Njihia v Republic (Criminal Appeal 20 of 2022) [2025] KECA 1566 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1566 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 20 OF 2022

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

OCTOBER 3, 2025

BETWEEN

PETER NDUHU NJIHIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This is a second appeal lodged by the appellant against the judgement delivered on 20th February 2018 by the High Court at Naivasha (Mwongo, J) in High Court Criminal Appeal No 42 of 2017. That appeal emanated from the judgement of the Chief Magistrate's Court at Engineer in Criminal Case (S.O) No. 462 of 2016 in which the appellant was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) of the *Sexual Offences Act*, No 3 of 2006.

2. The particulars were that on 11th May 2016, at [particulars withheld] Village in Kinangop, Nyandarua County, the appellant intentionally caused his penis to penetrate the vagina of MWN, a child aged seven years.

3. The prosecution's case was that the complainant, a girl aged 7 years old, who testified through an intermediary, was on the material day, at 3.00pm, heading home from school when she met the appellant. As it was raining, the appellant proposed that they get shelter at one Susan's house. On reaching Susan's house the appellant gave her Kshs 50/= and a cake, then took her to the bush next to Susan's house and there, he removed her trousers and unzipped his trousers and took "his thing for urinating" and put it inside "her thing for urinating". Although the complainant felt pain the appellant only stopped when it stopped raining. The complainant saw blood coming out onto her trousers.

4. Despite being threatened by the appellant with death should she disclose the incident to anyone, when the complainant got home, she informed her mother (PW2) about the incident. According to the

complainant, PW2 then took her to Mama Shiko's house where they checked her and took her to Engineer Hospital and to the police station where she was checked again.

5. PW2, the complainant's mother, in her evidence clarified that the date was 11th May, 2016 when at around 5.00pm, the complainant arrived home two hours later than usual. On asking the complainant the reason for her lateness, the complainant, while crying, explained that she had sheltered from the rain with the appellant who took her to a bush where he removed her trousers, told her to kneel and put his penis in her vagina. PW2, together with a neighbour (PW3) checked the complainant and noted that she was walking with her legs apart as if in pain, and her pant had blood stains while her vagina had a whitish discharge. They took her to Meridian Clinic before proceeding to the police station where she was given a P3 Form. A PRC Form was given to them at Engineer Hospital. She produced the complainant clinic card as proof of her age.

6. PW3, a Volunteer Community Health worker, stated that she was in her shamba when PW2's daughter was sent by pw2 to call her. PW2 narrated to her what had happened to the complainant and upon interrogation, the complainant explained to her how she had been defiled. On the suggestion of PW3, they proceeded to Nandarasi dispensary where the complainant was examined after which they were referred to Engineer Hospital where the doctor confirmed that the complainant had been defiled. The following day they reported the matter to Kinangop Police Station where they were given a P3 Form which was filled at Engineer Hospital together with a PRC Form. It was her evidence that the appellant was arrested by members of the public after the complainant identified him, after which he was handed over to the police.

7. On 12th May 2016, Dr. Mwangi Muchiri of Engineer Hospital (PW4) examined the complainant and filled in the P3 Form. According to him, the entrance to her vagina was tender/painful, swollen and red; the hymen was intact but inflamed and tender; there was a whitish discharge; and the high vaginal swab revealed pus cells (which indicated an infection process). His remarks were that "signs of penetration are present with stretching but not tearing of hymen". He also filled in the PRC Form in which he indicated that there was a brownish stained underwear showing old blood. He produced the P3 Form and PRC Form as exhibits.

8. At about 8.00am on 12th May 2016, the investigating officer, PC Everlyne Cherotich (PW5), received a report from the complainant, PW2 and PW3 on 12th May 2016, that the complainant had been defiled on 11th May 2016 at about 5.30pm. She recorded the details of the report as well as the appellant's statement. By then the complainant had already been taken to Nandarasi Health Centre, so she issued a P3 Form. She recorded statements of the witnesses and produced the complainant's clinic card as exhibit. She later liaised with AP Officers from Ndunyu Njeru who arrested the appellant.

