



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waswa v Republic (Criminal Appeal E048 of 2024)  
[2025] KEHC 8166 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 8166 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E048 OF 2024**

**MS SHARIFF, J**

**APRIL 8, 2025**

**BETWEEN**

**BRIAN JUMA WASWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**A. Background:**

1. The appellant Brian Juma Waswa was charged in *Bungoma CMCR 063 of 2022* with the offence of attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The appellant denied the 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 charge of attempted defilement and was sentenced on 3.10.2023 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 leniency.
  3. That the sentence imposed against him is too harsh and excessive as per the circumstances.
  4. That may it please this Hon. Court to consider reducing the sentence imposed on humanitarian grounds.



5. 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 9(1) and (2) reads as follows:

9 (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten 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. The sentence of 10 years imprisonment that the trial court meted to the appellant is in the compliance with the prescribed statutory minimum sentence. The trial magistrate duly considered the mitigating factors before passing the sentence. The question that arises is whether this court can review that 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* (2024) KESC 34 (KLR)(12 July 2024) Judgment, which declared that the mandatory minimum sentences prescribed in the *Sexual Offences Act* are lawful and valid.

7. 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 v Dickson Mwenda Kithinji & Others* (Supreme Court Petition No 2B of 2014 eKLR).

8. 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, DATED AND SIGNED AT BUNGOMA THIS 8<sup>TH</sup> DAY OF APRIL 2025.**

**MWANAISHA S SHARIFF**

**JUDGE**

**In the presence of :**

**Appellant**

**Ms Kibet for the state.**

