



**Ouma v Republic (Criminal Appeal E040 of 2022)
[2025] KEHC 4225 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E040 OF 2022
WM MUSYOKA, J
APRIL 4, 2025**

BETWEEN

FRANCIS OUNDO OUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction by Hon. RN Ng'ang'a, Resident Magistrate, RM, in Busia CMCSOC No. E122 of 2021, of 1st March 2022, and sentence by Hon. EC Serem, RM, of 15th March 2022)

JUDGMENT

1. The appellant, Francis Oundo Ouma, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. The particulars of the offence were that on 15th August 2021, at [Particulars Withheld], Wakhungu Sub-Location, Odiado Location, Samia Sub-County, within Busia County, he intentionally caused his penis to penetrate the vagina of JAM, a child aged 5 years. The appellant denied the charges, and a trial ensued, where 8 witnesses testified.
2. The proceedings and judgement indicate that there was an alternative charge, to which he pleaded, but the copy of the charge sheet in the original trial court record, and in the record of appeal, have only the main charge, of defilement.
3. The complainant, JAM, testified first, as PW1. She identified the appellant by the name Oundo, and stated that the appellant gave her maize, and defiled her at J's bedroom. The second witness, MCW, PW2, testified that the appellant had also visited their home, and removed her skirt. She started to cry, and her grandfather chased him away. PW3, BFA, was the mother of PW1. She got information about the sexual assault and went home. She examined the privates of PW1, and noted that discharge was oozing out, she was bleeding and had bruises. She took her to hospital and reported the matter to the police. She said that PW1 was 5 years old, having been born on 15th August 2021. (The transcript is



- misleading, for it records that PW3 said PW1 was 15 years old, contrary to what is recorded in the handwritten notes of the trial magistrate).
4. PW4, MAA, was welcomed home by PW1, who was limping and crying, and saying that her underwear was pressing her. When she checked her private parts, she noted injuries. There was discharge and blood. As PW1 was in distress, she did not interrogate her. Instead, they took her to hospital and reported to the police. When interrogated, she mentioned the appellant as the person who had defiled her. She said that PW1 was 5 years old.
 5. PW5, WA, had assigned the appellant some duties within the compound. PW1 disappeared from the compound for some time, and when she surfaced, she did not appear well. PW4 noted that she had blood on her underpants, whereupon a report was made at the police station, and she was taken to hospital. Upon being interviewed, PW1 mentioned the appellant as her assailant. She mentioned that PW1 was 5 years old, and at PP2. PW6, Mary Okotch (depicted as Sketch in the transcript), was the mother of PW2. She had left the appellant with PW2, as she had assigned him some responsibility. When she returned, she was informed by a neighbour that PW2 had reported to her crying, that the appellant had attempted to remove her underpants, forcing her to run to her grandfather. Later in the evening, she heard that PW1 had been defiled by the appellant.
 6. PW7, Edwin Imoo, was a clinician, who had attended to PW1. He described her as a 5-year-old, who was first seen in hospital on 15th August 2021. The history was of defilement by a 17-year-old, and that discharge and bloodstains on her underpants had been noted. She had difficulty walking. Her labia and majora were bruised. Her hymen was also freshly torn. It was concluded that there was physical harm and defilement. PW8, No. 238806 Police Constable Moses Mang'eni (depicted as Nang'eni in the transcript, and force number and rank not captured, although it was recorded in the original record), investigated the matter.
 7. The appellant was put on his defence, vide a ruling that was delivered on 11th November 2021. He made an unsworn statement, on 30th November 2021, and called no witness. He denied the charges, stating that he went to deliver water at the home of the mother of PW1, and was arrested.
 8. In its judgement, delivered on 1st March 2022, by Hon. EC Serem, RM, on behalf of Hon. Ng'ang'a, RM, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. The appellant was sentenced, on 15th March 2022 (depicted in the transcript as 15th December 2021) to serve life imprisonment.
 9. He was aggrieved, and brought the instant appeal, revolving around the medical evidence not linking him to the offence; the prosecution failing to present all the key witnesses; the investigations being shoddy; and his alibi defence being disregarded.
 10. The appeal was canvassed by way of written submissions, following directions to that effect given on 3rd October 2024. Only the appellant filed written submissions.
 11. Alongside the written submissions, the appellant filed amended grounds of appeal, where he shifted ground, from appealing against the conviction and sentence, and limiting himself to sentence, on grounds that the sentence imposed was harsh; sections 216 and 316 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya and Articles 27(1)(2) and 50(2)(p) of *the Constitution* were not invoked; and his entitlement to benefit to the least severe punishment was not considered.
 12. On the sentence of life imprisonment, the appellant submits on the doctrine of stare decisis, and cites Julius Kitsao Manyeso vs. Republic CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), Benard Barasa vs. Republic CACRA NO. 313 of 2018 (Makhandia, JA). He submits that the trial



