Mangeli v Republic (Criminal Appeal E045 of 2023) [2025] KEHC 15468 (KLR) (30 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15468 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E045 OF 2023

CW MEOLI, J

OCTOBER 30, 2025

BETWEEN

KYALO MANGELI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against sentence in Loitokitok Criminal Case S.O No 14 of 2020)

JUDGMENT

1. The Appellant, Kyalo Mangeli was charged in the main count with Defilement contrary to Section 8 (1) as read together with Section 8(3) of the *akn ke act 2006 3 Sexual Offences Act*. The particulars being that on 24th July, 2020 at Isineti market, Loitokitok sub-county, Kajiado County, he intentionally caused his penis to penetrate the vagina of DWM a child aged 14 years. The alternative charge was Indecent Act with a child contrary to Section 11(1) of the *akn ke act 2006 3 Sexual Offences Act*.

2. Following a full trial, the Appellant was convicted and sentenced to serve 15 years imprisonment. Aggrieved with the outcome, he filed an appeal raising 6 grounds of appeal as follows:

   a. That the trial court convicted and sentenced the appellant of the offence charged, notwithstanding prosecution failed to prove the case beyond reasonable doubt.

   b. That the trial court convicted and sentenced the appellant of the offence charged, notwithstanding the crucial prosecution witnesses were not availed.

   c. That the trial court convicted and sentenced the appellant of the offence charged, notwithstanding the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in selective judgement.

d. That the trial court convicted and sentenced the appellant of the offence charged, notwithstanding the plausible defence of the appellant was not given due consideration.

e. That the trial court convicted and sentenced the appellant of the offence charged, notwithstanding the vital ingredients of the offence charged were not proved as stipulated by law.

f. That I apply for copies of court proceedings to enable me raise more relevant grounds.

3. However, upon directions being issued for the filing of submissions on the appeal, the Appellant filed submissions dated 3rd October 2024 by which he abandoned the appeal on conviction, while pursuing the appeal on sentence. By the submissions, he seeks reduction of the sentence on grounds that he has reformed and post-sentencing mitigation. He highlights his rehabilitation during four years of incarceration, citing completion of vocational and religious courses, including a National Trade Test Certificate in Carpentry and Joinery, and certificates in Christian discipleship and evangelism.

4. He also invokes Paragraph 4.8.20(vii) of the Judiciary Sentencing Policy Guidelines (2023), on the principle of "the possibility of reform and social re-adaptation of the offender" as a relevant mitigating factor. He urges the court to consider his age, his antecedents as a first-offender, remorse, and time already served, and proposes a reduced sentence of ten years to enable his reintegration back into society to contribute.

5. Additionally, the Appellant complains that contrary to the requirement of Section 333(2) of the Criminal Procedure Code, time spent in custody during the trial was not considered at sentencing sentence. He relies on the Court of Appeal decision in Ahamad Abolfathi Mohamed and another v Republic (2018), and Paragraphs 5.1.2 and 2.3.19 of the Sentencing Policy Guidelines in this regard.

6. The Respondents did not file their submissions despite being opportunity to do so.

Analysis and Determination

7. On a first appeal, the court is obligated to re-evaluate the evidence adduced before the trial court with a view to arriving at its own conclusion.

8. In proof of the ingredients of the offence of defilement, the prosecution called five witnesses. The prosecution case was that in 2020 the complainant D.W.M (PW1) who was born on 14.4.2006 was aged 14 years and was residing with her mother Dorcas Mulani Nzau (PW2) at Isineti in a rented home consisting of two adjoining rooms constructed with iron sheets . The Appellant was their neighbor in the same compound occupying a different room with his wife and children.

9. On the night of 24.7.2020, PW2 left PW1 at the home with instructions to prepare supper as she went to attend a funeral wake in the neighborhood. At 9:20pm PW1 decided to retire to her adjoining room where she normally slept, but as she closed the door, the Appellant forced his way into the room, and held her mouth before closing the door. He then proceeded to push PW1 onto the bed and had sex with her. However, while this was going on, PW2 returned, and failing to elicit a response from the daughter, peeped through a hole in the wall separating the two rooms and as the lights were on, she was able to see gumboots and a man in a white t-shirt inside the room.

10. Acting fast, she locked the said room and urgently called the nyumba kumi elder, Emmanuel Mutungi (PW3) to come over, as the Appellant opened the window to PW1's room intending to flee and succeeded to do so, after knocking down PW2 when she tried to stop him. Presently, the Appellant appeared outside PW2's room pretending to have come from elsewhere and, as he and PW2 engaged

in an altercation in the presence of the Appellant's wife, PW3 arrived. The Appellant was restrained and with PW1 escorted to Isineti Police Station.

11. Later, on the same night, PW1 was escorted to Loitokitok hospital by the investigating officer P.C Faith Nzioka (PW5) who had received the report, and was examined by Ntipape Sanita (PW4), a clinical officer at Loitoktok sub-county hospital. PW4 testified that upon examination, it was found that PW1's hymen was perforated, and that her injuries were approximately 14 hours old. As documented in the P3 form and PRC form produced as Exh. 2 and 3, respectively. Also produced were PW1's laboratory reports, Exh. 4 a, b, c and for the Appellant , Exh.5.

