



**Mbaka v Republic (Criminal Appeal 5A of 2020)
[2026] KECA 299 (KLR) (13 February 2026) (Judgment)**

Neutral citation: [2026] KECA 299 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 5A OF 2020
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
FEBRUARY 13, 2026**

BETWEEN

DOMINIC MOGERE MBAKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at
Homa Bay (Karanja, J.) dated 5th December, 2019 in HCCRA No. 47 of 2017)*

JUDGMENT

1. Dominic Mogere Mbaka, the appellant herein was tried before the Chief Magistrate's Court at Homa Bay for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#). The particulars of the offence were that on the 30th day of November, 2016 at Nyakwadha village, Kotieno Location, Rangwe District within Homa Bay County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of J.A.O¹, a girl aged 6 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. The appellant pleaded not guilty to the charges. To advance its case against the appellant, the prosecution called five witnesses while the appellant gave sworn evidence and called five witnesses. At the end of the trial, the appellant was found guilty as charged, convicted, and sentenced to life imprisonment.
3. Being aggrieved, the appellant appealed to the High Court of Kenya against his conviction and sentence. The learned Judge (Karanjah, J.) having heard the appeal, dismissed it.



4. Dissatisfied, the appellant is now before this Court on a second appeal in which he has appealed against sentence only. The appellant faults the learned judge for meting out an excessive mandatory sentence which is unconstitutional.

¹ Initials used to protect the minor's identity

5. In support of the appeal, the appellant who was present in person, faulted the superior court for failing to consider his mitigation before sentencing. Further, he was sentenced to a mandatory sentence which is excessive and unconstitutional.

6. The appellant further submitted that he is a first offender, has changed, reformed, rehabilitated, expressed remorse and is ready to integrate into society.

7. Opposing the appeal, Mr. Muriuki learned counsel for the respondent, relies on the Supreme Court decision in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC34 (KLR) (12th July, 2024) (judgment)*, which declared the mandatory minimum sentences as provided under the *Sexual Offences Act* constitutional. The respondent urged the Court to uphold the sentence as legal.

8. This being a second appeal, the Court's jurisdiction is limited to consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code which provides;

“ ...

361

(I) 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, the 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.”

9. It is only on rare occasions that the Court can interfere with concurrent findings of fact by the two courts below. The case of *Samuel Warui Karimi vs. Republic* [2016] eKLR states aptly that:

“ This is a second appeal and this Court has stated many times before, that it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong vs. R*, [1984] KLR 611.”

10. In this appeal, the singular ground of the appeal is the severity of the sentence imposed upon the appellant and the appellant has offered mitigation urging this Court to review the sentence to a lesser imprisonment term. Under Section 361(1)(a) of the Criminal Procedure Code, severity of sentence is a matter of fact. It is, therefore, not a legal issue open for consideration by this Court on second appeal unless the trial court acted in error.



11. In the case of *Kagere vs. Republic* (Criminal Appeal E031 of 2023) [2024] KECA 1187 (KLR) (20 September 2024) (Judgment) this Court cited the case of *Dzombo Mataza vs. Republic* [2014] eKLR in which it was stated as follows:

“As already stated, this is but a second appeal. Under the law, we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno v Republic* (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it is shown that the two courts below-considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.”

12. Under the Act a person found guilty of the offence of defilement of a girl aged eleven (11) years or less is liable to serve life imprisonment. Guided by the provisions of Sections 8(1) and 8(2) of the *Sexual Offences Act*, the appellant was sentenced to life imprisonment for the said offence by the trial court. The same is not only lawful but also legal.
13. Sentencing is an exercise of discretion by the trial court. In *Benard Kimani Gacheru vs. Republic* (2002) eKLR it was stated thus:

“It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.”

14. Further, by dint of Section 361(1) of the Criminal Procedure Code, the appellant is precluded from raising the complaint on the severity of sentence on a second appeal, as severity of the sentence is a matter of fact. This position has now been made clear in the recent Supreme Court decision *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others* (supra) where it was held that:

“Before further delving into the question of constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court. We produce the same verbatim as follows:

“361. Second Appeals1. 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.”
49. 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.”

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

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. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

