Odhiambo alias Nyakwar Owiro v Republic (Criminal Appeal 368 of 2019) [2025] KECA 1623 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1623 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 368 OF 2019

MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA

OCTOBER 3, 2025

BETWEEN

JOHN OMONDI ODHIAMBO ALIAS NYAKWAR OWIRO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Migori (Mrima J.) dated 19th September, 2019 in HCCRA No. 31 of 2018)

JUDGMENT

1. This is a second appeal against the judgment and sentence of the trial court, in which the appellant, John Omondi Odhiambo alias Nyakwar Owiro, was charged with the offence of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* in the Senior Resident Magistrate's Court at Rongo. The prosecution alleged that on 30th March, 2018, in Awendo Subcounty of Migori County of the Republic of Kenya, the appellant intentionally caused his genital organ to penetrate the genital organ of CRO, (real name withheld), a minor aged 9 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. However, since the appellant was not convicted on this count we need not go into the details. The appellant denied the charges but was nonetheless tried, convicted and sentenced to life imprisonment.

2. Seven witnesses testified for the prosecution, in a bid to establish the prosecution case beyond reasonable doubt against the appellant. In summary, PW1, CRO recounted that on the material day at about 11am, she was in school playing with her friend JS, (real name withheld), when the appellant approached them and asked them to accompany him to his father's sugar cane plantation so that he could cut for them some sugar cane. They honoured the request and went with the appellant who duly cut for them the cane and they came back. However, when the appellant made a similar request for the second time, JS declined but CRO took up the bait and went along with him. On reaching the

plantation this time, the appellant tricked her to enter the plantation whereupon he drugged her and sexually assaulted her overnight.

3. When CRO came to in the morning of the following day she found herself alone in the plantation and tried to find her way home. As she did so, she pumped into PW3, Beatrice Nyambura, who assisted her to find her a way around. PW3 however noted that CRO was visibly shaken and unable to speak. She observed some blood on her buttocks. She consoled her before escorting her to her father, FO, (real name withheld), PW4, who also noted blood on the lower part of CRO's dress and appeared dumbfounded. He took her to hospital and upon treatment she recovered her speech and told him that the appellant was responsible for her condition. The incident was reported to PW5, APC James Ouma. In the company of FO, CRO and JS, they traced the appellant at the local shopping centre and immediately arrested him. PW6, Dr. Peter Mugambi, provided medical evidence that supported CRO's account, highlighting that the injuries observed were consistent with the alleged events and that indeed CRO had been defiled. Lastly, PW7, Investigating Officer IP David Mwangi, methodically presented the gathered evidence, piecing together witness testimonies and medical reports to build a strong case against the appellant.

4. The appellant, appearing in person, mounted his defence by denying the allegations and swearing his innocence. He called two workmates as witnesses, DW1 Paul Onyango and DW2 Vincent Ochieng, who testified in unison that on the material day, they had been with him the entire day and that he never left their sight. Despite the defence, the trial court, after carefully weighing the testimonies and evidence, delivered its judgment on 6th July 2018, convicting the appellant and sentencing him to life imprisonment.

5. The appellant's first appeal to the High Court against both the conviction and sentence was ultimately dismissed in its entirety. The appellant still being dissatisfied with the judgment of the High Court is before this Court for a second and perhaps last chance. However, the appeal is now limited to sentence only. The appellant, by way of his undated memorandum of appeal, basically claims that first appellate and trial courts erred in law by imposing and upholding a harsh sentence without taking into consideration his mitigation.

6. The appeal was heard by way of written submissions. At the plenary hearing, the appellant appeared in person on our virtual platform from Kibos medium prison, while Mr. Chirchir, learned Prosecution counsel holding brief for Ms. Ikol appeared for the respondent.

7. The appellant argued that both courts below erred in law by imposing and upholding a harsh sentence without taking into consideration his mitigation factors. He contended that the two courts failed to exercise discretion in sentencing due to the mandatory nature of the penalty prescribed under Section 8(2) of the *Sexual Offences Act*. The appellant further submitted that, as a first offender, he was entitled to benefit from Article 27(2) and 50(2)(p) of the *Constitution*, which guarantees protection against unfair discrimination in sentencing. He argued that the two courts below failed to consider Sections 216, 329, and 333(2) of the Criminal Procedure Code in determining the appropriate sentence.

8. He urged the court to be guided by the following decisions where courts exercised discretion and imposed a determinate sentence despite the mandatory sentences earlier imposed by the trial court. Evans Wanjala Wanyonyi v Republic [2019] KECA 679 (KLR) and Yawa Nyale v Republic [2018] KEHC 4441 (KLR). He further referred to the case of JLHS Manyaso v Republic Criminal Appeal No. 12 of 2021 at the Malindi, where mandatory life imprisonment was declared unconstitutional.

9. Lastly, the appellant urged this Court to invoke Section 333(2) of the Criminal Procedure Code so as to take into account the period he spent in custody before sentencing, citing the case of Ahmad Abolfathi Mohammed and Another v Republic [2018] eKLR in support thereof.

10. In response, Mr. Chirchir contended that the sentence imposed by the trial court and upheld by the first appellate court was lawful and appropriate given the nature of the offence. He argued that the trial court properly exercised its discretion in sentencing and that the mandatory life sentence was prescribed by law, leaving no room for an alternative sentence. Counsel further submitted that the appellant's mitigation was duly considered but did not outweigh the severity of the crime committed.

11. Counsel relied on the case of Munyiri v Attorney General & another [2023] KEHC 22358 (KLR), where the court upheld the principle that statutory sentencing provisions must be applied strictly unless exceptional circumstances warrant deviation. Counsel also cited the case of James Waweru Mwangi v Republic (supra), in arguing that judicial discretion in sentencing must align with statutory mandates. Furthermore, counsel referred to the case of Ahmad Abolfathi Mohammed & another v Republic (supra), to argue that Section 333(2) of the Criminal Procedure Code does not apply where a mandatory sentence is prescribed by law.

12. Counsel submitted that the appellant's reliance on constitutional provisions, including Article 27(2) and 50(2)(p) did not justify an interference with the sentence, emphasizing that judicial discretion was constrained by the statutory framework governing sentencing for the offence in question.

13. We have considered the record of appeal, respective submissions by counsel, authorities cited and the law and this is our take. Though the appellant argues that the sentence imposed was excessive and unconstitutional, however, Section 8(2) of the *Sexual Offences Act* prescribes a mandatory life sentence for the offence committed under this provision. The Supreme Court in Francis Karioko Muruatetu & Another v Republic [2021] KESC 31, (Muruatetu Two), clarified that the decision in the earlier Francis Karioko Muruatetu & Another v Republic (2017) eKLR (Muruatetu 1) applied only to murder cases and did not extend to other offences with mandatory sentences.

14. The recent Supreme Court judgment in the case of Republic v Joshua Gichuki Mwangi Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR (12th July 2024) (judgment), reaffirmed that mandatory minimum sentences under the *Sexual Offences Act* remain valid, binding and should be imposed as a matter of course unless there is legislative intervention. Our hands in the matter are bound therefor. We cannot interfere with the sentence imposed by the trial court and affirmed by the first appellate court. It was the statutory sentence.

15. In the result, the appeal is devoid of merit and is accordingly 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. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR