



**Maganga v Republic (Criminal Appeal E059 of 2021)
[2026] KECA 305 (KLR) (13 February 2026) (Judgment)**

Neutral citation: [2026] KECA 305 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E059 OF 2021
MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA
FEBRUARY 13, 2026**

BETWEEN

JUSTUS MAGANGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kisumu
(Ochieng. J) dated 12th March 2019 in Criminal Appeal No. 32 of 2018)*

JUDGMENT

1. Justus Maganga, the appellant is before us on a second appeal against the judgment delivered on 12th March 2019, by Ochieng J. (as he then was), in the High Court of Kenya at Kisumu. The appellant had been charged with the offence of defilement Contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*, (SOA). The appeal came before us for plenary hearing on 4th June, 2015. The appellant appeared in person and Ms. Kanyita, learned Prosecution counsel, appeared for the respondent. They both opted to rely entirely on their written submissions.
2. The particulars of the offence were that on diverse dates between 3rd and 15th October 2013, at Kisumu East Sub-County within Kisumu County, he intentionally caused his penis to penetrate the vagina of L.A., a child aged 13 years. In the alternative, he faced a charge of committing an indecent act with a child contrary to section 11(1) of the SOA on the same date and place.
3. The appellant pleaded not guilty to the charge, precipitating a full trial in which the prosecution presented eight witnesses to prove its case, while the appellant tendered a sworn defence and called no witnesses.
4. The prosecution's case was that the appellant, a neighbour to L.A., a minor aged 13 years, engaged her in a sexual relationship which began in July 2013. They used to rendezvous in the house of an old man who lived in the neighbourhood. She eventually fell pregnant and the appellant helped her to



- procure an abortion. She confided in her friends about the pregnancy and the abortion and they in turn informed her class teacher.
5. The class teacher reported the issue to the principal, MAN (PW4) and she called L.A.'s mother, E.A.E (PW3) to school and informed her. PW3 took L.A. to hospital but could not afford to pay for the x-ray required and she took her back home as she looked for ways and means to raise the money required.
 6. While at home the appellant came and spirited L.A. away, and took her into hiding in the home of one HA (PW6). There, the appellant continued to defile her. PW6 confirmed in her testimony that from her observation, the two were in love and they slept together in the same room in her house.
 7. Two weeks later, the appellant made a report to the Children's Department that L.A.'s parents were subjecting her to torture. The Children's Officer, Hellen Adhiambo Ochola (PW5), accompanied by the police visited L.A. and the appellant in their hide out and interrogated them. They concluded that the two were untruthful and arrested them. Subsequently, L.A. confessed to the police that her parents did not torture her and that it was the appellant who had put her up to such mischief.
 8. Consequently, L.A. was taken to hospital. Dr Masawa examined her and filled the P3 form in that regard. The P3 form was later produced by Dr. Omondi Patrick (PW8), because its maker was out of the country for further studies at the time of the trial. The P3 form indicated that upon examination, L.A.'s genitalia revealed a perforated hymen with a whitish discharge, but there were no signs of trauma.
 9. In his defence, the appellant denied committing the offence. He alleged that L.A. had changed her statement after she was held in a remand home for six months and there was no proof that he was the one who defiled her.
 10. Upon considering the evidence before her, the Resident Magistrate, Hon. C.N. Njalale found that the prosecution had proved its case beyond reasonable doubt. The appellant was found guilty as charged and sentenced to 20 years imprisonment in accordance with section 8(3) of the SOA.
 11. The appellant was aggrieved by the judgment and he filed an appeal to the High Court of Kenya on both conviction and sentence. His appeal was on the grounds that: the prosecution and the trial court failed to comply with section 207 (1) of the Criminal Procedure Code, (CPC); the fundamental rights and freedom of the appellant under 49(1)(f) of *the Constitution* were violated; and, the medical finding did not connect the appellant to the crime.
 12. Upon considering the appeal before him, Ochieng J, found that it had no merit. He dismissed the appeal and upheld the conviction and sentence of the lower court.
 13. Undeterred, the appellant filed the instant appeal to this Court seeking only two things: reduction of sentence and consideration of the period spent in custody before conviction.
 14. The appellant filed his undated submission and urged for leniency and reduction of the sentence imposed upon him. He also urged the Court to invoke section 333(2) of the CPC stating that he had spent eleven months in custody.
 15. Ms. Eunice Kanyita, learned Principal Prosecution Counsel, filed submissions dated 3rd June 2025 for the respondent and urged that the ground on reduction of sentence was not raised on first appeal, and is therefore, improperly before this Court. Additionally, that 20 years' imprisonment was appropriate sentence by law, the appellant having been convicted for defilement contrary to section 8(3) of the SOA. To buttress this argument, counsel relied on the decision of the Apex Court in Republic vs Mwangi, Initiative for strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR).



16. Counsel submitted that the appellant was out on bond during trial until 16th February 2018, when his bond was canceled because he had absconded. She urged the period from the moment bond was canceled up to the time the appellant was sentenced should be taken into consideration.
17. We have considered the record of appeal and the rival submissions. This being the second appeal our mandate is confined to consideration of matters of law by reason of Section 361 of the CPC. The mandate was well articulated by this Court in *Karingo vs. Republic* [1982] KLR 213 as follows:

“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 based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja vs. R* (1956) 17 EACA 146)”
18. The two issues for determination are whether the sentence meted upon the appellant should be interfered with and reduced as prayed and whether section 333(2) of the CPC was considered during sentencing.
19. On the first issue, section 8 (3) of the SOA pursuant to which the appellant was sentenced 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.”
20. We note that, as rightfully pointed out by the respondent, the appellant did not challenge the sentence in the High court. Be that as it may, it is trite that sentence under section 8(3) of the SOA is proper and legal. In *Republic v. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR), referred to by the respondent, the Supreme Court pronounced that the minimum sentences provided in the SOA are proper and they do not interfere with the discretion of the Court to sentence.
21. In *Gichuki Mwangi* (supra), the Apex Court held that:

“What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence.

Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.”
22. The Legislature having bound the sentencing court by stipulating a minimum sentence of not less than 20 years imprisonment in section 8(3) of the SOA, we find that the trial court had no option but to impose the statutory sentence, and for the superior court to uphold it. We are also cognizant that our mandate under section 361(1) of the CPC limits us to considering only matters of law and severity of sentence is a matter of fact and not of law. We therefore, find that we have no jurisdiction to interfere with sentence as passed.
23. On the second issue, the appellant urged that section 333(2) of the CPC was not considered while sentencing him. The respondent urged that the appellant was initially out on bond until 16th February 2018 when he was re-arrested, having absconded. Counsel conceded that the time spent in remand should be considered.



24. We note that the lower court sentenced the appellant on 22nd March 2018, while he was in remand from 16th February 2018. The sentence was upheld by the superior court. Section 333 (2) of the CPC stipulates that:

Subject to the provisions of section 38 of the Penal Code (Cap. 63), every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

25. In keeping with Section 333 (2) of the CPC, we find that the sentence should have been ordered to commence from the time the appellant was re-arrested and was in custody prior to sentencing. Accordingly, we uphold the sentence of 20 years’ imprisonment imposed upon the appellant and upheld by the superior court, save that we order the sentence to commence from 16th February 2018, when he was re-arrested. To that very limited extent, the appeal on sentence succeeds.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar

