



REPUBLIC OF KENYA



KENYA LAW
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**Ngicho v Republic (Criminal Appeal E036 of 2022)
[2025] KECA 1626 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1626 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E036 OF 2022
MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA
OCTOBER 3, 2025**

BETWEEN

JULIUS ODONGO NGICHO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the judgment of the High Court of Kenya at Homabay
(Kiarie Waweru Kiarie, J) dated 2nd November 2021, in HCCRA No. 4 of 2019)*

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court at Homabay and charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on unknown date of July 2018 at Gem West location, Rangwe Subcounty within Homabay County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AA, a child aged 11 years.
2. Alternatively, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. As he was not convicted and sentenced on this count, the less we say about it the better.
3. The appellant pleaded not guilty to the main count and in a bid to prove its case, the prosecution called a total of five (5) witnesses. The trial court upon evaluation of the evidence tendered by both the prosecution and the defence returned a verdict of guilt in a judgment dated and delivered on 4th March 2019, and subsequently sentenced the appellant to life imprisonment.
4. The appellant being aggrieved with the judgment of the trial court, appealed to the High Court by way of Homabay Criminal Appeal No. 4 of 2019 on various grounds. However, upon re-evaluation of the evidence tendered in the trial court as required, the first appellate court dismissed the appeal in its entirety.



5. It is that decision that further riled the appellant, precipitating this second and perhaps last appeal before this Court.
6. The appeal principally turns on sentence. The appellant challenges the mandatory life sentence that was imposed on him. It is his contention that the life sentence is unconstitutional as its mandatory nature deprives the court the discretion to consider mitigation that may be proffered. The appellant also contends that the victim was aged between 12 and 14 years, and therefore he ought to have been sentenced under Section 8(3) of the *Sexual Offences Act* as opposed to Section 8(2) of the same Act. That the appropriate sentence that would then have availed him had Section 8(3) of the Act been invoked would have been a minimum sentence of 20 years and not life sentence.
7. When the appeal came before us for hearing, the appellant appeared in person on our virtual platform whereas the respondent was represented by Ms. Kanyita, learned Prosecution counsel. Both parties opted to rely entirely on their respective written submissions that they had filed.
8. In his written submissions, the appellant merely reiterated and expounded on the facts of the case and the grounds of appeal and we need not therefore rehash.
9. In response, Ms. Kanyita submitted that the age of the victim was proved to have been 11 years old at the time of the commission of the offence. This was aptly captured by the trial court which correctly stated that as she had not celebrated her 12th anniversary birthday, she was by law still 11 years old. Consequently, counsel submitted that the trial court was correct in charging, convicting and sentencing the appellant under Section 8(2) of the *Sexual Offences Act*.
10. Counsel further submitted that whereas there had been in the recent past decisions of this Court seeking to align the reasoning of the supreme Court in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR (Muruatetu1) to mandatory minimum sentences in *Sexual Offences Act*, those attempts have been thwarted or have since hit a brick wall with the recent decision of the Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) which confirmed that the holdings in Muruatetu 1 case did not extend to mandatory minimum sentences under the *Sexual Offences Act*, and that such sentences under the said Act were legal and should be imposed. Given the foregoing, counsel urged that this appeal was devoid of merit and ought to be dismissed therefor.
11. Having considered the record, and the respective submissions by the parties to this appeal on sentence, this is our considered view. The age of the victim was proved to have been 11 years and 10 months old at the time of the commission of the offence. She had not yet attained the age of 12 years as to push her to the age bracket of between 12 to 14 years, so that the appellant could benefit from sentencing in that age bracket, being a minimum sentence of 20 years imprisonment. The appellant's argument that since AA was said to have been slightly over 11 years, he should have been sentenced under Section 8(3) of the *Sexual Offences Act* is therefore devoid of legal basis. In dealing with the issue, the trial court stated thus:

“A birth certificate produced as PEX4 shows the birth date as 2/8/2006. It is clear that at the time of the offence, the child was aged 11 years and ten months. Her age is 11 because she has not achieved her 12th birthday”
12. It is also noteworthy that the two courts below were concurrent in reaching the conclusion. We have no reason to fault them.



13. We have taken note of the appellant's submissions regarding the jurisprudence on the unconstitutionality of the mandatory life sentence. However, that jurisprudence has now been put to rest as correctly submitted by counsel for the respondent, by the decision of the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) (supra). In this decision the 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 statute books unattended to, then the mandatory sentences therein are legal. Consequently, a person convicted of defilement under Section 8(2) of the Act, as in this case can only be sentenced to life imprisonment. Consequently, the right sentence was aptly meted out on the appellant and we can do nothing about it despite the pleas by the appellant.

14. In the premises, the appeal has no merit and it is accordingly dismissed in its entirety.

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. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

