



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lemong v Republic (Criminal Appeal E057 of 2021)  
[2023] KEHC 19499 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19499 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E057 OF 2021  
GMA DULU, J  
JUNE 29, 2023**

**BETWEEN**

**DANIEL NGOMA LEMONG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Magistrate's Case No. 9  
of 2020 at Voi Law Court on 17th November, 2020 by Hon. D. Wangeci - PM)*

**JUDGMENT**

1. The appellant was convicted by the Magistrate's Court on a recorded plea of guilty to defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to 20 years imprisonment.
2. He has now come to this court on appeal and relied on the following amended grounds:-
  1. That the learned trial Magistrate erred in law in convicting and sentencing him yet failed to find that his constitutional rights to a fair trial under Article 50(g) and (h) were violated.
  2. The learned Magistrate erred in law and fact by failing to find that the prosecution did not discharge its duty pursuant to Section 107 of the [Evidence Act](#).
  3. The learned trial Magistrate erred in law and fact by failing to adequately analyze the appellant's defence in addition to his application for the conduct of DNA test.
  4. The sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by statute and failed to consider the appellant's mitigation and the facts and circumstances unique to the case.



3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions. I note that both sides have relied on decided court cases. I have also perused the proceedings.
4. The appellant has raised both technical and substantive grounds of appeal. I will deal with the technical grounds first.
5. The technical ground is that the appellant's rights to fair hearing under Article 50(g) and (h) of the Constitution were violated. The relevant provisions of the Constitution relied upon by the appellant state as follows:-

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- (2) Every accused person has the right to a fair trial, which includes the right –
  - (g) To choose, and be represented by an advocate, and be informed of this right promptly.
  - (h) To have an advocate assigned to the accused person by the State at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.
6. Having perused the record of proceedings in the trial court, I note that the appellant was first brought to the Magistrate's court on 29<sup>th</sup> April, 2020 and pleaded not guilty to the charge and was granted bond. The case was then mentioned several times, and on 17<sup>th</sup> November, 2020 the appellant indicated that he wanted to change his plea, and even after being informed by the court of the seriousness of the sentence under Section 8(3) of the Sexual Offences Act, he maintained his plea to guilty to the charge.
7. In my view, though the appellant was not specifically not informed by the trial court of his right to legal representation, that default by the trial court was not fatal to the proceedings, as there is no indication on record that he did not know of his right to legal representation.
8. Turning to Article 50(g) of the Constitution, it is clear from the Constitutional provisions that the State is only obliged to provide legal representation to an accused at its own cost in cases where substantial injustice would otherwise result. Presently, the State provides such free legal services to murder and robbery with violence suspects, and not those charged with sexual offences like the appellant. The appellant has also not shown or demonstrated any substantial injustice was likely to result to him, or that resulted to him at the trial, as he was sufficiently warned by the trial court about the serious consequences of him pleading guilty.
9. I thus find that the ground of appeal on fair hearing has no merits and I dismiss the same.
10. Grounds 2 and 3 relate to proof of the offence charged beyond reasonable doubt. In my view, this ground also has to fail because from the record, the appellant pleaded guilty to the main count of defilement even after being warned of the severity of the sentence by the trial court. Facts were then given by the prosecutor, which facts the appellant accepted, before he was finally convicted by the trial court.
11. It is of note also that the appellant has not specifically challenged his plea of guilty, but has come to this court giving an impression that a full trial was conducted and witnesses did not tender adequate evidence, and DNA examination was not done or considered, which is not the factual position. This in my view, is an attempt to mislead this court.



12. In my view, the conviction on his plea of guilty was entered properly and was unequivocal as it complied with the steps enumerated in the case of *Adan v Republic* (1973) EA, for recording a plea of guilty.
13. I thus find that grounds 2 and 3 of appeal, have no merits, and I dismiss the same.
14. Ground 4 of appeal relates to the sentence. On this ground, the appellant has relied on the *Constitution*, Article 50(2) (p) on the right of an accused to benefit from least severe punishment provided by law for an offence, and several cases, including the reasoning of the Supreme Court in the case of *Francis Karioko Mumatetu & Others v Republic* (2017) eKLR.
15. Indeed, in the present case, the appellant was handed down the minimum statutory sentence. I will be guided by the reasoning in the persuasive High Court decision in Machakos High Court Petition E017 of 2021 *Maingi & 5 others v DPP* (2022) eKLR in which Odunga J. as he then was stated as follows:-
  - i. To the extent that the *Sexual Offences Act* prescribes mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fell foul of Article 28 of the *Constitution*. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be mandatory minimum prescribed.
  - ii. Taking tune from the decision in *Francis Karioko Mumatetu & Another v Republic* (2017) eKLR those who were convicted of sexual offences and whose sentences were passed on the basis of minimum sentence were at liberty to petition the High Court for orders of resentencing in appropriate cases.”
16. In my view, even though this is an appeal but not a constitutional petition, which was filed in 2021 before the decision of the Machakos High Court (*Maingi case*) above, which challenged the mandatory minimum sentences, this court has jurisdiction to deal with and determine the appropriate sentence herein.
17. In considering the appropriate sentences I note that the appellant was a first offender, and pleaded guilty to the charge and did not waste court’s time and saved government expenses of bringing and putting witnesses in the dock to testify. However, the facts of the case were such that the appellant ran after, grabbed and forcefully had sexual intercourse with an innocent and defenceless girl, who had gone out with other girls to fetch firewood. Such was a beastly and demeaning act on the complainant or victim.
18. In my view, the sentence imposed by the Magistrate herein was appropriate and not excessive. I will thus dismiss the appeal on sentence.
19. Consequently and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence. Right of appeal within 14 days explained.

**DATED, SIGNED AND DELIVERED THIS 29<sup>TH</sup> DAY OF JUNE 2023 IN OPEN COURT AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

The appellant

Mr. Sirima for State

Mr. Otolo court assistant

