



**Oloo v Republic (Criminal Appeal E040 of 2021)
[2025] KECA 1787 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1787 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E040 OF 2021
MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA
OCTOBER 24, 2025**

BETWEEN

MOSES ODHIAMBO OLOO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kisumu,
(J.R. Karanja, J), dated 20th October, 2020 in HCCRA No. 54 of 2018)*

JUDGMENT

1. The appellant, Moses Odhiambo Oloo, was in the main count 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 charge stated that on 26th August 2018 at West Kanyada Location, Rachuonyo Homa Bay County, the appellant caused his penis to penetrate the vagina of M.A.W a child aged 10 years. Arising from the particulars in the main charge, the appellant was charged with an alternative charge of indecent act with a minor contrary to section 11[1] of the *Sexual Offences Act*. At the conclusion of the trial, he was found guilty of the main charge and sentenced to life imprisonment.
2. Dissatisfied with the judgment of the trial court, the appellant unsuccessfully moved the High Court to reconsider the findings. Undeterred, he is now before this Court, raising nine grounds of appeal, which essentially challenge the sentence imposed on him.
3. During the trial, the prosecution called five (5) witnesses including the minor complainant, MAW who testified as PW2, her uncle, PW3, EOO (E), Dr. Willis Omondi [Dr Omondi] testified as PW1, the clinical officer at Rachuonyo-Sub County Hospital, MO [M testifying as PW4, JOO [J], PW5, E's brother, and the arresting officer, Corporal Chepkoech Kessem (PC Chepkoech) the Investigating Officer, PW6.



4. The evidence as presented at the trial was that on the fateful day, at around 6:00 pm, MAW was at home with her cousin Sharon. MAW's uncle E had gone to town. The appellant who is E's housekeeper entered the house. E called his daughter S and instructed her to feed the goats, but S delegated the work to the MAW and left. When MAW went to E's bedroom to get a saw for preparing the animal feeds, the appellant followed her and grabbed her neck, pulled off her skirt and tore off her under pant. The appellant then dragged her to the sitting room, put her on the chair and while still holding her neck, the appellant pulled down his trouser and inner wear to his knees. He parted MAW's legs and inserted his penis into her vagina. Fortunately, E walked in and when the appellant tried to run, he tripped over the clothes around his knees. E called his brother [M and sent him to call the chief. On arrival JOO, the area chief alerted the police and accompanied Musa back to the scene. J arrested the appellant and was rearrested by PC Chepkoech who preferred the present charges against him.
5. Dr. Willis Omondi from Rachuonyo District Hospital attended to the complainant. On physical examination, he noted a bruised vaginal wall and vaginal discharge. Upon urinalysis, spermatozoa and epithelial cells were seen. Dr Omondi concluded that MAW had been defiled.
6. Upon being placed on his defence, the appellant opted to remain silent and did not call any witnesses. The trial court found the evidence sufficient to sustain a conviction and meted out a life sentence. This led to the unsuccessful appeal before the High Court and ultimately this 2nd appeal before us.
7. At the hearing of the appeal, the appellant who was acting in person relied on his written submissions to contend that he was sentenced to a mandatory sentence, which does not meet the objectives of sentencing – namely: retribution, deterrence, rehabilitation, restorative, community protection and denunciation.
8. The appellant contends further that the mandatory nature of the sentence is discriminatory and unconstitutional, as it denies the appellant the right to a fair trial. Relying on the cases of Julius Kitsao Manyeso vs. Republic [2023] eKLR & Evans Nyamari Ayako vs. Republic [2024] eKLR among others, the appellant urged the court to invoke the provisions of section 333[2] of Criminal Procedure Code and factor in the time already spent in custody before the sentencing.
9. The appellant urges the Court to allow the appeal in view of the mitigating circumstances; that he is remorseful; reformed and rehabilitated. While in custody, the appellant underwent training in theological courses, which he says have been useful to him during his reformation.
10. Opposing the appeal, Learned Prosecuting Counsel Ms. Kanyita appeared for the respondent and relied on her written submissions. She opposed the appeal relying on the Supreme Court decision in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12th July, 2024) (Judgment) where the apex 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 the statutes unattended, then the mandatory sentences therein are legal. Consequently, a person convicted of defilement under section 8(2) of the Act, as in the case herein, must be sentenced to the mandatory life sentence.
11. This being a second appeal, this Court's jurisdiction flows from section 361 (1) of the Criminal Procedure Code, and by virtue of the provision, the focus is on matters of law and not facts. And sentence is a matter of fact. Our interference with factual conclusions is only warranted where the



courts below considered irrelevant facts, neglected relevant ones, or outrightly erred in the analysis of the evidence. In *Dzombo Mataza vs. Republic* [2014] KECA 831 (KLR), it was held that:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno vs. Republic* (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. We do not discern such misgivings in this appeal.”

12. Having considered the record of appeal, the respective rival submissions and the law, the main issue for determination is whether there is any justification for this Court to interfere with the sentence of life imprisonment imposed based on his arguments concerning proportionality, rehabilitation, judicial discretion and time already served. The appellant challenges the mandatory life sentence imposed on him under Section 8(2) of the *Sexual Offences Act* arguing that it is excessive, contrary to the objectives of rehabilitation, and fails to incorporate mitigating factors such as his age, time served, and remorse.

13. This Court in *Bernard Kimani Gacheru vs. Republic* [2000] eKLR, held that sentencing is a matter within the discretion of the trial court and should be disturbed only if it is excessive or based on improper considerations. Furthermore, the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others* (supra) held that:

“57. ... 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...”

67. 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 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... 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.”

14. The appellant, having been convicted of defiling a child below the age of eleven, was subject to the life sentence prescribed by law, which the trial court imposed and upheld by the first appellate court. The apex Court having stated the position of the law, there is absolutely no reason to depart from those sentiments. Consequently, we are satisfied that the appeal lacks merit and is dismissed.

DATED AND DEVERED 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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

