OOO v Republic (Criminal Appeal E035 of 2022)
[2025] KECA 1878 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1878 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E035 OF 2022

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

NOVEMBER 7, 2025

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E035 OF 2022

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

BETWEEN

OOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an Appeal from the Judgment of the High Court of Kenya at Homa Bay (Karanja, J.) dated 26th July, 2018 in HCCRA No. 60 of 2016)

JUDGMENT

(Being an Appeal from the Judgment of the High Court of Kenya at Homa Bay (Karanja, J.) dated 26th July, 2018

in

HCCRA No. 60 of 2016)

********** **JUDGMENT OF THE COURT**

1. This is a second appeal by the appellant, Oliver Odhiambo Okinda, against the conviction and sentence of life imprisonment for the offence of incest by a male person contrary to Section 20(1) of the Sexual Offences Act. The particulars of the charge were that on 23rd October 2014 at Marindi village, Homa Bay County, he defiled P.A.O{{^1} a girl aged 14, whom he knew to be his

[1] Initials used to protect the identity of the minor

daughter. Arising from the particulars of the main charge, the appellant also faced an alternative charge of indecent act contrary to section 11(1) of the Sexual Offences Act.

2. PARAGRAPH 3.

The appellant was aggrieved and filed an appeal before this Court raising the grounds that:

i. The superior court judge erred in law by stating in his judgment on page 6 that failure by the complainant's mother and her brother Brian to testify in this matter did not water down the prosecution's case against the appellant in any way and,

ii. That the first appellate court erred in law in failing to find out that the case was not fully discharged by the prosecution because the prosecution's duty at all times is to prove each and every element of his case before the court beyond reasonable ground, the same is emphasized in section 107 and 109 of the Evidence Act not the accused person to affirm his/her innocence.

4. On her part, Ms. Opiyo, submitted that the appellant was sentenced to life imprisonment which sentence is legal as provided for under Section 20 of the Sexual Offences Act and urged the Court not to interfere with it.

5. This being a second appeal, under section 361(1)(a) of the Criminal Procedure Code, the mandate of this Court is limited to matters of law only. Further, the Court will not interfere with concurrent findings of facts by the two courts below, unless such findings were based on no evidence, or on misapprehension of the evidence, or that the courts below acted on wrong principles to arrive at the findings. See Chemogong vs. Republic [1984] KLR 611, Ogeto vs. Republic [2004] KLR 14, and Karingo vs Republic [1982] KLR 213 where this Court stated that:

> " 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 it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi s/o Karanja V. R. [1956] 17 E.A.C.A 146)"

6. PARAGRAPH 7.

The appellant was charged with the offence of incest under Section 20(1) of the Sexual Offences Act which provides that:

> " Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years,
>
> Provided that if it is alleged in the information or charge that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

8. A reading into the above statute requires a court to impose the sentence of life where it is established that a child below the age of 18 years was defiled by a male person who to his knowledge

was his "...daughter, granddaughter, sister, mother, niece, aunt or grandmother".

9. PARAGRAPH 10.

This Court while considering the issue of life sentence as prescribed under Section 20 (1) of the Sexual Offences Act in ESM vs. Republic (Criminal Appeal 99 of 2015) [2023] KECA 736 (KLR) (16 June 2023) (Judgment) held that:

> "in the recent past, there has been a pragmatic shift, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR where it was held that the mandatory nature of the death sentence was unconstitutional. This court has taken cue and has taken the position that mandatory sentences when so prescribed by statute, are unconstitutional. Similarly, in Christopher Ochieng vs. Republic [2018] eKLR (also cited by the appellant) this court held as follows:
>
> "In this case, the appellant was sentenced to life imprisonment based on the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."
>
> 26. Nonetheless, the court is not precluded from handing down the prescribed mandatory sentence if
>
> the same is appropriate in the circumstances prevailing in a particular case. In order to determine whether or not it was appropriate, the court has to give consideration to the mitigation, if any, as well as the laid down sentencing guidelines. This view is fortified by the decision of this court in Joshua Gichuki Mwangi vs. Republic, Nyeri Criminal Appeal No 84 of 2015 where the court held that:

We emphasize that this court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished... QUOTE

On the other hand, there are definitely others deserving of leniency and this is the leeway we are asserting that ought to be at the disposal of courts..."

11. Similarly, in the case of DKM vs. Republic (Criminal Appeal 120 of 2015) [2023] KECA 698 (KLR) (16 June 2023) (Judgment) this court held that:

> "It is also not in dispute that the sentence passed is one which the trial court was legally mandated to pass under section 7 of the Criminal Procedure Code. The appellant however challenges his sentence on grounds that the learned trial court and the first appellate court failed to appreciate that life sentence was not mandatory under section 20(1) of the Sexual Offences Act. It is our considered opinion that the appellant misapprehended the position. We say so because the trial court ultimately passed the sentence of life imprisonment after considering the appellant's mitigation and the aggravating circumstances. In other words, the sentence was handed down after due consideration of all the relevant factors. Therefore, the High Court upheld the sentence because it was

satisfied that the trial court had handed down an appropriate sentence.

9. On our part, even though we agree with the appellant that section 20(1) of the Sexual Offences Act does not make life sentence mandatory, we decline his invite to interfere with the sentence of the trial court as affirmed by the first appellate court. The appellant has failed to meet the threshold to warrant this Court's interference with the sentence as his appeal is entirely on the severity of a sentence clothed as a challenge to the legality thereof. We find that the life sentence passed by the trial court was not because it was of mandatory nature, but it was the consequence of a meticulous analysis of the appellant's mitigation and the aggravating circumstances of this case."PARAGRAPH 12.

In this appeal, the appellant, a father to the complainant, was a man entrusted to provide her with protection and care. Sadly, the appellant betrayed her in an act that left her traumatized and delivered a baby of his father. Needless to say, section 361(1) of the Criminal Procedure Code specifies that where appeals lie from the subordinate courts, as in the case before this Court, this Court is expressly barred from determining matters of fact. The appellant's appeal on the severity of the sentence being a matter of fact, falls outside the purview of this Court's jurisdiction. See Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR).

13.

14. From the foregoing, both as a matter of law, and as a matter of established legal decisions, we have no hesitation in finding that the sentence meted upon the appellant was the mandatory minimum sentence legislated by the provision under which he was charged. Consequently, there is no reason whatsoever to warrant our interference with the lawful sentence imposed by the trial court and upheld by the High Court. The appeal thus lacks merit and is dismissed.

Dated and delivered at Kisumu this 7th day of November, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

Page 1 of **8**