



**Maingi v Republic (Criminal Appeal 175 of 2017)  
[2023] KEHC 17718 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17718 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL 175 OF 2017**

**CM KARIUKI, J  
MAY 18, 2023**

**BETWEEN**

**PATRICK NDUNGÚ MAINGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Conviction and Sentence of Hon S N Mwangi Senior Resident  
Magistrate in Nyabururu Chief Magistrate's Criminal Case No. 8 of 2015)*

**JUDGMENT**

1. The Appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. Particulars being that on the 1st day of January 2015 in Subukia Sub-County within Nakuru County, intentionally and unlawfully caused his penis to penetrate the anus of DK, a child aged 12 years.
3. In the alternative count, he faced one of Committing an indecent act with a child Contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars are that on the 1st day of January 2015 in Subukia Sub County within Nakuru County, intentionally and unlawfully caused his penis to come into contact with the anus of DK, a child aged 12 years.
4. The trial court verdict aggrieved him and thus lodged an instant appeal.
5. During the hearing of the appeal, he filed his submission in which he said he was only impugning sentence and was seeking a revision to the same downward as he had been in custody from 1/1/2015 to 21/7/2017 which he was sentenced (over 2 ½ years) and sought to be forgiven.
6. He was a first offender. He had, by the date of hearing, served eight years.



## Respondent Submission

7. At the hearing, the prosecution called a total number of 4 witnesses. However, at the close of the prosecution's case, the Appellant opted to give sworn evidence and did not call any witnesses.
8. The appellant was then convicted of the primary count and was, on 21<sup>st</sup> July 2017, sentenced to serve 20 years imprisonment as stipulated under the provisions under section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
9. Dissatisfied with the judgment, the appellant filed this Appeal and enumerated seven grounds of Appeal to which the appeal is opposed.
10. In the case of *Daniel Wambugu Maina – versus- Republic* [2018], eKLR brief elements required to prove the charge of defilement were stated as follows;AgePenetrationIdentity
11. On sentence, submitted that applicant could not rely on Petition No. 84/2015, which on 7/10/2022 out lowered mandatory minimum sentence stipulated in sexual offenses Act No. 3 of 2006 in that the instant matter appeal was lodged on 21/7/2017 as it can not apply retrospectively.

## Determination

12. Under Rule 21 of High Court standard operation procedures,2022, a party seeking re-sentencing should move court via notice of motion but only regarding the matters emanating from the mandatory death sentence. However, in matters arising from mandatory minimum sentences Petition No. 84/2015, which on 7/10/2022 Odunga J as he then was while declaring such sentences unconstitutional, directed that any person seeking re-sentencing in the such scenario must petition the high court for the resentencing orders.
13. In the instant matter, the appellant has moved this court via an appeal and seeks a reduction of a sentence but not resentencing. He has not impugned a sentence on the grounds of being a mandatory minimum sentence but is being harsh in his circumstances.
14. This court can now tamper with the previously mandatory minimum sentences after being declared unconstitutional and award a sentence less than the previously prescribed minimum sentences where circumstances do allow. Hon. Justice Odunga of the Machakos High Court ruled that the mandatory minimum sentences provided by the [Sexual Offences Act](#) for sexual offences are unconstitutional and that they limit the discretion of the court to determine the appropriate sentence to impose. See [Maingi & 5 others v Director of Public Prosecutions & another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022)
15. The appellant was said to be a first offender and had spent 21/2 years in custody at the time of sentencing. Judiciary sentencing policies consider such factors in sentencing to mitigate accused sentence and scale it downward.
  - i. Thus, in this case, ten years to run from the date of arrest 1.1.2015.
  - ii. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 18<sup>TH</sup> DAY OF MAY 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

