



REPUBLIC OF KENYA



KENYA LAW
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**Khauka v Republic (Criminal Appeal E036 of 2024)
[2025] KEHC 8276 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 8276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E036 OF 2024**

MS SHARIFF, J

APRIL 8, 2025

BETWEEN

ISMAEL KHAUKA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Background:

1. The appellant Ismael Khauka was charged in Sirisia PMCCR/E009 of 2023 with the offence of defilement contrary to Section 8 (1) as read with 8 (3) of the *Sexual Offences Act* No. 3 of 2006. He faced an alternative count of committing an indecent act with a child contrary to Section (11) of the Sexual Offence Act.
2. The appellant denied both the main and the alternative charge and thereafter the case went on for trial with the state calling 5 witnesses. Upon conclusion of the trial the appellant was convicted of the main charge of defilement and was sentenced on 6.2.2024 to serve 10 years custodial term.

B. Appeal:

3. Being aggrieved by both conviction and sentence, the appellant preferred this appeal which he premised on the following grounds:
 1. That he is a first offender and remorseful for the offence committed.
 2. That this appeal is not against the sentence but merely requesting for this Hon. Court to consider reducing the same on humanitarian grounds.
 3. That the sentence of 10 years' imprisonment as meted out against him was manifestly harsh and excessive and request this Hon. Court to consider reducing the same.



4. That his family is very poor and his wife is unemployed. He is a sole bread winner to the family and the prolonged sentence subjects them to severe suffering hence this request for the reduction of the sentence.
5. That the sentence imposed be reduced and fall under probative terms and kindly, humbly request the reduced sentence to be served under probation.
6. That he wishes to raise more grounds at the hearing of this appeal thereof.

C. Analysis and determination

4. It is noteworthy that the appellant is craving for a sentence review in this appeal wherefore I will not do a re-analysis of the evidence given that the conviction and sentence is not contested.

D. Legal analysis:

5. The operative section 8(3) reads as follows:
 - 3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
6. Whereas the appellant's appeal is worded as being against both conviction and sentence, the grounds of the appeal are expressly clear that the appeal is neither against his conviction nor the sentence but that this court ought to exercise leniency and mercy by reviewing the sentence.
7. The sentence of 10 years imprisonment that the trial court meted to the appellant is not in compliance with the prescribed statutory minimum sentence. Whereas the trial magistrate duly considered the mitigating factors before passing the sentence, the departure from the statutory prescribed mandatory minimum sentence was not explained. The appellant was thus given lesser sentence of 10 years yet the Sexual Offences Act prescribes for a mandatory minimum sentence of 20 years. Yet the appellant has the audacity to crave from this court a further reduction of the custodial term.
8. The question that arises is whether this court can review the appellant's sentence. The answer to that question is in the negative. The appellant cannot crave for clemency through an appeal. He ought to have moved this court through an application for revision of his sentence and it is only through such an application that this court would have considered the same within the backdrop of the judgment of the Supreme Court in Petition No 18 of 2023 ; Republic v Joshua Gichuki Mwangi & Others which declared that the mandatory minimum sentences prescribed in the Sexual Offences Act are lawful and valid.
9. This court is bound by the above decision courtesy of the doctrine of stare decisis as codified under the provisions of article 163(7) of the Constitution of Kenya 2010. See the case of Gitaru Peter Munya Vs Dickson Mwenda Kithinji & Others (Supreme Court Petition No 2B of 2014) eKLR.
10. It instructive to note that even if the appellant had preferred a revision of sentence, this court would not have been inclined to reduce his sentence in light of the clear error committed by the trial court in sentencing as already stated hereinabove.
11. I wish to categorically admonish the respondent for failing to issue a notice of enhancement of judgment despite the glaring error in under sentencing the appellant. Had that notice been issued, I would have enhanced the appellant's sentence, to one that is statutory compliant.
12. On the balance I do find that this appeal is devoid of merit and I disallow it.



This file is hereby marked as closed

DELIVERED, SIGNED, AND DATED AT BUNGOMA THIS 8TH DAY OF APRIL, 2025.

MWANAISHA S. SHARIFF

JUDGE.

In the presence of :

Appellant

Ms Kibet for the state.

C/A Diana

