



**AOO v Republic (Criminal Appeal E035 of 2022)
[2025] KEHC 2008 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2008 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E035 OF 2022
WM MUSYOKA, J
FEBRUARY 21, 2025**

BETWEEN

AOO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. PA Olengo, Senior Principal Magistrate, SPM, in Busia CMCSOC No. E097 of 2022, of 17th October 2022)

JUDGMENT

1. The appellant, AOO, 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 3rd October 2022 within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of CA, a girl aged 14 years. The appellant pleaded guilty to the charge, on 4th October 2022, and was convicted on 17th October 2022, and sentenced to serve 30 years in prison.
2. He was aggrieved, and brought the instant appeal, against the sentence, revolving around the trial court not considering that he was a first offender; not considering his mental status before imposing sentence; and not considering his mitigation.
3. Directions were given on 8th May 2024, for canvassing of the appeal by way of written submissions. The only written submissions I see in the record were filed by the appellant. In addition to the grounds in his petition of appeal, that the sentence was harsh, he raises other grounds, around not being warned that the penalty for the offence was heavy, not being given an opportunity to communicate with his Advocate and not being informed of his right to counsel.



4. The typescript, or the typed proceedings, do not accurately capture the purport of the handwritten notes made by the trial court, and I have largely relied on the handwritten notes.
5. The offence was allegedly committed on 3rd October 2022, and the appellant was apprehended the same day, and was produced in court the following day, 4th October 2022. The charges were read to him the same day, and he pleaded that they were true. The facts were not read out to him, for the case was put off to 6th October 2022 for the facts. On 6th October 2022 the matter was again put off to 11th October 2022. On 11th October 2022, the trial court cautioned the appellant of the minimum sentence, and once again put off the matter to 17th October 2022, when the facts were read to him, and he stated that the facts as read to him were true. He was accordingly convicted. He made a statement in mitigation, and sentence was pronounced.
6. Was the plea-taking exercise, where the appellant pleaded guilty to the charge, mishandled? I do not believe that it was. The trial court was aware of the gravity of the matter, given the hefty sentence, a minimum of 20 years in jail, should the appellant be convicted. The matter was adjourned or put off 3 times for facts, which should have given the appellant adequate time to reflect over the matter and engage an Advocate if he so desired. In addition, the trial court took the trouble of cautioning him of the minimum sentence, on 11th October 2022, and adjourned the matter to give him time to think it over. I am not persuaded that the matter was hurried, and the appellant had not been given a chance to exercise the options open to him, inclusive of changing plea and obtaining legal representation.
7. On the sentence being harsh and excessive, the offence created under section 8(3) of the *Sexual Offences Act* protects minors between the ages of 12 and 15, and the penalty it prescribes, for those who defile children in this age-bracket, is a minimum of 20 years imprisonment. There is no upper limit, and, therefore, there is wide discretion, and the sentence of 30 years imprisonment cannot be said to be out of the ordinary.
8. The trial court did not attempt to explain the sentence. The prosecutor urged that the appellant be treated as a first offender. The appellant mitigated, stating that he had children, some in Class 8 and others in Form 2. Being a first offender often elicits leniency, and so does the prospect of the children of the offender being rendered destitute, by imposition of a harsh or lengthy custodial sentence on their parent. That ought to be counterbalanced against the circumstances and consequences of the offence.
9. The appellant was a family man, with children of the same age as the complainant in this case. For a married man, why prey on underage primary school girls? A family man, with children of the same age as the one the appellant defiled, would be expected to do better, in terms of protecting and nurturing them, rather than violating them. The fact that the appellant could prey on his children's age-mate would be signal that his own, if they include daughters, would not be safe with him. I am not persuaded that the sentence imposed did not fit the crime.
10. He has raised the issue of his mental state at the time of the commission of the offence and argues that the trial court ought to have considered that. The appellant made a statement in mitigation, before he was sentenced. That would have been the perfect opportunity for him to raise that. He did not. There was no way the court would have known about his mental state, unless it was brought to its attention, and the best person to do so could only be him. He is raising it too late in the day. In any event, he has not provided any material to support his assertion about his mental state at that time.
11. The appellant could have benefited from the decisions in *Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021* (Mativo, J), which had rendered mandatory minimum and maximum sentences, prescribed for sexual offences under the *Sexual Offences Act*,



- unconstitutional. However, those decisions have now been declared to be bad law, in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (Koome CJ, Ibrahim, Wanjala, Ndung’u & Lenaola, SCJJ).
12. However, he should benefit from *Julius Kitsao Manyeso v Republic Malindi* CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), which declared life imprisonment unconstitutional; and in *Evans Nyamari Ayako vs. Republic Kisumu* CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA), which declared that life imprisonment translated to 30 years. These 2 decisions are consequential, in that the maximum punishment for a person, who defiles a minor of 11 years and below, is life imprisonment, according to section 8(2) of the *Sexual Offences Act*. The application of *Evans Nyamari Ayako v Republic Kisumu* CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA), would reduce that to a maximum of 30 years imprisonment, which would overlap with the sentence prescribed under section 8(3), which, by design, should be lower than that prescribed for the offence under section 8(2).
 13. The decisions in *Julius Kitsao Manyeso vs. Republic Malindi* CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA) and *Evans Nyamari Ayako v Republic Kisumu* CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA) were not affected by *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung’u & Lenaola, SCJJ). The appellant should benefit from a re-alignment of his sentence to those 2 decisions, and, as a result, I hereby reduce it to the minimum prescribed under section 8(3), which is 20 years imprisonment.
 14. The appeal herein succeeds to the limited extent stated in paragraph 13 hereabove, and it is disposed of in those terms. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 21ST DAY OF FEBRUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. AOO, the appellant, in person.

Advocates

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