- court imposed a mandatory sentence, without considering the mitigating circumstances, and cited Nilsson vs. Republic [1970] EA 599 (Harris, J). It is submitted that the trial court did not call for a victim assessment report, nor invoke sections 216 and 316 of the *Criminal Procedure Code* and Articles 27(1)(2) and 50(2)(p) of *the Constitution*. He also submits that the time that he spent in custody was not considered. He submits that he had only turned 18 years old, he has since reformed and has been rehabilitated during the period that he has been in prison. He cites Yawa Nyale vs. Republic [2018] KEHC 4441 (KLR) (Odunga, J), James Waweru Mwangi vs. Republic [2022] KEHC 2102 (KLR) (Kimondo, J) and Ahamad Abolfathi Mohammed & another vs. Republic [2018] eKLR (K. Kariuki, M’Inoti & Murgor, JJA) to support those contentions.
13. The appeal turns only on sentence, following amendment of the petition of appeal. I shall, therefore, limit this judgement to that.
 14. On the sentence imposed being harsh, I do not think the appellant is on firm ground. He was charged and convicted under section 8(2) of the *Sexual Offences Act*, which provides for mandatory life imprisonment. Section 8(2) prescribes a mandatory sentence. There is no discretion given to the court. The harshness is prescribed by the law itself, to protect children of tender years. Where the sentence imposed is the mandatory sentence the law prescribes, the issue of it being excessive would not arise.
 15. However, the mandatory sentence prescribed by section 8(2) of the *Sexual Offences Act* has been moderated by the Court of Appeal. It was held, in Manyeso v Republic [2023] KECA 827 (KLR) (Nyamweya, Lesiit & Odunga, JJA), that the life sentence, whether mandatory or permissive, is unconstitutional; then in Ayako vs. Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA), that in terms of duration, where a court considers imposing life imprisonment, it should translate to 30 years imprisonment.
 16. The decision in Ayako vs. Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA) came after the appellant had been sentenced. The penalty prescribed, by the *Sexual Offences Act*, is mandatory life. Ayako vs. Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA), held that where life imprisonment is prescribed, because it has been rendered unconstitutional, it should translate to 30 years imprisonment. So that where life imprisonment is prescribed as the mandatory sentence, then the offender should get 30 years imprisonment, instead, as the mandatory punishment. In this case, the prescribed penalty is mandatory life, and, therefore, the mandatory duration of imprisonment ought to be 30 years, according to Ayako vs. Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA).
 17. Was there discretion, at the time the sentence was pronounced? The sentence was pronounced on 15th March 2022. By that time, Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) had been delivered. It decried mandatory sentences and emphasised on the trial court having discretion in sentencing, upon considering the circumstances of the case. By the time the sentence was being imposed Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) had also come, which clarified that the 2017 decision did not apply universally, and that may explain why the trial court shied away from imposing a sentence other than the mandatory one prescribed by the statute.
 18. The High Court, in Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J), came after the sentence had been imposed, and followed Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala,



