

**JUDGMENT**  
**HCCRA E036 OF 2024**



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**  
**(CHERERE-J)**  
**HCCRA E036 OF 2024**

**BETWEEN**  
**JOSHUA BANGE**  
**ONYANGO.....APPELLANT**  
**AND**  
**REPUBLIC.....**  
**.....RESPONDENT**

***(Being an appeal from the conviction and sentence in  
Nyamira MCSO 29 of 2018 by Hon. M.C.Nyigei on 27<sup>th</sup>  
September 2022)***

---

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 10<sup>th</sup> June 2018 at Gekano Sub-location in Manga Sub-County within Nyamira County, he intentionally and unlawfully caused his penis to penetrate the vagina of AKO, a child aged fourteen years. Appellant was charged with an alternative count of unlawfully touching the vagina of AKO contrary to section 11 (1) of the same Act.
2. The matter proceeded to full hearing before the trial court. The prosecution called its witnesses who testified in support of the charge and produced documentary exhibits in

**JUDGMENT**  
**HCCRA E036 OF 2024**

evidence. Upon being placed on his defence, the Appellant elected to give sworn testimony and was subjected to cross-examination. After considering the evidence of both the prosecution and the defence, the learned trial magistrate delivered judgment convicting the Appellant.

3. Upon conviction, the learned trial magistrate sentenced the Appellant on 27<sup>th</sup> September 2022 to serve twenty (20) years' imprisonment.
4. Being dissatisfied with both conviction and sentence, he lodged this appeal challenging both conviction and sentence. When the appeal came up for hearing before this Court on 17<sup>th</sup> February 2026, the Appellant expressly informed the Court that he was not pursuing the appeal against conviction and that his appeal was confined strictly to sentence.
5. In his oral submissions, the Appellant urged this Court to consider that he was young at the time of conviction, that he was remorseful for his actions, and that during his incarceration he had reformed. He pleaded for leniency and invited the Court to interfere with the sentence imposed by the trial court.
6. The Respondent, through learned prosecution counsel Mr. Chirchir (SADDP), opposed the appeal. Counsel submitted that section 8(3) of the Sexual Offences Act prescribes a

**JUDGMENT**  
**HCCRA E036 OF 2024**

mandatory minimum sentence of 20 years' imprisonment and that the trial court had no discretion to impose a lesser sentence. It was further submitted that this Court equally lacks jurisdiction to reduce the sentence below the statutory minimum.

7. In light of the Appellant's abandonment of the appeal against conviction, the sole issue for determination is whether this Court can lawfully interfere with the sentence of 20 years' imprisonment imposed under section 8(3) of the Sexual Offences Act.
8. Section 8(3) of the Sexual Offences Act provides that a person who defiles a child aged between twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years. The complainant in this matter was fourteen years old at the time of the offence.
9. It is settled that an appellate court may interfere with sentence where the sentence is It is settled that an appellate court may interfere with sentence where the sentence is illegal, founded on wrong principles, manifestly excessive, or where relevant factors were not considered.
10. However, where Parliament has expressly prescribed a statutory minimum sentence, the discretion of the court is

**JUDGMENT**  
**HCCRA E036 OF 2024**

circumscribed by statute unless the provision has been declared unconstitutional.

11. The Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** declared the mandatory death penalty unconstitutional, but subsequently clarified in **Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR** that the earlier decision applies strictly to the mandatory death sentence under section 204 of the Penal Code and does not invalidate mandatory or minimum sentences prescribed under other statutes, including the Sexual Offences Act.
12. Section 8(3) therefore remains valid law and binding on this Court. It therefore follows that, absent a successful constitutional challenge to section 8(3) of the Sexual Offences Act, this Court cannot lawfully reduce the sentence below the statutory minimum of 20 years' imprisonment.
13. The trial court, having convicted the Appellant for defilement of a child aged fourteen years, was bound by law to impose a sentence not less than 20 years. The sentence imposed on 27<sup>th</sup> September 2022 was therefore lawful and within the statutory framework.

**JUDGMENT**  
**HCCRA E036 OF 2024**

14. Whereas the Appellant has urged this Court to consider his youthfulness, remorse and reform during incarceration, and while those are ordinarily relevant mitigating factors in sentencing, such considerations cannot override an express statutory minimum. The discretion of the court in such circumstances is constrained, and mitigation cannot be used to circumvent a clear legislative command.
15. The only remaining issue concerns compliance with section 333(2) of the Criminal Procedure Code, which requires the sentencing court to take into account the period spent in custody prior to conviction and sentence. The record shows that the Appellant was arrested on 10<sup>th</sup> June 2018 and was released on bond on 05<sup>th</sup> July 2018. He therefore spent approximately twenty-five days in custody before being admitted to bond and remained at liberty until conviction and sentence on 27<sup>th</sup> September 2022. There is no indication on the face of the trial court's judgment that the period of 23 days was expressly taken into account.
16. In order to give full effect to section 333(2) of the Criminal Procedure Code, and to ensure that the Appellant receives credit for the period lawfully spent in custody prior to his release on bond, I direct that the twenty (20) year sentence imposed on 27<sup>th</sup> September 2022 shall remain effective from the date of sentence, but the prison authorities

**JUDGMENT**  
**HCCRA E036 OF 2024**

shall give credit for the period between 10<sup>th</sup> June 2018 and 05<sup>th</sup> July 2018, being approximately twenty-three (23) days during which the Appellant was in custody before admission to bond.

**DELIVERED AT NYAMIRA THIS                    19<sup>th</sup>                    DAY OF  
February                    2025**

**WAMAE.T. W. CHERERE  
JUDGE**

**Appearances**

**Court Assistant                    - Anita**

**Accused                                    - Present in person**

**For the DPP                                    - Mr. Chirchir (SADPP)**