



REPUBLIC OF KENYA



KENYA LAW
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**Ouma v Republic (Criminal Appeal 45 of 2019)
[2025] KEHC 2795 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL 45 OF 2019
WM MUSYOKA, J
MARCH 14, 2025**

BETWEEN

THOMAS OUMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from sentence by Hon. TA Madowo, Resident Magistrate, RM,
in Busia CMCSOC No. 140 of 2018, imposed on 7th October 2019)*

JUDGMENT

1. The appellant, Thomas Ouma, 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 29th November 2018, at Odiado Location, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of JA, a girl aged 12 years.
2. The appellant pleaded not guilty to the charge, on 5th December 2018, and a trial was conducted, where 4 witnesses testified. He was found to have a case to answer, on 1st July 2019, and was put on his defence on 29th July 2019. He was convicted of defilement, on 4th September 2018, and sentenced to 20 years imprisonment on 7th July 2019.
3. He was aggrieved, and brought the instant appeal, against the sentence, revolving around the trial court imposing a mandatory minimum sentence without considering the prevailing jurisprudence that sentencing is a matter within the discretion of the trial court; not considering his mitigating circumstances; and not exercising discretion.



4. Directions were given on 30th September 2024, for canvassing of the appeal by way of written submissions. The only written submissions that I see, in the record before me, were filed by the appellant. He argues that sections 216, 329 and 333(2) of the *Criminal Procedure Code*, Cap, 75, Laws of Kenya, were not considered, which resulted in discrimination under Articles 25 and 27 of *the Constitution*. He cites *Evans Wanjala Wanyonyi v Republic* [2019] eKLR (Makhandia, Kiage & Otieno-Odek JJA), *Fatuma Hassan Solo v Republic* [2006] (Makhandia, J), *Yawa Nyale v Republic*[2018] KEHC 4441 (KLR) (Odunga, J), *Regan Muriithi v Republic* [2021] KEHC 3816 (KLR)(PJ Otieno. J), *James Waweru Mwangi v Republic* [2022] KEHC 2102 (KLR) (Kimondo, J) and *Jesse Gathomi Mbutu v Republic*.
5. The appellant was convicted in 2019, after the Supreme Court had rendered itself on mandatory sentences in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ). In sentencing, the trial court does not appear to have had been influenced by that decision. Certainly, the sentence was imposed before *Maingi & 5 others v 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), where the High Court made declarations along the lines of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), but in connection with sexual offences, as defined under the *Sexual Offences Act*, highlighting that mandatory sentences took away the discretion of the trial and sentencing court, which was unconstitutional.
6. The appellant would have benefitted from those decisions, *Maingi & 5 others v 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), had this appeal been considered earlier. Unfortunately, for the appellant, the Supreme Court, in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR)(Koome, CJ, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), decreed that the legal position declared in *Maingi & 5 others v 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), is bad law, and that the mandatory minimum sentences, prescribed under the *Sexual Offences Act*, are constitutional. That would mean that the trial or sentencing court would legally have its discretion curtailed to a certain extent.
7. The above position would mean that there would be no force in the argument that the trial court erred in imposing a mandatory minimum sentence, without considering the prevailing jurisprudence. The paradigm has shifted. The prevailing jurisprudence is not what it was in 2019, when this appeal was filed.
8. The appellant has submitted that sections 216, 329 and 333(2) of the *Criminal Procedure Code* were not considered. Sections 216 and 329 of the *Criminal Procedure Code* are in similar terms, because one applies to trials before the magistrate's court, while the other applies to High Court trials. They give the trial and sentencing court discretion to call for evidence to inform it of the proper sentence to pass. It is a useful tool, to assist the court determine whether it ought to impose a custodial or non-custodial sentence, and where a custodial sentence is called for, to evaluate the duration of the sentence. The conventional practice is to call for a report by a probation officer, commonly known as a pre-sentence report. It could also include victim impact statements, provided for under sections 329A to 329E of the *Criminal Procedure Code*.
9. So, how did the trial court approach it? After convicting the appellant, the trial court ordered for a pre-sentence report, on 4th September 2019. That pre-sentence report was availed on 24th September 2019,



and was read to the appellant on 7th October 2019, before sentence was pronounced. In passing the sentence, the trial court expressed itself to have considered the mitigation by the appellant and the pre-sentence report. Clearly, there was compliance with sections 216 and 329 of the *Criminal Procedure Code*.

10. Section 333(2) of the *Criminal Procedure Code* is about a sentence of imprisonment commencing from the date when it is pronounced. There is a proviso or rider, though, that, where the convict had spent some time in custody, that period or duration shall be considered. Unlike sections 216 and 329 of the *Criminal Procedure Code*, which are permissive or discretionary, section 333(2) is in mandatory terms.
11. Did the trial court take section 333(2) of the *Criminal Procedure Code* into account? The sentencing hearing proceedings of 7th October 2019 are silent on that. There was no consideration of section 333(2).
12. The appellant cannot benefit from the decisions in Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), Maingi & 5 others v 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), for the reasons that I have discussed above. He can only benefit from consideration of section 333(2), in terms of the period that he spent in custody being reckoned.
13. The original trial court record reflects that he was arrested on 4th December 2018, and was arraigned in court on 5th December 2018. He was admitted to a bond of Kshs. 300,000.00, with 1 surety. He prayed for reduction of bond, on 1st February 2019, and the court called for a pre-bail report. It would appear, from the trial record, that the pre-bail report was never availed, for the issue of the reduction of bond did not arise thereafter. I have not seen any minutes relating to approval of bond. It would be safe to conclude, in the circumstances, that the appellant remained in remand custody throughout his trial. He is entitled to benefit from section 333(2) of the *Criminal Procedure Code*.
14. I shall, accordingly, allow the appeal herein, in terms of directing that the period, the appellant spent in custody upon his arrest and during trial, shall be reckoned in his sentence, in accordance with section 333(2), from 4th December 2018 to 7th October 2019, both dates inclusive. The appeal herein succeeds to that limited extent, and it is disposed of in those terms. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 14TH DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Thomas Ouma, the appellant, in person.

Advocates

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

