Kinyanjui v Republic (Criminal Appeal E018 of 2022)
[2025] KECA 1543 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1543 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E018 OF 2022

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

OCTOBER 3, 2025

BETWEEN

DOUGLAS KARIUKI KINYANJUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (R. Mwongo, J.) dated 25th February, 2022 in Criminal Appeal No. 14 of 2018)

JUDGMENT

1. Douglas Kariuki Kinyanjui (the appellant), was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (the Act) at the Chief Magistrate's Court at Naivasha in Criminal Case S.O. No. 20 of 2018. It was alleged that on diverse dates between 11th and 24th March 2018 in Naivasha within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the anus of KNK, a child aged 8 years. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act. The accusation was that on the dates and place stated above, he intentionally and unlawfully caused his genital organ to come into contact with the genital organ, namely, the anus of KNK, a boy aged 8 years.

2. The prosecution case rested on the testimony of 4 witnesses, namely, the complainant (PW1), the Complainant's Grandmother (PW2), a Clinical Officer at the Naivasha District Hospital (PW3), and the Investigating Officer (PW4). The defence case rested on the appellant's unsworn testimony. He did not call any witness in support of his defence. At the conclusion of the case, the trial Magistrate returned a verdict of guilty on the main count. After considering the appellant's mitigation, the trial Magistrate sentenced him to serve life imprisonment as per the provisions of section 8 (2) of the Act.

3. Dissatisfied with the said decision, the appellant appealed to the High Court at Naivasha in Criminal Appeal No. 14 of 2018 seeking to overturn the conviction and sentence. After hearing the appeal, Mwongo, J. upheld both the conviction and sentence and dismissed the appeal.

4. Undeterred, the appellant is now before this Court in this second appeal seeking to reverse the High Court decision citing 5 grounds in his amended grounds of appeal dated 12th May 2025. The grounds are:

   (a) the prosecution did not establish a prima facie case against him and it relied on circumstantial evidence which renders the conviction unsafe;

   (b) the learned Judge failed to evaluate the entire evidence;

   (c) mandatory sentences under the Act are unconstitutional since they deprive the court the discretion to consider mitigation;

   (d) the sentence of life imprisonment is harsh and excessive;

   (e) emerging jurisprudence shows that courts can exercise their discretion and impose a lesser severe sentence.

5. When this appeal came up for hearing before us on 14th May 2025, the appellant appeared in person while Mr. Omutelema Senior Assistant Director of Public Prosecution appeared for the respondent. Both parties relied on their written submissions.

6. In support of his appeal, the appellant cited Hamisi Bakari & another vs. Republic [1987] eKLR in support of his argument that the prosecution did not prove its case beyond reasonable doubt since it relied on insufficient circumstantial evidence. Citing authorities, he argued that the burden of proof always remains with the prosecution. He faulted the High Court claiming it failed to re-evaluate the evidence afresh.

   He contended that he was maliciously framed by PW2 who bore a grudge against him and that the trial court failed to consider his defence which exonerated him from the accusation. It was his submission that the prosecution evidence was not credible and cited Kimani Ndung'u vs. Republic [1979] 1 KLR in support of the proposition that admitting unreliable evidence renders the conviction unsafe. He also questioned the genuineness of the P3 form arguing that it was copied from the PRC form nor was DNA conducted to prove the medical evidence beyond reasonable doubt.

7. The appellant maintained that the circumstantial evidence was prejudicial to his case and cited the Supreme Court of India in Kiriti Pal vs. State of West Bengal [2015] 11 SCC 178 in support of the proposition that courts must adopt a very conscious approach and should record convictions only if circumstantial evidence irresistibly points to the accused.

8. Regarding the sentence, the appellant maintained that the mandatory sentences violate Article 25 (c), 27 (1), 47 (1), 50 (1), 157 (11), and 159 (2) (e) of *the Constitution* and are therefore unconstitutional, since they rob magistrates the discretion to determine sentences taking into account the peculiar circumstances of each case. He also submitted that his mitigation as required under sections 216 and 329 of the Criminal Procedure Code was not possible because the sentence meted out was mandatory. He cited the case of John Njue Nguta vs. Republic, Criminal Appeal No. 55 of 2014 where this Court remitted a case back to the High Court for mitigation and sentencing since the appellant had not mitigated during his trial.