- Njoki & Lenaola, SCJJ). In *Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J)* the High Court declared minimum and mandatory sentences, for the sexual offences created in the *Sexual Offences Act*, unconstitutional, on grounds that those provisions took away discretion from the courts, at sentencing. However, as those decisions had not been made by 15th March 2022, the same did not influence the trial court in sentencing the appellant. The appellant herein must have grounded the instant appeal on the prescripts in *Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J)*.
19. However, the discretion, given by *Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J)*, in sentencing, with respect to sexual offences under the *Sexual Offences Act*, has since been lost. The Supreme Court has pronounced *Maingi & 5 others vs. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J)* to be bad law, in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR)(Koome, CJ, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ). It was declared, by the Supreme Court, that the sentences prescribed in the *Sexual offences Act* are constitutional and legal.
 20. The effect would then be that the sentence, that the trial court imposed on 15th March 2022, based on section 8(2) of the *Sexual Offences Act*, was lawful. Section 8(2) is in mandatory terms, for it provides that 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.” That leaves no room for exercise of discretion, which should explain why the trial court did not go out of its way to get a victim impact assessment report, for whatever that report may say would not influence the sentence to be imposed, which is mandatory life imprisonment. I note, though, that the trial court did call for a presentence report. One was availed, dated 10th March 2022. However, in sentencing, the trial court made no reference to it, which, I suppose, was because it would not have influenced the court in anyway in sentencing, as at that time there was no discretion.
 21. *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR)(Koome, CJ, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ) did not pronounce itself on *Manyeso vs. Republic* [2023] KECA 827 (KLR) (Nyamweya, Lesiit & Odunga, JJA) and *Ayako vs. Republic* [2023] KECA 1563 (KLR) (Omweng, Omondi & J. Ngugi, JJA). That would suggest that the principles, set in the 2 decisions, still stand, declaring life imprisonment unconstitutional, and translating it to 30 years.
 22. I note that the appellant has made statements in mitigation, in his written submissions, about how he has reformed and been rehabilitated, and how he is young and should be afforded a second chance in life. That could be so. However, the law does not allow the appellate court much room to exercise discretion. I am sitting on appeal, not on re-sentencing, and my remit is limited to considering the legality and propriety of the decisions of the trial court. So far, my findings and holdings are that the court, which tried the appellant, acted properly and within the law.
 23. There could be some little matter of the age of the appellant. At trial, the clinician, PW7, while talking about the history given to him of the defilement of PW1, mentioned that the assailant was 17 years old. That would have suggested that the appellant was also a minor at the time the offence was committed. That could make a difference, with respect to the sentences to be imposed on minors. The appellant submits that he was 18 at the time of the commission of the offence. However, he was tried as an adult, for the prosecution got his age assessed, and an age assessment report, dated 24th August 2021, from



the Medical Superintendent in charge of the Busia County Referral Hospital, where he was said to be above 18 years of age, is on the file. There is also on record a medical report, dated 3rd September 2020, signed by the medical Superintendent for Sio Port Sub-County Hospital, where his age was assessed at 20 years.

24. In view of everything said above, the sentence imposed on the appellant herein should be aligned to *Ayako vs. Republic* [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA), and I shall allow this appeal, as I hereby do, to that very limited extent, of setting aside the sentence of life imprisonment, and substituting it with a sentence of 30 years.
25. I note that the appellant had been granted bond, but the same was never processed, and, therefore, he remained in remand throughout his trial. He was arrested on 19th August 2021, and arraigned in court on 23rd August 2021, when plea was taken, and he was sentenced on 15th March 2022. His sentence should include the time that the appellant spent in remand custody, running from 19th August 2021 to 15th March 2022, and I hereby so order.
26. In view of *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR)(Koome, CJ, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), neither the trial court nor the appellate court has discretion to consider any other sentence, for the hands of the court are tied to the sentences imposed by the statute, except for the little wriggle room allowed by *Manyeso vs. Republic* [2023] KECA 827 (KLR) (Nyamweya, Lesiit & Odunga, JJA) and *Ayako vs. Republic* [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA).
27. Based on paragraphs *para 24 24* and *para 25 25*, hereabove, I shall, accordingly, allow the appeal, to the limited extent indicated. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 4TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Francis Oundo Ouma, the appellant, in person.

Advocates

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

