



**Magio v Republic (Criminal Appeal E018 of 2021)
[2024] KEHC 14948 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E018 OF 2021
WM MUSYOKA, J
NOVEMBER 28, 2024**

BETWEEN

PATRICK NYANGU MAGIO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, in Busia CMCSO No. E054 of 2021, of 12th July 2021)

JUDGMENT

1. The appellant, Patrick Nyangu Magio, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(3) of the [Sexual Offences Act](#), Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the charge were that on 25th March 2021 within Busia County, he intentionally caused his penis to penetrate the vagina of LA, a child aged 13 years. The appellant denied the charges, and a trial ensued, where 8 witnesses testified.
2. PW1, LA, a Class 6 pupil, was out collecting firewood with other children, when she stumbled upon the appellant, who chased her with a panga, and undressed her. She was rescued by a woman, who took her home. PW2, GK, was with PW1, when the appellant emerged. She heard screaming. PW3, MN, was with PW1 and GK, and others, when the appellant emerged, with a panga, accusing them of stealing firewood. She testified that the appellant raped V, and she was crying. PW4, MAW, was the mother of PW1. The woman who had rescued PW1 telephoned her, to inform her that PW1 had been defiled. She instructed her to take PW1 to a health facility, where she later joined her. She found PW1 bleeding heavily, and could not walk. She was transferred to a bigger hospital, where she was admitted, for 4 days, amidst heavy bleeding. PW1 narrated to her what happened.



3. PW5, Kizito Murunga Aluko, was the clinical officer, who attended to PW1, who had come with a history of defilement. She was bleeding, was admitted and stitching was done at the theatre, to end the bleeding. PW6, No. 238806, Police Constable Moses Manganya, received the report of the defilement, from PW4, and escorted PW1 to medical facilities. He also escorted the appellant to the same facilities. PW7, No. 110479, Police Constable Yegon, was the arresting officer. He re-arrested and rescued the appellant, from members of the public, who had cornered him, and were beating him, accusing him of defilement. PW8, No. 110724, Police Constable Lilian Twala, was the investigating officer. She visited the scene, and recovered clothes and a panga.
4. The appellant was put on his defence, vide a ruling that was delivered on 14th June 2021. He made a sworn statement, on 25th July 2021. He denied the charges.
5. In its judgment, delivered on 12th June 2021, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to 20 years imprisonment, which was described as mandatory, on the same date.
6. The appellant was aggrieved, and brought the instant appeal, revolving around the charge being bad for duplicity; the evidence being contradictory and amounting to hearsay; the expert evidence lacking probative value; the defence being disregarded; and violations of Articles 49 and 50 of *the Constitution*.
7. The appeal was canvassed, by way of written submissions. I have seen submissions by the appellant, but not those by the respondent. I have read through the written submissions filed by the appellant, and taken note of the arguments made.
8. The appellant submits only on the sentence, stating that he was not seeking review of the evidence on record, as he was not contesting the conviction. He submits that the sentence of 20 years was a minimum mandatory sentence, which denied him a fair hearing, as the discretion of the trial court was impaired. He cites Daniel Onyango Ochar vs. Republic KEHC 3887 (KLR) (Aburili, J), Dismas Wafula Kilwake vs. Republic [2019] KECA 5 (KLR)(Musinga, M'Inoti & Murgor, JJA), GK vs. Republic [2021] KECA 232 (KLR)(Musinga, Makhandia & Sichale, JJA), Maingi & another [2022] KEHC 13118 (KLR)(Odunga, J), Joshua Gichuki Mwangi vs. Republic [2022] eKLR (Mativo, J), Richard Ochieng Orwa vs. Republic [2021] KEHC 4633 (KLR) (F. Ochieng, J), David Ochami Odinga vs. Republic [2020] KEHC 8231 (KLR) (Cherere, J) and Republic vs. Ahmad Abolfathi Mohammed & Sayed Mansour Mousavi [2018] KECA 820 (KLR) (Nambuye, Musinga & Gatembu, JJA). He also submits that he spent 4 years in remand custody, and that since his imprisonment he has reformed, for he has undertaken religious studies while in prison.
9. A conviction, for defilement of a minor of 13 years, attracts a mandatory minimum sentence of 20 years imprisonment, according to section 8(3) of the *Sexual Offences Act*. Mandatory and minimum sentences for sexual offences were declared unconstitutional in Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J).
10. The appellant pleads, no doubt going by Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J), that the trial court ought to have exercised discretion, by taking into account mitigating or extenuating circumstances. In mitigation, the appellant had stated that he was a first offender. A probation report was not called for, and, in sentencing, the trial court pronounced that the sentence prescribed was mandatory.
11. The appellant, no doubt, did not benefit from discretion by the trial court, for the hands of the court were hamstrung by the mandatory minimum sentence prescribed. No probation report was called for,



ostensibly as it would not have helped much, given the mandatory nature of the prescribed sentence. I note that the appellant has sought to make statements in mitigation in his written submissions.

12. However, *Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021* (Mativo, J) are no longer good law. The Supreme Court has pronounced itself on them, in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), where it was declared that the minimum mandatory sentences, provided by certain laws, remain lawful and constitutional.
13. Had *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) not declared *Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021* (Mativo, J) to be no longer good law, I would have revised the sentence imposed by the trial court. As it is now, that discretion has been lost. My hands are tied. As the appeal turns only on sentence, I shall hold that it has no merit, and I hereby dismiss it, and confirm the sentence imposed by the trial court. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 28TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Patrick Nyangu Magio, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

