



REPUBLIC OF KENYA



KENYA LAW
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**Okuku v Republic (Criminal Appeal E025 of 2024)
[2025] KEHC 7160 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E025 OF 2024
WM MUSYOKA, J
MAY 23, 2025**

BETWEEN

ALEX MUGE OKUKU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. T. Madowo, Senior Resident Magistrate, SRM, in Busia CMCSOC No. E060 of 2020, of 21st December 2022)

JUDGMENT

1. The appellant, Alex Muge Okuku, 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 8th August 2020, at [particulars withheld] area, Bunyala Sub-County, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of EA, a girl aged twelve years. The appellant pleaded not guilty to the charge, on 30th December 2020. A trial was conducted, where five witnesses testified. He was convicted on 21st December 2022, and sentenced on 13th February 2023, to serve twenty years in prison.
2. He was aggrieved, and brought the instant appeal, against sentence, with the grounds of appeal revolving around the sentence of twenty years being a mandatory minimum, which denied him a fair hearing, and took away the discretion of the court, by preventing consideration of mitigating circumstances.
3. Parties were given twenty-one days to file written submissions. I have only come across written submissions by the appellant, which are undated, and were filed on an unknown date.



4. In those written submissions, the appellant cites *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J), *Joshua Gichuki Mwangi v Republic* [2022] eKLR (Mativo, J) and *Dismas Wafula Kilwake v Republic* [2019] KECA 5 (KLR) (Musinga, M'Inoti & Murgor, JJA), to argue that statutory minimum sentences take away the discretion of the court, by eliminating consideration of mitigating circumstances.
5. The charge against the appellant was founded on section 8(3) of the *Sexual Offences Act*, which covers child victims in the age bracket of twelve and fifteen. The defilement of minors in that bracket attracts a minimum sentence of twenty years. Upon conviction, the appellant herein was sentenced to twenty years imprisonment, which is the minimum allowed, under the provision of the *Sexual Offences Act* under which he was charged.
6. The applicant, no doubt, hinges his appeal on *Wachira & 12 others* [2022] KEHC 12795 (KLR) (Mativo, J) and *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J), on the unconstitutionality of the minimum sentences, prescribed by the *Sexual Offences Act*, where the High Court found and held that statutory minimum sentences are mandatory in a sense, for the trial court cannot consider alternative sentences, and it is limited or restrained in the custodial sentences it can impose, and then, based on that, declared the provisions, prescribing minimum sentences in the *Sexual Offences Act*, unconstitutional, opening the way for trial courts to exercise discretion, in terms of consideration of alternative sentences and imposition of custodial sentences lesser to what the minimums require.
7. Unfortunately for the appellant herein, *Wachira & 12 others* [2022] KEHC 12795 (KLR) (Mativo, J) and *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) have only held sway for a season, for they have since been declared bad law, by 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, Ndung'u & Lenaola, SCJJ), which has asserted that the sentences prescribed in the *Sexual Offences Act*, inclusive of the minimum sentences, are lawful and constitutional. The appellant, cannot, therefore, benefit from the discretion proposed in *Wachira & 12 others* [2022] KEHC 12795 (KLR)(Mativo, J) and *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J).
8. I see that the appellant, in his written submissions, cites section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, and argues that that provision should have been considered in sentencing. That provision states that the duration of every sentence of imprisonment should be calculated or reckoned from the date the sentence is pronounced. It carries a proviso to effect that where the convict had spent some time in custody, prior to sentence, the period spent in custody should be considered. The provision is in mandatory terms, and a convict is entitled to benefit from it. It is not a matter of discretion by the court.
9. I note that when sentence was pronounced, on 13th February 2023, the trial court did not apply section 333(2) of the *Criminal Procedure Code*. The period that the appellant had spent in custody was not considered or mentioned or factored in the sentence. The sentence order did not refer to that period.
10. According to the charge sheet, the appellant was arrested on 25th December 2020 and was arraigned in court on 30th December 2020. He was granted bond on 30th December 2020, and his surety was approved on 7th January 2021, when, I presume, he was released. He was, therefore, in pre-arraignment and pre-trial detention between 25th December 2020 and 7th January 2021. I see, from the trial record, that it was ordered, on several occasions, that warrants of arrest be issued, whenever the appellant did not attend court, but the said warrants would be lifted before he could be arrested, for, on each



occasion, he would turn up in court thereafter on his own. The period, running from 25th December 2020 and 7th January 2021, ought to have been considered, in computing the twenty-year period that he is to spend in prison custody.

11. The appeal herein succeeds to the limited extent stated in paragraph 9 hereabove, and I hereby order that the sentence of twenty years imprisonment, pronounced on 13th February 2023, by the trial court, shall be calculated or computed, considering the period that the appellant spent in pre-arraignment and pre-trial custody, between 25th December 2020 and 7th January 2021, both dates inclusive. The appeal is disposed of in those terms. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Alex Muge Okuku, the appellant, in person.

Advocates

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

