



**Ondati v Republic (Criminal Appeal 147 of 2020)
[2025] KECA 1897 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1897 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 147 OF 2020
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
NOVEMBER 7, 2025**

BETWEEN

NICHOLAS ONDATI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of
Kenya at Kakamega, (Majanja, J) dated 3rd September 2019)*

JUDGMENT

1. This is a second appeal against the conviction and sentence imposed by the Senior Magistrate’s Court at Hamisi, (“trial court”), wherein the appellant, Nicholas Ondati, had been charged, tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(5) for the *Sexual Offences Act*, (“SOA”). The particulars of the offence were that on diverse dates between 9th and 14th December 2015, at xxxxx village in xxxx Sub-Location, xxxxxLocation within Vihiga County, the appellant unlawfully and intentionally caused his genital organ namely, the penis, to penetrate the genital organ, namely the vagina of J.K., a minor aged fifteen years. In the alternative, he faced a charge of committing an indecent act with a child, contrary to Section 11(1) of the same Act. As the appellant was neither convicted nor sentenced on the alternative count, we need not go into the details of the count.
2. The facts leading to this appeal are that on the morning of 9th December 2015, J.K. (real name redacted), a fifteen-year-old girl, left home to fetch firewood. While doing so, she encountered the appellant, a relative, who invited her to his house under the guise of offering her some maize to eat. Upon entering the house however, the appellant locked the door and then knocked her down and forcefully inserted his fingers and thereafter his penis into her vagina. Fearing reprisal, JK did not scream and remained confined in the appellant’s house for five more days and continued to have unconsensual sex with him.



3. Satisfied, the appellant visited J.K.'s mother, (E), (real name redacted as well) (PW2) and informed her that he had the custody of her daughter and wanted her to go and collect her. Alarmed, PW2 in the company of one Rael, proceeded to the appellant's house. At the house Rael called out J.K., who emerged and was immediately taken by the duo to Hamisi Sub-County Hospital for medical examination and treatment. At the hospital, Simon Manyu (PW3), a clinical officer, examined her and noted bruising, tenderness, and a foul-smelling discharge from her vaginal area. Laboratory tests revealed pus cells in her urine, consistent with a bacterial infection. He concluded that she had engaged in penetrative sexual activity. During the trial, he tendered in evidence the P3 form, treatment notes, and post-rape care form in respect of J.K.
4. Subsequently, village elders suspecting that the appellant had committed the offence, arrested him and presented him to the Administration Police Officer Stephen (PW4) at Givogi AP Camp. The officer re-arrested the appellant and subsequently transferred him to Gambogi Police Post. Investigations were conducted by PC Taragwa (PW5) of Gambogi Police Post who thereafter charged the appellant with the Offences.
5. In his defence, the appellant gave a sworn statement denying the allegations. He claimed that he was being framed due to a land dispute involving the J.K.'s father and himself.
6. Upon evaluating the totality of the evidence, the trial court found the main count against the appellant proved as required in law. It accordingly convicted the appellant and sentenced him to twenty years' imprisonment.
7. His first appeal to the High Court of Kenya at Kakamega was after due consideration, dismissed in its entirety by Majanja, J.
8. The appellant being again dissatisfied with the said judgment is now before this Court on second and perhaps last appeal which is but limited to sentence only.
9. When the appeal came up for hearing the appellant appeared in person via our virtual platform from Kitale Annex prison while Mr. Kilambyo, learned Prosecution counsel appeared for the respondent. Both parties elected to rely entirely on their written submissions that they had filed and exchanged.
10. The appellant in challenging the sentence imposed, urged this Court to reduce it to a lesser form of punishment, citing the progress he had made in rehabilitation.
11. He contended that his continued incarceration, despite demonstrable reform, undermines the rehabilitative purpose of sentencing and risks converting correctional facilities into punitive detention camps. The appellant referred to the cases of Julius Kitsao Manyeso Cr. Appeal No. 12 of 2021 and Makumbi Subui Wanyeso v Republic Cr. Appeal No. 110 of 2022, in arguing that sentences should be subject to review where rehabilitation has been achieved, and that failure to do so may amount to inhuman treatment.
12. He pleaded for the application of Section 333(2) of the Criminal Procedure Code, so that the time he spent in remand custody while undergoing trial be considered as part of the sentence served.
13. Counsel for the respondent opposed the appeal. Counsel submitted that the appellant was lawfully sentenced to the statutory minimum sentence. Counsel emphasized that this being a second appeal, the Court's jurisdiction is confined to matters of law under Section 361(1) (a) of the Criminal Procedure Code and that sentence was a matter of fact. He cited the case of Njoroge v Republic [1982] KLR 388, in asserting that severity of sentence is a question of fact and therefore not within the purview of determination by the Court of Appeal unless the sentence was unlawful or was enhanced by the High Court which was not the case here.



