



REPUBLIC OF KENYA



KENYA LAW
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**Nyangau v Republic (Criminal Appeal 344 of 2019)
[2025] KECA 1779 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1779 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 344 OF 2019
MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA
OCTOBER 24, 2025**

BETWEEN

JAMES NYANGAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nyamira,
(Nagillah, J.) dated 9th December, 2015 in HCCRA No. 15 of 2015)*

JUDGMENT

1. The appellant, James Nyangau, was charged before the Senior Resident Magistrate's Court at Keroka in Criminal Case No. 408 of 2014 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 the 22nd April, 2014, at [Particulars withheld] in Masaba North District of Nyamira County, the appellant caused his penis to penetrate the vagina of LBN¹, a child aged nine (9) years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the survivor, date, and place of the alternative count were the same as that in the main charge.
3. The appellant pleaded guilty to the main count and the learned trial magistrate convicted and sentenced him to life imprisonment as provided for by the law. The appellant was aggrieved by the decision of the lower court and appealed against the conviction and sentence before the High Court.
4. The High Court (Nagillah, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 9th December, 2015.



5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal faulting the learned judge for failing to consider the appellant's age when sentencing and meting a life sentence which is unconstitutional.

¹ Initials used to protect the minor's identity

6. In his written submissions, the appellant argued that the mandatory life sentence meted against him is unconstitutional due to its indeterminate nature. Relying on the case of Julius Kitsao Manyeso vs. Republic Mombasa [Criminal Appeal No. 12 of 2021] the appellant submits that the mandatory sentences are discriminatory and denies the judicial officer the opportunity to exercise discretion.
7. The appellant claims that he is elderly and unwell, but he is remorseful, has completed rehabilitation while in custody, and is prepared to reintegrate into society.
8. In opposing the appeal, the respondent contends that the sentence meted against the appellant is within the law as provided for under the *Sexual Offences Act*, and has not been declared unconstitutional. In support of this argument, reference is made to the case of Elemon vs. Republic (Criminal Appeal 103 of 2019) [2023] KECA 734 (KLR).
9. The respondent submits that in the instant appeal, the appellant pleaded guilty and was sentenced to life imprisonment as per section 8(2) of the *Sexual Offences Act*, which sentence was upheld on 1st appeal. The appellant admitted unequivocally having defiled the complainant despite being cautioned four times, therefore the sentence is appropriate as the law provides for a mandatory sentence of life imprisonment under section 8(2) of the *Sexual Offences Act*.
10. Regarding the complaint that the trial court failed to consider the appellant's age before sentencing, the respondent contends that sentencing is an exercise of discretion and an appellate court will ordinarily not interfere with that exercise of discretion unless it was not well exercised. Relying on the case of Arthur Muya Muriuki vs. Republic [2015] eKLR the respondent submits that both the trial and the appellate court were just and fair as they gave a sentence that is stipulated in section 8(2) of the *Sexual Offences Act*; and that both courts did not act on any wrong principle nor were they capricious in their sentences.
11. This being a second appeal, the mandate of the Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. See Section 361(1) of the Criminal Procedure Code (CPC). In the case of Kaingo vs. Republic [1982] KLR 213, this Court stated thus:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did. See (Reuben Karoti S/O Karanja versus Republic [1956] 17EACA 146).”

12. Our assessment is that the main issue that falls for determination is whether this Court should interfere with the sentence that was imposed on the appellant. A perusal of the appellant's memorandum of appeal and the submissions in support indicates that the appeal is on sentence only. During the trial, the prosecution stated the facts which formed the basis of the charge as follows:

On 22nd April 2014 it was about 3:00 pm one Loice Nyakeko a minor aged 9 years was at their residence at home within Riamoni village and was in the company of her younger



sister namely Kemunto. The two were fetching water from a nearby well which is within the residence of the accused herein and which they have routinely fetched water from. As Loice was fetching water, the accused appeared and requested her to accompany him to a nearby maize farm where he could give her Kshs.20. The said minor objected to the request by the accused and instantly the accused held the minor by hand and pushed her to the said maize farm and he forcefully removed the minor's pants and forced her to the ground. The accused removed his trousers to the knee size and was able to lie on top of the said minor and defiled her by inserting his penis into the minor's vagina. This made the said minor to raise an alarm owing to the pain she experienced and the alarm attracted one Lydia Kemunto Benard who is the mother of the said minor and she rushed in the direction of the alarm which was nearby. The minor was screaming for help. Lydia rushed on suspicion that maybe the minor had fallen in the borehole only to find the accused in the process of defiling the victim as she was still crying. Lydia also raised alarm by screaming and members of the public responded and were able to arrest the appellant while still in the act of defiling. Due to anger of the members of the public, the public inflicted mob justice on the accused while leading him to the area assistant chief of Riamoni Sub location who advised them to take the accused to Keroka Police Station. The victim was escorted to Keroka Police Station after being treated at Gesima Health Centre and a P3 Form was filled to this effect. The P3 Form and treatment chits were produced as Exh. 1[a], Exh. 1[b] and Exh. 1[c]. Investigations led to accused being charged with the offence. I also produce treatment notes for the accused as Exh. 2. These are the facts in respect of how the offence was committed. Accused is charged with the offence herein.”

13. The appellant admitted the charge and confirmed that the facts were correct. The trial court cautioned the appellant four times on the charges he faced and the life sentence possible upon conviction but still maintained his plea of guilty. He was then allowed to present his plea in mitigation, during which he pleaded for forgiveness from the court, acknowledging that the offence he committed was serious. After considering the nature of the offence and the mitigating factors, including that the appellant was a first offender, the learned magistrate sentenced the appellant to life imprisonment. The appellant, however, argues that the trial court and the first appellate court imposed a mandatory minimum sentence, which he claims is unconstitutional.
14. As regards sentencing, it is now acknowledged that sentencing is a discretionary exercise by the trial court. An appellate court will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in *Bernard Kimani Gacheru vs. Republic* (2002) eKLR stated thus:

“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. We also recognise the Supreme Court’s pronouncement in Petition No. E018 of 2023, Republic vs Joshua Gichuki Mwangi, in regards to minimum sentences prescribed by section 8 of the *Sexual Offences Act* in which it stated that:

“66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in the Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed....

(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”

16. Although the appellant argues that the mandatory minimum sentence imposed is unconstitutional, this Court lacks jurisdiction to interfere with the sentence. Further, from the record, it is evident that the appellant did not before the High Court challenge the constitutionality of the sentence meted by the trial court and hence cannot raise it at this stage. In Republic vs. Mwangi [supra], the Supreme Court stated that;

“The record also shows that the issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the Respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the Respondent’s sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.”

17. In the circumstances, the appellant has not established any grounds upon which this Court can interfere with his sentence. Ultimately, we are satisfied that the appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 24TH 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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

