Maroko v Republic (Criminal Appeal 328 of 2018)
[2025] KECA 2279 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2279 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 328 OF 2018

MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA

DECEMBER 19, 2025

BETWEEN

KYIONDI NYABAKURA MAROKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kisii, (Majanja, J.) dated 14th November, 2018 in HCCRA No. 29 of 2018)

JUDGMENT

1. This is a second appeal by Kyiondi Nyabakura Maroko, the appellant 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 offence were that on the 31st day of December, 2013 at [particulars withheld], District within Kisii County unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of JK[1] a girl aged three and a half years who to his knowledge is his daughter. The appellant also faced an alternative count of an indecent act with a child contrary to section 11[1] of the *sexual offences act*.

2. The appellant pleaded not guilty and at the hearing, the prosecution called 4 witnesses and upon considering the evidence, the trial court found the appellant guilty of the main charge and convicted him of the offence and sentenced him to life imprisonment.

3. The appellant was aggrieved by the conviction and sentence, and appealed to the High Court, faulting the trial court for failing to appreciate and analyse evidence; failing to note that crucial witnesses were not called; relying on the evidence of a single identifying witness; not subjecting him to a medical examination; and meting a manifestly harsh and excessive sentence, in the circumstances. In

[1] Initials used to protect her identity

its determination, the High Court dismissed the appeal, and upheld the conviction and sentence. Dissatisfied with that outcome, he has appealed to this Court on sentence only.

4. When the appeal came up for hearing on 1st July 2025, the appellant who was at Kibos Maximum Prison appeared in person, whilst learned prosecution counsel, Ms. Kitoto, appeared for the State. Parties relied on their respective written submissions. In support of the appeal, the appellant contended that both the trial court and the 1st appellate court failed to either call for a victim impact report or invoke the provisions of sections 216, 329 and 333(2) of the Criminal Procedure Code, thus denying him the right to benefit from those provisions of the law. He also laments that the first appellate court and trial court failed to consider application of the said sections in determining the appropriate sentence to impose; and that this amounted to unfair discrimination.

5. He argued that the mandatory sentence meted out was unconstitutional as it denied the judicial officer the discretion in sentencing. Further, the term spent in custody was not factored in.

6. He urged us to interfere with the term sentence, the appellant submits that he is reformed, rehabilitated, has undergone training in life and spiritual skills, and is ready to integrate into society.

7. The respondent opposed the appeal. While it is acknowledged that under sections 216 and 329 of the Criminal Procedure Code (CPC), the court may before passing sentence, or making an order against an accused person, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made, the respondent pointed out that from the record it was evident that upon conviction, the trial Court took his plea in mitigation, and called for a report from the Probation Office; and also paid due regard to the law which provides for a mandatory life imprisonment; that the proceedings before the learned Judge was at appeal stage and therefore no fresh evidence could have been taken except as provided for by the law; and that calling for evidence before confirming the sentence by the trial judge would have amounted to adducing fresh evidence which was not part of the initial trial at appeal stage.

8. On failure to consider the appellant's mitigation, it was emphasized that the record shows the trial court considered the appellant's mitigation and obtained a probation report. In imposing the life sentence, the court expressly stated that it had taken both the mitigation and the probation officer's report into account, and that the applicable law prescribed a mandatory sentence of life imprisonment.

9. On sentence, it is submitted that the prosecution having proved that the complainant was aged 3 years at the time of the offence, the sentence provided for under the *Sexual Offences Act* is life imprisonment; thus, the appellant was thus sentenced in accordance with the provisions of the law.

10. This, being a second appeal, the mandate of this Court, is limited by Section 361(1) (a) of the Criminal Procedure Code to consider issues of law as opposed to factual matters that have been tried by the first court and re-evaluated on first appeal and concurrent findings arrived at, unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this Court to interfere. In such appeals, this Court therefore has a duty to pay homage to concurrent findings of fact made by the two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings, in which event, the decision is bad in law, thus entitling this court to interfere. See Nyale vs. Republic (Criminal Appeal 54 of 2021) [2023] KECA 1081 (KLR) (22 September 2023) (Judgment) and In Rashid vs. Republic (Criminal Appeal 90 of 2021) [2023] KECA 596 (KLR) (26 May 2023) (Judgment).

11. Having carefully considered the record, the submissions by the parties, the authorities cited, and the law, the issue for determination is whether the sentence meted against the appellant was lawful in the circumstances.

12. The appellant was charged with the offence of incest under Section 20(1) of the *Sexual Offences Act*. It provides:

> " 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."

13. The appellant was sentenced to life imprisonment as provided by the law. He, however, faults the trial court and the first appellate court for imposing a mandatory minimum sentence which is harsh, excessive and unconstitutional as it is contrary to Articles 50(2) of *the Constitution*.

14. Section 361(1)(a) of the Criminal Procedure Code provides that severity of sentence is a matter of fact, and this Court cannot hear a second appeal on a matter of fact. Under section 361(1)(b), the Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court and unless the trial court had no power to pass the sentence in the first place. This was not the case here.

15. In John Gitonga vs. Republic [2013] eKLR this Court rendered itself thus on this issue:

> " ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

16. Sentencing is a discretionary exercise by the trial court. An appellate court will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in Bernard Kimani Gacheru vs. Republic (2002) eKLR stated thus:

> "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 factor, or took into account, some wrong material, or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any one of the matters already stated is shown to exist."

17. In addition, the Supreme Court in Petition No. E018 of 2023, Republic vs. Joshua Gichuki Mwangi, in regards to minimum sentences stated that:

> " 66) 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 the 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. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. 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....

(68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

18. Although the appellant argues that the mandatory minimum sentence imposed is unconstitutional, this Court lacks jurisdiction to interfere with the sentence. Further, from the record, it is evident that at the High Court the appellant did not challenge the constitutionality of the sentence meted out by the trial court, hence cannot raise it at this stage. In this regard, we draw from the case of Republic vs. Mwangi [supra], the Supreme Court stated that;

> "The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the Respondent's sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.

19. In the circumstances, the appellant has not established any grounds upon which this Court can interfere with his sentence. Consequently, we are satisfied that the appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 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