14. That the sentence is the statutory minimum under Section 8(3) and cannot be reduced below that threshold. Counsel relied on the case of *Republic v Joshua Gichuki Mwangi*, Petition No. E018 of 2023, where the Supreme Court clarified that mandatory minimum or maximum sentences under the SOA remain valid and constitutional and should be imposed.
15. That where the law prescribes a mandatory minimum sentence, courts are bound to impose it without deviation. That the appellant's claims of rehabilitation and hardship were not supported by the record. In conclusion, counsel maintained that the sentence imposed was lawful, urging the Court to dismiss the appeal therefor.
16. The sole issue for determination in this appeal is the propriety and legality of the sentence imposed upon the appellant. Where the appeal is confined to sentence, the Court is limited to determining whether the sentence imposed was lawful, proper, and in accordance with the applicable statutory framework.
17. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the SOA. The trial court sentenced the appellant to twenty years' imprisonment, which was affirmed by the High Court on first appeal. Section 8(3) of the SOA prescribes a minimum sentence of twenty years' imprisonment for defilement where the victim is aged between twelve and fifteen years. The record confirms that J.K. was aged 15 years at the time of the offence, and the age was duly proved through documentary and oral evidence. The sentence imposed was therefore the statutory minimum. On second appeal, this Court is not at liberty to interfere with a sentence that is lawful unless it is shown to be manifestly excessive, harsh, or founded on wrong principles. See Section 361 (supra), of the Criminal Procedure Code as well as the cases of: *Wanjema v Republic* [1971] EA 493 and *Ogolla s/o Owuor v Republic* [1954] EACA 270.
18. The trial court considered the appellant's mitigation, including his status as a first offender when imposing the sentence and determined that its hands were tied in the case as it could not lawfully impose any other sentence. The High Court affirmed the position feeling that the sentence was neither harsh nor excessive in the circumstances. In our view no misdirection or error of law has been demonstrated in the sentencing process to invite our intervention.
19. Having considered the record, the applicable law, and the submissions of the parties, we find no basis to interfere with the sentence imposed. The sentence was lawful, proportionate, and in conformity with the SOA. However, in imposing the sentence both courts below did not revert to the provisions of Section 333 (2) of the Criminal Procedure Code. The purport of this section is to mandate the courts to consider the period a convicted person has spent in custody when imposing a prison sentence. This ensures that the time the individual has already spent in detention is deducted from the total sentence thereby preventing excessive punishment and promoting proportionality. In this appeal, we note that though the appellant was presented to court and granted bail on 13th January 2016, he was unable to meet the terms thereof. He therefore remained in remand custody throughout the trial until he was convicted and sentenced on 2nd November 2016. Whilst imposing the sentence, the trial court did not take into account as required, the period the appellant had remained behind bars aforesaid. The same omission befell the first appellate court. It is an omission that we must correct.
20. We accordingly direct that the appellant's sentence shall be computed from 13th January 2016. To that very, very limited extent, the appeal on sentence succeeds.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF NOVEMBER, 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 the original