12. The Appellant, upon being placed on his defence gave a sworn statement to the effect that on 23rd July 2020, he was watering onions at a farm in Kirusha, Namelok, with his colleague Boniface Wambua (DW1) until around 10 – 11 pm. While walking home to Isinet town, they encountered police officers who stopped them. While Boniface fled, he was arrested allegedly for being out at night without good reason. He denied knowing PW1 and PW2. On his part, Boniface Wambua testified that he worked with the Appellant on 23.7.2020, but as they headed home, they were intercepted by police who arrested the Appellant, while he himself managed to escape.

13. In its judgment, the trial court examined the evidence with care and found the Appellant guilty and convicted him on the main count. The findings cannot be faulted. The evidence regarding the age of PW1, the fact of penetration and identification through recognition, of the Appellant by PW1 and PW2 as the perpetrator was compelling. Not to mention that the Appellant was caught in flagrante delicto by the complainant's mother, PW2 on the material night. The Appellant having advisedly abandoned the appeal on conviction, the court will consider his complaints regarding the sentence.

14. During sentencing, the Appellant who had no previous conviction told the court in mitigation that he had a young family with six school-going children, and was the family's bread winner. A pre-sentence report dated 10th June 2021 did not support a lenient sentence, citing increasing incidents involving defilement. The Appellant was on 16.6.2021 sentenced to 15 years imprisonment. The trial court stating in its notes as follows:

> " The accused person is convicted of the offence of defilement under Section 8(1) (3) of the *akn ke act 2006 3 sexual offences act*.
>
> Subsection (3) of the said act provides that where a person is convicted under this subsection, he is liable to imprisonment for a term not less than 20 years.
>
> Taking into consideration to report and that of accused person is a first-time offender, I hereby sentence the accused person to 15 years' imprisonment. Right of appeal 14 days". (sic)

15. The Appellant has complained that the above sentence is harsh and excessive while contending that the trial court did not consider mitigating factors. He claims that he has been reformed and undertaken various courses while in prison. He further complains that the time that he had spent in custody prior to sentence was not considered. Hence urging the court to reduce his sentence to 10 years imprisonment.

16. Section 8(3) of the *akn ke act 2006 3 Sexual Offences Act* provides that:

> ''A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.''

17. The trial court was acutely aware of the above provision. And although it did not expressly state this, the jurisprudence in the case of Evans Nyamari Ayako v Republic Criminal Appeal No. 22 of 2018 and other similar cases, emanating from the application of the decision of the Supreme Court in Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR (Muruatetu I) may have influenced the awarding of a sentence, other than the prescribed mandatory sentence.

18. The rationale in the Muruatetu I (supra) has hitherto been applied in many cases involving offences under the *akn ke act 2006 3 Sexual Offences Act*. Including Christopher Ochieng Vs. Republic (2018) eKLR and Manyeso V. Republic CRA No. 12 of 2021 (2023) KECA 827 (KLR). However, the Supreme Court has recently pronounced itself in Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024) KESC 34 (KLR) as follows, regarding minimum or mandatory sentences prescribed under Section 8 of the *akn ke act 2006 3 Sexual Offences Act*:

> " In any case, the sentence imposed by the trial court was lawful and remains lawful as long as Section 8 of the *akn ke act 2006 3 Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with the sentence."

19. Further, in an appeal to the Supreme Court emanating from the Court of Appeal decision in Republic Versus Evans Nyamari Ayako Petition No: E002 of 2024 the Supreme Court in its judgment delivered on 11th April 2024 stated that:

> " (51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.
>
> In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence." (emphasis added).

20. As explained in Muruatetu II case above, and whose dicta was applicable as of June 2021 when the Appellant was sentenced, the decision in the Muruatetu I and Ayako's case cannot be applied in sentencing an offender convicted under Section 8 (1) as read with Section 8(3) of the *akn ke act 2006 3 Sexual Offences Act*, and this court, like the Court of Appeal in Mwangi's case above, lacks the jurisdiction to reduce the sentence of 15 years imposed by the trial court. Equally, the trial Court had no jurisdiction to award the sentence of 15 years imprisonment.

21. Based on the provisions of Section 8 (3) of the *akn ke act 2006 3 Sexual Offences Act* and flowing from the foregoing recent decisions of the Supreme Court thereon, the lawful mandatory sentence for the offence for which the Appellant was convicted is 20 years imprisonment. The trial court had no discretion, and the sentence of 15 years imprisonment is erroneous and without jurisdiction. The ground seeking reduction of sentence must fail. The court hereby sets aside the illegal sentence of 15 years imprisonment and substitutes therefor the lawful mandatory sentence of 20 years imprisonment.

22. As regards the application of Section 333(2) of the Criminal Procedure Code in sentencing, a perusal of the record supports the Appellant's complaint. The record shows that the Appellant having been arrested on 24.07.2020 remained in custody until his sentencing on 16.06.2021. In the circumstances, the court directs in accordance with Section 333(2) of the Criminal Procedure Code and the dicta in Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR) that, the substituted

sentence of twenty years imprisonment shall run from the date of the Appellant's arrest, that is 24th July, 2020. The appeal succeeds to that extent alone.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 30 TH DAY OF OCTOBER 2025 .

C.MEOLI

JUDGE

In the presence of:

Appellant: Present

For the State: Mr. Kilunda

C A: Lepatei