9. Mr. Omutelema in his submissions dated 2nd May 2025 maintained that this appeal lacks merit because the offence was proved to the required threshold. He rehashed the evidence on record and submitted

that the prosecution had proved each and every element of the offence; therefore, the learned Judge properly analyzed the evidence and concluded that the appellant's appeal had no merit. Further, the learned Judge correctly observed that the child was aged 8 years old at the time of the offence, and that his age was clearly stated by PW2, his grandmother. Counsel maintained that penetration of the child's anus was proved by PW3 who produced a PRC form as prosecution exhibit 1 which showed an inflammation at the anal region at the inner part and epithelial cells. Addressing the contestation that the medical evidence was not corroborated, counsel contended that the learned Judge found no basis to interfere with the trial court's finding since there was evidence of inflammation of the anus showing penetration.

10. Addressing the ground that the appellant's right to fair hearing was violated, counsel noted that even though the charge sheet was substituted after two witnesses had already testified, the appellant was asked to plead to the fresh charges and he did not object to the amendment. Counsel maintained that the said amendments were limited only to the deletion of a non- existent section of the Statute and changing the minor's age from 6 years to 8 years. Therefore, no prejudice could arise from such inconsequential amendments. Accordingly, the failure to give the appellant a chance to recall the two witnesses was not a violation of his right to fair trial.

11. Regarding the issue of the minimum mandatory sentences, Mr. Omutelema pointed out that the learned Judge held that the Supreme Court decision in Francis Karioko Muruatetu & Ano. vs. Republic (Petition 15 & 16 of 2015; [2017] KESC 2 (KLR)) was only applicable in murder cases.

12. On whether the appellant's defence was considered, Mr. Omutelema maintained that the appellant gave unsworn evidence and alleged that the minor was defiled by his own father. Nevertheless, the appellant never cross-examined any of the prosecution witnesses on that allegation. Consequently, the trial court concluded his defence was a mere denial.

13. Regarding the appellant's right to be assigned an advocate by the state, counsel maintained that the appellant never made an application to have pro bono counsel allocated to him nor did he exhibit an inability to defend himself. Conversely, he conducted his defence throughout the case.

14. Regarding the severity of the sentence, Mr. Omutelema submitted that the mandatory sentence applicable for the offence in question is life imprisonment. He relied on the Supreme Court holding in Republic vs. Joshua Gichuki Mwangi SCORK Petition E018 of 2023 [2024] KESC 34 (KLR) that harshness and excessiveness of a sentence are not within the purview of the Court of Appeal jurisdiction.

15. This is a second appeal; therefore, our jurisdiction is limited to considering matters of law as stipulated by section 361 of the Criminal Procedure Code. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence or the courts below are demonstrably shown to have acted on wrong principles in arriving at their findings. (See David Njoroge Macharia vs. Republic [2011] eKLR). This Court in Karani vs. R. [2010] 1 KLR 73 held that:

> " By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

16. Similarly, the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [supra] stated thus:

> " Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

17. We have reviewed the record as well as submissions in this appeal and in our view, the issues for determination are:

    (a) whether the offence of defilement was proved to the required standard;

    (b) whether the High Court failed to appreciate that the conviction was premised on circumstantial evidence, rendering the conviction unsafe; and

    (c) whether there is a basis for this Court to interfere with the sentence.

18. For the prosecution to secure a conviction in a charge under section 8 (1) and (2) of the Act, it must establish beyond reasonable doubt the following elements:

    (a) the victim must be a child aged 11 years or below;

    (b) prove of penetration as defined in section 2 of the Act, which defines key terms used throughout the Act to ensure clarity and consistency in its application. It defines "penetration" as follows: means the partial or complete insertion of the genital organs of a person into the genital organs of another person; and,

    (c) the identity of the perpetrator must be established. These three ingredients must be proved.

19. Was penetration was proved to the required standard? The trial court and the first appellate court found that the evidence established that the complainant was defiled. Having reconsidered the evidence on record, we note that complainant recalled that he had been sent to the quarry by his grandmother to check whether ballast had been taken by a lorry only for the appellant to chase him, grab him and force him into his polythene house where he removed his trouser and inner wear and made him lie down on the ground before inserting his "kachuchu" in his buttocks. The complainant stated that he did not scream because the appellant had threatened to kill him if he dared to scream. His evidence was corroborated by the medical evidence of PW3, who testified that when her colleague Tabitha Ndung'u examined the complainant, his anal region was inflamed and loose with stool coming out. From the foregoing, we see no reason to doubt the concurrent findings by the two courts below on this issue, which in our view was supported by the evidence. Concurrent findings of two courts below are not to be interfered with unless there is misreading of evidence or non-consideration of important piece of evidence. Accordingly, this ground of appeal fails.

20. Regarding the complainant's age, we note that PW2, the complainant's grandmother stated that the complainant was 8 years old and her evidence was corroborated by PW3 who produced an age assessment report conducted on 9th April 2018 and produced as the prosecution exhibit 3. It showed that the complainant was approximately between 7 – 8 years old. Therefore, at the time of the offence,

the complainant was a child aged below 11 years, within the ambit of the age range prescribed in section 8 (2) of the Act.

