



REPUBLIC OF KENYA



**KENYA LAW**  
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**WNO v Republic (Criminal Appeal 93 of 2019)  
[2025] KEHC 1365 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1365 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 93 OF 2019  
AC BETT, J  
FEBRUARY 11, 2025**

**BETWEEN**

**WNO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against sentence from the decision of Hon. M. I. Shimenga  
(RM) in Butere SPMC.S.O. No. 9 of 2018 delivered on 14th day of August 2019)*

**JUDGMENT**

**Background**

1. The Appellant WNO was convicted of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The particulars of the offence were that on the 6<sup>th</sup> day of April 2018 at (particulars withheld), he intentionally caused his penis to penetrate the vagina of LA a child aged 8 years.
3. Upon conviction, the trial court called for a pre-sentence report and after considering the Appellant's mitigation and the pre-sentence report, sentenced the Appellant to fifteen (15) years imprisonment.
4. The Appellant was aggrieved by the sentence imposed upon him and filed a petition of appeal in which he set out the grounds of appeal as follows:-
  1. That, due to the section of law the sentence is harsh and humbly pray for review of the said sentence.
  2. That, I be served with the trial proceedings to enable me erect more grounds.



## Summary Of The Case

5. The case against the Appellant was that on the 6<sup>th</sup> day of April 2018, he took his 8 years old grandchild to his house after separating her from her brother under the pretext that he was taking her there so that he could give her pineapples. At the house, the Appellant started caressing her chest and stomach while calling her his wife. He carried her and pulled down her panty half way. He touched her private parts and she started crying. According to the victim, as the Appellant carried her, she felt something hard on her buttocks and she started crying upon which the Appellant let go of her. The victim then went and informed her brother of the incident and the matter was later reported to the police.
6. The court directed that the appeal be disposed of by way of written submissions.

## Analysis And Determination

7. I have considered the submissions by both parties. The Appellant submits that the court ought to have considered the provisions of Article 50 (2) (p) of *the Constitution* and favour him with the least severe of the prescribed punishment bearing the fact that he is 60 years old, hypertensive and the sole breadwinner of his orphaned grandchildren.
8. On the other hand, the Respondent submits that the sentence was lawful and should be upheld subject to the provisions of Section 333 (2) of the *Criminal Procedure Code*.
9. Article 50 (2) (p) of *the Constitution* states that:-  

“ Every accused person has the right to a fair trial which includes the right –

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”
10. The right of an accused to benefit from the least severe of the prescribed punishment has been held by court to relate to a situation where the law has been changed since an accused person was charged and the change in the law has resulted in a heavier punishment for the same offence. In the case of *Margaret Lima Tuje v. Republic* [2016] eKLR, the court held thus:-  

“ 14. A reading into Article 50 (2) (p) of *the Constitution* relates to a right an accused person is entitled to in a case where the prescribed punishment has been changed between the time the offence was committed and the time of sentencing.

15. The applicant in this case is, according to the particulars of the charge, said to have committed the offence on 23<sup>rd</sup> November, 2015.

16. The *Alcoholic Drinks Control Act* No 4 of 2010, under which she was charged, was passed in the year 2010. This therefore means that the applicant committed the said offence after the passing of this law. There has also not been any change in the said Act with regard to the punishment for the offence which the applicant was charged with. As such, the provisions of Article 50 (2) (p) of *the Constitution* do not, and cannot apply to this case.”
11. The Appellant herein was charged on 24<sup>th</sup> April 2018 with the offence of defilement contrary to a statute that was passed in the year 2006. Since the year 2006 to the time of passing the sentence,



there was no amendment to the said Act in regard to the prescribed punishment. In the premises, the Appellant's reliance on Article 50 (2) (p) of *the Constitution* is misconceived.

12. Since the Appellant prays for a review of the sentence, this court is under obligation to consider whether his appeal has merit.

13. Section 11 (1) of the *Sexual Offences Act* provides as follows:-

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

14. As submitted by the Respondent, the word “liable” connotes that the trial court has the discretion to impose a lesser sentence where the circumstances so dictate. In the case of *Daniel Kyalo Murema v. Republic* [2009] eKLR, the Court of Appeal stated that the words “shall be liable to” did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.

15. I further agree with the Republic that discretion cuts both ways and it means that the trial court is empowered to impose a lighter or heavier sentence than prescribed subject to the circumstances of the case.

