



REPUBLIC OF KENYA



**Mwandikwa v Republic (Petition 219 of 2019)
[2022] KEHC 14654 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 219 OF 2019
A. ONG'INJO, J
OCTOBER 24, 2022**

BETWEEN

JOHNSTON MAKAU MWANDIKWA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner herein sought that the court includes his pre-sentence custody period in the sentence meted out in the trial court.
2. The petition was supported by affidavit sworn by the petitioner.
3. A perusal of trial courts sentencing proceedings indicates that the Petitioner was sentenced to 20 years imprisonment after the trial Magistrate considered his mitigations, the fact that he is a 1st Offender and the fact that he had spent considerable time behind bars during trial.
4. The trial Magistrate however observed that the offence was serious & applicant's actions were callous considering that the victim of his actions was a girl aged 10 years who had been thrust to the realm of adulthood & her innocence taken away.
5. When the applicant lodged appeal in HCCRA No. 60 of 2013 against sentence the Hon. Justice Njoki said that the trial Magistrate left nothing to chance & meticulously addressed all issues he was required to before he sentenced the appellant. The Judge observed that no loophole was left which she could resort to so as to exercise discretion in favour of the appellant. She upheld the sentence of 20 years imprisonment imposed against the appellant.
6. I noticed that in Appeal no. 60 of 2013 the Office of Director of Public Prosecution had filed a notice dated 27/08/2018 to re-enhance sentence under Section 354(3) (a) (i) & (ii) but having failed to address the same in their submissions the Judge concluded that they had abandoned the same.



7. Section 8(2) of the *Sexual Offences Act* under which the applicant was charged & convicted provides:-
“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.
8. The trial Magistrate therefore exercised leniency in sentencing the applicant to 20 years imprisonment instead of life imprisonment mention any other higher sentence.
9. As stated by Hon. Lady Justice Njoki J in CR. Appeal No. 60 of 2013 there is no loophole to unsettle the finding of the trial Magistrate on sentencing. Petition herein is therefore dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF OCTOBER 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court assistant

Mr. Ngiri for state

Petitioner – present in person

HON. LADY JUSTICE A. ONG'INJO J

24/10/2022