21. When age is a factor in a criminal case, the relevant age is the age at the time the offense was committed not the age at the time of the trial. Determination of a person's age is generally treated as a factual issue, requiring evidence to be presented and assessed by the court. This means that age is not simply assumed or taken for granted, but must be proven like any other factual matter in a legal case. We are persuaded that the complainant's age was proved beyond reasonable doubt. We find no reason to depart from the concurrent findings by the two courts below on this issue.

22. We will now address the question whether the appellant was properly identified as the offender. Courts place significant emphasis on proper offender identification in criminal cases, recognizing it as a crucial element for a fair trial and accurate conviction. Decided cases highlight the need for reliable identification evidence, whether through eyewitness testimony, fingerprints or other means and outline the factors courts consider when assessing the veracity of such evidence. Courts scrutinize eyewitness testimony carefully, considering factors like the witness's opportunity to observe the offender, the lighting conditions, the distance of the observation and the time elapsed between the crime and the identification. The court must be satisfied that the witness has a reliable recollection beyond a mere impression. (See R. vs. Turnbull and Ano. (1976) 3 All ER 549, a landmark case in English law concerning the reliability of visual identification evidence).

23. Notably, the complainant knew the appellant by name. He even went ahead to point him out at the dock as "Dougy". He also stated that he used to see him and he did not work but lived in Mithuri, the same neighbourhood the complainant lived with his grandmother. This was therefore a case of recognition rather than identification. We are guided by the dictum by this Court (per Madan, JA) in Anjononi and Others vs. Republic [1980] KLR thus:

> "...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

24. Similarly, this Court in Peter Musau Mwanzia vs. Republic [2008] KECA 92 (KLR) stated that:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example that the suspect had been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question."

25. Having considered PW1's evidence that the appellant lived in their neighbourhood and the fact that the incident happened in broad day light, we are satisfied that this was a case of recognition, therefore, the appellant was positively identified by the complainant. The appellant's defence that he was framed by PW2 because they had disagreed and his claim that the complainant was defiled by his own father did not dislodge the prosecution evidence. Therefore, the inevitable conclusion we arrive at is that the offence of defilement was proved beyond reasonable doubt.

26. The other ground urged by the appellant is that he was convicted on circumstantial evidence contrary to article 25 (c), 27 (1), 47 (1), 50 (1), 157 (11), and 159 (2) (e) of *the Constitution*, section 362 of

the Criminal Procedure Code and section 107 of the *evidence Act*, making the conviction unsafe. Circumstantial evidence is defined as indirect evidence used to prove a fact in issue through inference. It differs from direct evidence, which directly proves the fact, and is often used when direct evidence is unavailable. Courts have established specific principles for the use of circumstantial evidence, emphasizing that the circumstances must be fully established, point unerringly to the accused's guilt and form a complete chain that excludes any other reasonable hypothesis. To our mind, the prosecution evidence was direct as opposed to circumstantial.

27. Importantly, we have carefully considered the appellant's petition of appeal before the High Court, the undated amended grounds of appeal and his submissions before the High Court. We note that the appellant did not specifically complain on the issue of reliance on circumstantial evidence by the trial court. Therefore, the said issue was not placed before the High Court for its determination. In Peter Kihia Mwaniki vs. Republic [2010] eKLR, this Court stated:

> " Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter... By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit."

28. On a second appeal, this Court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not raised before the lower courts, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal. Consequently, we are precluded from addressing the said issue.

29. Regarding the excessiveness and unconstitutionality of mandatory minimum sentences prescribed by the trial court, this Court in MGK vs. Republic [2020] eKLR stated:

> " 16. As regards the sentence, under section 361(1) of the Criminal Procedure Code, severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal."

30. Regarding the alleged unconstitutionality of the life sentence meted by the trial and the failure to consider the appellant's mitigation and the fact that the trial court is deprived the discretion to mete out an appropriate sentence, the Supreme Court affirmed the lawfulness of mandatory minimum/ sentences under the *Sexual Offences Act* in Republic vs. Joshua Gichuki Mwangi & Others (supra) when it stated:

> " (57) In the Muruatetu case, this Court solely considered the mandatory sentence of death under section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...

(62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below...

(68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remains lawful as long as section 8 of the Sexual Offences Act remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

31. The upshot of the foregoing is that until the law is changed or the Supreme Court rules differently, our hands are tied. We cannot interfere with the sentence imposed in this case. However, we hasten to add that the sooner this issue is resolved, the better to bring to an end the obvious discrimination in the sentencing policy. In conclusion, we find that this appeal is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 3RD DAY OF OCTOBER, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.