16. The Republic submitted that in view of the fact that the Appellant committed the offence against a child of 8 years and that she was his grandchild, then the trial court exercised its discretion properly.

17. In the case of *ES v. Republic* [2022] eKLR, the appellate court imposed a 20 year sentence on the appellant who had been found guilty of an indecent act with a child. The court held as follows:-

“42. There is no sexual offence that is there or less serious than the other. All sexual offences rob the victims of their right to consent and where it involves a minor, their innocence. It is more detestable when such actions are perpetrated by a person related to a victim, a person in a position of trust, and especially where the victim is a child of tender age as in the present Appeal. It is expected that one of the paramount duties of a parent is to protect their child. In a situation where the parent turns into the assailant, it behoves the justice system to ensure that such behaviour is adequately punished.

43. In considering the sentence in this appeal, I am guided by the Court of Appeal case of *M K vs Republic* [2015] eKLR which explained that the provision under section 20(1) was not a minimum mandatory sentence of life imprisonment and that it merely allowed the trial court to exercise its discretion in meting out a maximum term of life imprisonment. See *Bernard Kimani Gacheru vs Republic* [2002] eKLR.

44. In the final analysis, it is my finding that the appeal against conviction lacks merit and I uphold the conviction. I set aside the 30 year sentence and substitute therefor a sentence of 20 years imprisonment which shall run from the date of first arrest being October 22, 2019.”

18. I have carefully perused the mitigation and the pre-sentence report. I have re-evaluated the mitigation on the grounds of the age and condition of the Appellant. The fact that the Appellant was sentenced



to 15 years means that by the time he completes his sentence, he will be well into his seventies. That would mean that the Appellant would have spent the better part of his latter years in prison.

19. I believe that had the trial court considered the age of the Appellant, it would have passed a lighter sentence on him. In the case of *Ali Abdalla Mwanza v. Republic* [2018] KECA 287 (KLR), the Court of Appeal stated:-

“ 14. In considering whether the sentence of 40 years was manifestly excessive, we have taken note of the latest health profile for Kenya compiled by the World Health Organization (WHO) data for 2018, on life expectancy which is indicated as 64.4 for male and 68.9 for the females and total life expectancy average as 66.7. Of course if one went to the specifics of the causes of death in Kenya, a fair percentage would be due to murders and other homicides but that is perhaps not for us to determine in this appeal although it has a bearing in considering sentencing as a deterrent. It is also trite that every case of sentencing should strictly be considered on its own circumstances as no one individual should be sent to prison purely to send a message to other would be offenders.

15. In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case it would appear manifestly excessive. We say so because the Judge did not impose a death sentence or even a life sentence. When the Judge imposed a term sentence, to us it would appear, it was meant to be lower than life sentence. It is for the aforesaid reasons that we are of the view that if the trial Judge had taken the above matters into consideration, perhaps she would have considered a lesser term than 40 years. In the circumstances we partially allow the appeal and substitute the sentence of 40 years with a term of 20 years from the date of conviction.”

20. I am alive to the holding in *Macharia v. Republic* [2003] EA 559 where the Court of Appeal held:-

“An appellate court will not review or alter a sentence imposed by the trial court on the mere ground that if the appellate court had been trying the appellant it would have passed a somewhat different sentence, and will not ordinarily interfere with the discretion of the trial Judge unless the Judge acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive.”

21. I have carefully weighed the Appellant’s arguments vi-a-vis the offence that was committed. The Appellant committed a morally reprehensible offence against a child of tender years whom he was under duty to protect. A custodial sentence was imperative as a punitive and deterrent measure.

22. Considering the age of the Appellant and the fact that he was hypertensive however, I believe that his case merited a lesser sentence. I therefore, allow the appeal and substitute the sentence of fifteen (15) years with a sentence of ten (10) years.

23. The Appellant was in custody from the date of his arrest on 23<sup>rd</sup> April 2018 until the date of sentence on 14<sup>th</sup> August 2019. Section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody in imposing its sentence. The Appellant’s sentence of 10 years imprisonment shall therefore run from the date of arrest.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11<sup>TH</sup> DAY OF FEBRUARY 2025.**



**A. C. BETT**

**JUDGE**

In the presence of:

Appellant virtually

Ms. Chala for Respondent/State

Court Assistant: Polycap