9. On being placed on his defence, the appellant, in his unsworn statement, stated that on 12th May 2016, he was heading to the shop having left the shamba when he met two Administration Police Officers in the company of his brother, with whom he was not in good terms. His brother pointed him to the police officers who arrested him and took him to Engineer/Kinangop Police Station. He denied the offence and was charged in court.

10. According to him, he was brought up by his step-mother after his mother abandoned him following the death of his father. It was his case that his step-mother and step- brothers wanted to disinherit him hence the reason for the false allegations against him.

11. As already stated, the learned trial magistrate found him guilty of the offence, convicted him accordingly and sentenced him to life imprisonment.

12. Dissatisfied with the decision, he appealed to the High Court complaining: that, the trial magistrate erred in law and facts by convicting him on defective charge sheet contrary to section 134 of the Criminal Procedure Code; that, the trial magistrate erred in law and facts by convicting him whereas the name in the charge sheet was not the name of the person who either testified as PW1 or was examined by PW4; that, the trial magistrate erred in law and in fact by convicting him yet principles applicable in case of circumstantial evidence were never applied; and that the court erred in both law and facts by convicting him on case not proved beyond reasonable doubt.

13. In his judgement dismissing the appeal, the learned Judge (Mwongo, J) sitting as the first appellate court, found: that, on the authority of the case of Isaac Nyoro Kimita & another v Republic [2014] eKLR cited in the case of Erick Maina Mbulele v Republic [2018] eKLR the typographical error in the charge sheet and the omission of the word 'unlawful' did not occasion any prejudice to the appellant who perfectly understood what the charge against him was and thoroughly cross-examined the complainant and the doctor on the offence with which he was charged; that the case against the appellant was based on direct evidence of PW1 which was found to be believable and in accordance with section 124 of the *Evidence Act*, as propounded in the case of Erick Maina Mbulele v Republic [2018] eKLR did not require corroboration.

14. Although the learned Judge initially set aside the life sentence imposed on the appellant for the failure by the trial magistrate to exercise her discretion in the matter, upon delivering his reserved decision on the sentence, he based on the post-judgement directions issued by the Supreme Court in Francis Karioko Muruatetu & Another v Republic and Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR "reinstated" the sentence imposed by the trial court which he had set aside.

15. Undeterred, the appellant is before this Court on second appeal in which, according to the amended grounds of appeal, he is only appealing against the sentence which he contends: was excessive, harsh and unjust considering that he was a first offender; does not sit well with the provisions of the sentencing policy directives; that he is remorseful and repentant; that he has potential if given another chance that the Court should consider giving him a lesser sentence; that ought to have factored in section 333(2) of the Criminal Procedure Code.

16. We heard the appeal on the Court's virtual platform on 14th May 2025 during which the appellant appeared in person from Naivasha Maximum Prison while learned Senior Assistant Deputy Director of Public Prosecution, Mr Omutelema, represented the respondent. Both the appellant and the Mr Omutelema relied entirely on their written submissions.

17. In his submissions the appellant urged us to consider the fact that the circumstances of the case were not too grievous as a life was not lost and he cited a decision of the Indian Supreme Court in Thomas Mwambu Wenyi v Republic [2017] eKLR cited in this Court's decision in Thomas Mwambu Wenyi v Republic [2017] eKLR in which the need to impose an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime was committed was stressed in order to achieve the twin objectives of deterrence and correction. He also cited the Judiciary Sentencing Policy Guidelines and contended that a life sentence does not serve the objectives listed therein. He contended that the appellant was aged 18 years hence the circumstances were not grievous to warrant the life sentence that was imposed and referred to the case of Geoffrey Mutai v Republic [2017] eKLR in which a life sentence was reduced to of 7 years imprisonment. It was his submissions that he was 18 years which was the period of cross over from adolescence to adulthood marked by significant changes (puberty), emotional development, exploration of identity and relationships, transition into adulthood, establishing careers and forming relationships. During his incarceration, he submitted, he had fully embraced the rehabilitative work offered in prison and was

fully engaged in beads and bead work and has as a result acquired skills which would be beneficial to him upon his release. On section 333(2), the appellant cited the case of Ahamad Abolfathi Mohammed & Anor v Republic [2018] eKLR and urged us to consider the period served in custody. He urged us to be guided by the decision in Owino v Republic [2024] KECA 43 (KLR) in which this Court set aside the life sentence imposed and substituted therefore 30 years.

