



**Masembo v Republic (Criminal Appeal E029 of 2024)
[2025] KECA 1635 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1635 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E029 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
OCTOBER 3, 2025**

BETWEEN

JACKTON OJUKA MASEMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay (Waweru, J.) dated 26th July, 2021 in HCCRA No. 17 of 2018)

JUDGMENT

1. Jacktone Ojuka Masembo, the appellant herein, was charged, tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#).
2. The particulars of the offence were that on 11th May, 2018 at (Particulars withheld) sub location (Particulars withheld)location, Rachuonyo North sub-County within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of C.N.A. ¹, a child aged 10 years.
3. He pleaded guilty to the charge, was convicted on his plea of guilty and was sentenced to life imprisonment.
4. The appellant was aggrieved by the decision of the lower court and filed an appeal against both conviction and sentence before the High Court raising the grounds that he was harassed and beaten by unknown people to admit to the offence; the offence was not proved; he was not given a chance to defend himself; and that the sentence meted out was harsh and dehumanizing.
5. The High Court (W. Kiarie, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 26th July, 2021.

¹ Initials used to protect her identity



6. The appellant was again dissatisfied with the decision of the High Court and has lodged this appeal. Before this Court, the appellant filed an undated memorandum of appeal continuing his challenge to the outcome on three (3) grounds of appeal which essentially indicate that the appellant is only appealing on sentence. His contention being that the learned judge of the first appellate court erred in upholding a mandatory life sentence.
7. In his written submissions, the appellant argued that the court failed to scrutinize and analyse the mandatory nature of the sentence, which was manifestly harsh and excessive. He complains that both the trial and the 1st appellate court failed to invoke the provisions of Sections 216, 322, and 333[2] of the Criminal Procedure Code, thereby denying him the rights enshrined therein.
8. Relying on the case of *Evans Wanjala Wanyonyi vs. Republic* [2019] KECA 679 9KLR), [2019] eKLR and *Yawa Nyale vs. Republic* [2018] eKLR, the appellant maintains that the mandatory life imprisonment imposed was declared unconstitutional and urges the Court to consider the holding in *Malindi Criminal Appeal No. 12 of 2021 Julius Kitsao Manyeso vs. Republic* (2023) KECA 827 (KLR) and substitute the life sentence imposed with a term sentence.
9. The appellant urges us to consider that he was a first offender; was not aware of the consequences of the crime; has learnt his lesson; is reformed; and is ready to reintegrate into society. The appellant further prays for leniency due to his current condition, as he is suffering from a disability, both of his eyes were removed due to illness; and he relies on the assistance of a helper.
10. Opposing the appeal, the State reminded the Court of its duty as the second appellate court, which is limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. Relying on the case of *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023)* [2024] KESC 34 (KLR) (12 July 2024) (Judgment) where the Supreme Court affirmed the mandatory sentences in the *Sexual Offences Act* holding that for as long as section 8 of the *Sexual Offences Act* remains in our statutes unamended, then the mandatory sentences therein are legal. The respondent argued that the appellant was convicted on his own plea of guilty and was sentenced to life imprisonment as per the law. Therefore, he could not challenge his sentence on appeal.
11. Having considered the appeal and the grounds urged in support thereof as well as the submissions of both parties and the law, we reiterate that the court's mandate is limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that the Court can interfere with concurrent findings of fact by the two courts below. See *Ogolla s/o Owuor* (1954) EACA 270 and *Wanjema vs. Republic* [1971] EA 493.
12. As already stated, the present appeal is on sentence only. During the trial, the prosecution stated the facts which formed the basis of the charge as follows:

“The facts are that on 11th May 2018 at (Particulars withheld) sub location the complainant was going home from school at 5:00 pm. She met the accused who is a shepherd herding some cattle while armed with a panga and a rungu. The accused called the complainant but she ignored him. The accused went after her, grabbed and carried her to a nearby bush and ordered her to lie on the ground and remove her pants. The accused threatened to cut her if she screamed. The complainant complied and accused had unprotected sex with the minor. She tried to scream but the accused covered her mouth with his hand. After he finished, he ordered her to go home. When she reached home, she reported to her mother about the same. The mother mobilised members of the public who arrested the accused and took him to Kendu Bay police station. The complainant was taken to hospital where she was examined



and treated vide this treatment notes which I produce as exhibit 1. She was issued with a P3 form while was duly filed which I produce as exhibit 2. The accused was charged with this offence. I have the complainant's immunization card showing she was born on 26th January 2007, which I wish to produce as exhibit 3.

Accused: The facts are correct

Prosecution: I have no previous records of conviction.

Mitigation: I pray for leniency. I do not know why I committed the offence.

13. The appellant admitted the charge and confirmed the facts to be correct. He was then given an opportunity to present his plea in mitigation, whereupon, he prayed for leniency and stated that he did not know why he committed the offence. Upon considering the offence and the mitigating factors, including the fact that the appellant was a first offender, the learned magistrate observed that the appellant took advantage of a minor who could not defend herself, thus he deserved a deterrent sentence. The appellant was then sentenced to life imprisonment.

14. Section 361 of the Criminal Procedure Code expressly states that severity of sentence is a matter of fact and is not to be entertained by this Court. Consequently, this court can only interfere with the sentence if it is demonstrated that there has been a material misdirection with regard to the sentence as was stated by this Court in *Bernard Kimani Gacheru vs. Republic*, (2002) eKLR as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

15. Further, the Supreme Court in *Republic vs. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), categorically held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional and that trial courts have no discretion to impose sentence below the minimum statutory sentences in sexual offences. The Court held that;

“56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances. 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.”

16. In the present case, the appellant consciously pleaded guilty for the offence of defilement under section 8(1) as read together with section 8(2) of the *Sexual Offences Act* which imposes a mandatory life sentence for defilement involving a child aged eleven years and below. That is what the appellant was sentenced to serve. In the present case, the appellant attacked the sentence on the proposition that the sentence was wrongfully imposed, and was illegal on account of the fact that the sentence was prescribed by statute as a minimum sentence from which there could be no derogation. This, the appellant argued, was unconstitutional. He sought to set aside that sentence, and for the Court to impose a proper (more lenient one) that takes into consideration of his individual circumstances.
17. Section 361 of the Criminal Procedure Code is unequivocal that a second appeal to this Court on severity of sentence is a matter of fact and is not to be entertained by the Court. The circumstances under which this Court can interfere with sentence and the applicable principles were set out by the court in the famous case of Bernard Kimani Gacheru vs. Republic [supra] and Republic vs. Joshua Gichuki Mwangi [supra]. Consequently, there is no basis to interfere with the sentence imposed. The upshot is that the appeal lacks merit and is dismissed.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

