

**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: MUSINGA (P), KIAGE & ODUNGA, JJ.A.)**  
**CRIMINAL APPEAL NO. 130 OF 2018**

**BETWEEN**

**GODFREY WANYONYI BUKANJA.....APPELLANT**

**AND**

**REPUBLIC**

**RESPONDENT**

*(Being an appeal from the Judgment of the High Court at  
Bungoma (H. A. Omondi, J.) delivered on 16<sup>th</sup> June 2017*

*in*

***Criminal Appeal No. 155 of  
2015)***

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**JUDGEMENT OF COURT**

1. On 16<sup>th</sup> June 2017, the learned Judge (**H.A. Omondi, J.** as she then was) delivered a judgment in Bungoma High Court Criminal Appeal No. 155 of 2015 in which the appellant's appeal against his conviction and sentence was dismissed.
2. The appellant, **Godfrey Wanyonyi Bukanya**, had been charged with and convicted of the offence of defilement of a girl contrary to **section 8(1)** as read with **section 8(4)** (sic) of the **Sexual Offences Act** before the Principal Magistrate's Court, Sirisia, in Criminal Case No. 1061 of

2014. The particulars of the offence were that on the 15<sup>th</sup> day of December 2014 within Bungoma County, he intentionally and unlawfully inserted his male genital organ, penis, into the female genital organ, vagina, of the complainant, MNM, a girl aged 13 years. The appellant denied the charge.

3. The prosecution's case, in brief, was that on that day while the complainant was walking to Lwanda Village in the company of her brother, she became unwell and decided to return home but lost her way in the process. She approached DW2 for help and disclosed her mother's telephone number and asked DW2 to inform the mother of her situation. The appellant then joined them, and on being informed of the complainant's predicament, claimed that he knew the complainant's home and offered to escort her. Along the path, they came to a bush where the appellant defiled her before abandoning her, saying that she knew her way home.

4. The complainant's evidence that she returned to go back home was confirmed by her brother, (PW4), while her mother, (PW1), confirmed that she had had sent the two children to Lwanda Village to deliver some money to a women's group. PW1 confirmed having received a call from DW2 that the complainant had been seen at Chelebi and had been left in the company of the appellant. When PW1 proceeded to the appellant's home, the complainant was not there. Instead, the appellant informed her that the complainant would get home the following day.
5. The following day, PW1 traced the complainant to the home of a lady who had given her refuge. Upon the matter being reported to AP Namwela Camp, the appellant was arrested, while the complainant was taken to Malakisi Health Centre where PW6 examined her and formed the opinion that she had been defiled. PW6 also assessed her age to be 13 years.
6. In his evidence the appellant admitted that he had met DW2 who told him that a child who had been in the company of her brother was abandoned and had departed

for Namwela, the same direction he was heading to. He confirmed meeting the child, who told them that she was going to Lwanda to deliver some money and not to Namwela and that he concluded that it was perhaps not the child DW2 had mentioned. He was therefore surprised when at 9.00 p.m. two strange women went to his place demanding for the child, yet he wasn't with her. DW2 confirmed encountering the complainant who had lost her way and that he made a call to PW1 to alert her. He further confirmed telling the appellant to catch up with the complainant who was ahead and to ensure that she reached home. DW3, Mary Wanjala's evidence was that she was in the company of the appellant when they met the complainant who refused to accompany them, saying she wanted to go to her uncle's home. She parted ways with the appellant at 4.00 p.m. and assumed he had gone home.

7. The learned trial magistrate found that the complainant's age was sufficiently proved by way of medical age assessment, as 13 years; that there was ample opportunity

for identification of the appellant by the complainant; and that the medical examination confirmed that there was penetration of the complainant's genitalia. The appellant's defence was rejected and he was convicted of the said offence and sentenced to 20 years' imprisonment. His appeal against both conviction and sentence to the High Court was dismissed in its entirety

8. In this second appeal, which is clearly against the sentence only, the appellant contends: that he is remorseful; that his sentence should be reduced to the 10-years' period he had already served; that he has been facing a lot of problems relating to ill-health in prison; and that he has undergone tremendous change that has made him useful to the society, having been trained and rehabilitated.
9. We heard this appeal on the Court's virtual platform on 1<sup>st</sup> September 2025 when the appellant appeared in person, while learned Assistant Deputy Public Prosecutor, **Ms Mwaniki**, appeared for the respondent. Both the appellant

and Ms Mwaniki entirely relied on their written submissions which we have considered.

10. This being a second appeal, we derive our jurisdiction from **section 361(1)** of the **Criminal Procedure Code** which provides that:

***A party to an appeal from a subordinate court may, subject to subsection (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 an appeal under this section—***

***(a) on a 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 had no power under section 7 to pass that sentence.***

17. From the above provision, it is clear that we have no jurisdiction to delve into allegation of severity of the sentence since as held in ***MGK v Republic [2020]***

**eKLR:**

***“As regards the sentence, under section 361(1) of the Criminal Procedure Code severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal.”***

11. The appellant does not allege that the sentence that was imposed on him by the trial court and confirmed by the High Court was illegal. In addition, the circumstances contemplated by this Court in **Robert Mutungi Muumbi v Republic [2015] eKLR** have not been shown to exist.

In

that case it was stated that:

***“Section 361(1)(a) of the Criminal Procedure Code restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact. However, it is appreciated under section 361(2) of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing.”***

18. This legal position was recently restated by the Supreme

Court in **Republic v Mwangi; Initiative for**

**Strategic Litigation in Africa (ISLA) & 3 Others**

**(Amicus**

**Curiae) [2024] KESC 34**

**(KLR)**

**(the**

**Mwangi Case) thus:**

***“...the Court of Appeal’s jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent’s appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal’s jurisdiction.”***

12. **Section 361(1)(b)** aforesaid bars this Court from entertaining appeals against sentence unless the subordinate court had no jurisdiction to pass the sentence or the sentence was enhanced by the first appellate court. None of these factors apply to this appeal.

13. **Section 8(1) and (2)** of the **Sexual Offences Act** provides that:

***(a) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

***(2) .....***

***(3) 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.***

14. There is no doubt that the sentence meted against the appellant was, according the jurisprudence from the Supreme Court, lawful and we have no power to interfere therewith.

15. In the premises, this appeal fails and is dismissed.

16. We so order.

**Dated and delivered at Kisumu this 30<sup>th</sup> day of January, 2026.**

**D. K. MUSINGA (PRESIDENT)**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

.....  
**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**