18. On behalf of the respondent, it was submitted: that the appeal against sentence is, pursuant to section 361 of the Criminal Procedure Code, incompetent; that the appellant was given an opportunity to mitigate before being sentenced and reference was made to the case of Republic v Joshua Mwangi Gichuki Petition E018 of 2023, for the position that the minimum mandatory sentence is legal. We were urged to uphold the sentence.

19. We have considered the submissions made in this appeal.

This being a second appeal, we derive our jurisdiction from section 361(1) of the Criminal Procedure Code which provides that:

> A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or
>
> b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

20. We are alive to the fact that in a second appeal, this Court has no jurisdiction to delve into an allegation of severity of a sentence. However, there is a limited jurisdiction to interfere with the sentence, even on a second appeal, where it is alleged that the sentence imposed is illegal or where the circumstances contemplated by this Court in this Court in Robert Mutungi Muumbi v Republic [2015] eKLR are shown to exist. In that case it was stated that:

> "Section 361(1)(a) of the Criminal Procedure Code restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact. However, it is appreciated under section 361(2) of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing."
>
> 17. This Court stressed in MGK v Republic [2020] eKLR
>
> that:
>
> > " 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."

18. This position of the law was recently restated by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) (the Mwangi Case) 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."

21. By dint of that section, the jurisdiction of this Court on a second appeal is confined to matters of law. Section 361(1) (b) of the Criminal Procedure Code bars us from entertaining appeals against sentence unless the subordinate court had no jurisdiction to pass the sentence or the sentence was enhanced by the first appellate court. None of these factors apply to this appeal.

22. Whereas, the Supreme Court has held that in murder cases, courts have discretion to hand down a sentence other than death, the same Court is yet to make a determination as regards minimum or mandatory sentences. Until then, the Apex Court has held that such sentences must be imposed. The Supreme Court, while alluding to trends in other jurisdictions, held in the Mwangi Case that:

> "(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."

23. We must however point out, as we are bound to do, that there are glaring discrepancies in the sentences prescribed under the *Sexual Offences Act*. For example, section 8(1) and (2) of the said Act provides that:

> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

24. Section 20(1) of the *Sexual Offences Act*, on the other hand, provides that:

> Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece,

aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person. [Emphasis added].

25. The predecessor to this Court (as per Sir Clement DeLestang V.P) in Opoya v Uganda [1967] EA 752 at page 754 expressed itself, on the phrase "liable to"" in sentencing, thus:

> " It seems to us beyond argument that the words 'shall be liable to' do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

26. What the two provisions provide is that whereas defilement of a child below 11 years attracts mandatory life sentence, incest with a child of the same age (which in our view ought to be more serious considering the fact that the victim and the culprit are related), only attracts life sentence as the maximum sentence.

27. The appellant pleaded with the Court to consider the fact that he was 18 years at the time of the offence and has since reformed and has been rehabilitated. Sadly, in light of the binding precedent from the highest Court in the land, we are unable to consider those submissions. We must, however, point out that the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR referred to Article 10(3) of the International Covenant on Civil and Political Rights of 1966 which was ratified by Kenya in 1972, and which stipulates that— "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." The Apex proceeded to:

> " ...acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.
>
> 96. We therefore recommend that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.
>
> 97. We are of the view that such proposed legislation will enable us to comply with Articles 2(6) of *the Constitution* which states that any treaty or convention ratified by Kenya shall form part of the law of Kenya."

28. In the end, the Supreme Court directed that:

> "this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought constitute life imprisonment."

29. That was in 2017. More than 7 years down the line, no concrete step has been taken to effectuate the Supreme Court decision in light of the dire prison conditions partly contributed to by the imposition of the minimum or mandatory sentences. Someone somewhere is still idly holding the decision without knowing what to do with it. Surely a decision of the highest Court in the land must count for something. We can only hope that those entrusted with the responsibility of enacting legislation will see it appropriate to move with alacrity in the right direction as was contemplated by the Supreme Court.

30. For now, we must ruefully inform the appellant that recourse to his plea does not fall on our laps and return a verdict that his appeal is dismissed.

31. We so order.

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

J. MATIVO

....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

....

JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR