



**Petero v Republic (Criminal Appeal E022 of 2021)
[2025] KECA 1782 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1782 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E022 OF 2021
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
OCTOBER 24, 2025**

BETWEEN

PETER EMECHE PETERO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Bungoma
(Kiarie Waweru Kiarie, J) dated 4th October, 2018 in HCCRA No. 32 of 2015)*

JUDGMENT

1. Peter Emeche Petero, the appellant herein was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the [Sexual Offences Act](#). The particulars of the offence were that on 22nd November, 2013 in Bungoma County, the appellant unlawfully and intentionally attempted to cause his penis to penetrate the vagina of SC (name withheld), a child aged 4½ years. He was alternatively charged with the offence of committing indecent with a child contrary to section 11(1) of the [Sexual Offences Act](#) based on the same facts. After full trial, he was convicted on the main charge and sentenced to serve twenty (20) years imprisonment.
2. Aggrieved by the conviction and sentence, the appellant filed an appeal before the High Court of Kenya at Bungoma. In his petition of appeal, the appellant challenged his conviction on the grounds that he had been convicted on the basis of contradictory evidence, he faulted the trial magistrate for mis- interpreting the law on arriving at the impugned verdict without taking into consideration his submissions. He was aggrieved that he was denied the opportunity during trial to express his views before the verdict was reached. In that regard, he complained that his right to fair trial were violated. He therefore urged the Court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.



3. At the hearing of the appeal before the first appellate (K.W. Kiarie, J), the appellant abandoned his appeal against conviction. He instead pleaded with the court to consider reducing the custodial sentence that was imposed on him. In his considered judgment, the learned Judge held thus:

“ 11. Section 9(2) of the *Sexual Offences Act* provides as follows:

‘A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.’”

4. In the case of *Nelson v Republic* [1970] EA599, it was held as follows:

“The principle upon which an appellate court will act in exercising its jurisdiction to review sentence are firstly, (sic) established the court does not alter a sentence on a mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge under (sic) as was said in *James v Rex* [1950]. 18 EACA 147, it is evident that the Judge has acted upon some wrong principles or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *Republic v Shershewcity* [1912] C.CA28 T. LR 364.”

5. The first appellate court declined to interfere with the sentence meted on the appellant by the trial court thus provoking this second appeal.

6. In his grounds of appeal, the appellant was aggrieved that the custodial sentence imposed on him was harsh and excessive. He continued to reiterate that the custodial sentence imposed upon him ought to be reviewed downwards in view of the mitigating circumstances. Both the appellant and the respondent filed written submissions in support of their opposing positions. Whereas, the appellant urged the Court to consider his appeal favourably, the respondent was of the view that the appeal lacked merit and should be dismissed. In addition to the written submissions, the appellant orally pleaded with the Court to take into consideration the period that he was in remand custody when the appeal came up for plenary hearing.

7. The Jurisdiction of this Court as the second appellate Court is circumscribed under section 361(1) of the Criminal Procedure Code is clear: It provides thus:

“A party to an appeal from a subordinate court may, subject to sub-section (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 under this section-

- a. on 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 has no power under section 7 to pass that sentence.”

8. In *Benard Kimani Gacheru v Republic* [2002] KECA 94 (KLR), this Court held that:

“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 factors, or took into account, some wrong material, or acted on a wrong principle.”

9. Upon review of the facts of this appeal, it was clear to us that the custodial sentence mated on the appellant was legal. Section 9(2) of the *Sexual Offences Act* provides that when a person is convicted of the offence of attempted defilement, he is liable to be sentenced to serve an imprisonment term of not less than ten (10) years. Although the appellant urged this Court to uphold his plea that the sentence was harsh and excessive, just like the first appellate Court, we hold that the trial court did not err in awarding the sentence of twenty (20) years imprisonment taking into account that the age of the victim was 4½ years old at the time of the attempted sexual assault. The appellant’s mitigation was considered. The first appellate Court did not err in principle or considered extraneous circumstances when it dismissed the appellant’s appeal on sentence.
10. The only issue that the first appellate court appeared to have overlooked is the fact that the appellant was in remand custody prior to his conviction and sentence. This period ought to have been taken into account pursuant to section 333(2) of the Criminal Procedure Code.
11. In the premises therefore, other than the taking into account the period of remand custody, the appeal lacks merit and it hereby dismissed. The appellant’s custodial sentence shall take effect from 22nd November, 2013, when he was arraigned before the trial court for plea.

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. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR.

