imprisonment imposed on 25<sup>th</sup> October 2023 in Kapenguria Principal Magistrate's Court Criminal Case No. 1928 of 2015 is hereby set-aside and substituted with life sentence.
  - c. The file is hereby marked as Closed.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**



Judgment delivered virtually and in the presence of: -

Samuel Mukhwana, the Appellant in person.

Mr. Majale, Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

