



**Nyambega alias Bobu v Republic (Criminal Appeal 371 of 2019)
[2026] KECA 596 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KECA 596 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 371 OF 2019
MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA
MARCH 13, 2026**

BETWEEN

JOSEPH MOGESA NYAMBEGA ALIAS BOBU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at
Migori (Mrima J) dated 27th February 2019 in HCCR NO. 4 of 2018)*

JUDGMENT

1. This is the second appeal of the appellant, against the judgment of the High Court at Migori by Mrima J, in a first appeal which arose from the Principal Magistrate's Court at Kehancha. The appellant had been convicted for the offence of defilement contrary to section 8 (1) and (2) of the *Sexual Offences Act* (S.O.A), and sentenced to life imprisonment in the Magistrate's court, which conviction and sentence were upheld by the first appellate court.
2. The appellant first appeared before the trial Magistrate faced with a charge of defilement contrary to section 8 (1) as read with section 8 (2) of the S.O.A. The particulars of the charge were that on the 1st and 2nd October 2016, at [Particulars Withheld] in Kuria East Sub-County within Migori County, he intentionally caused his penis to penetrate the vagina of C.S., a girl aged 9 years old. In the alternative, he was charged with committing an indecent act with the child contrary to section 11(1) of the Act on the same date and place, by touching her vagina.
3. The appellant pleaded not guilty to the charge and in a bid to prove its case, the prosecution presented five witnesses. The appellant on his part mounted an unsworn defence and did not call any witnesses.



4. A synopsis of the prosecution case is that C.S. (PW2), a 9 year- old child, lived with her parents A.N.M. (PW1) and S.M.G. (PW3) in their rented house next to the appellant who also lived in a rented house, within [Particulars Withheld]. The two houses had a sealed connecting door within PW2's bedroom.
5. On 1st October 2016, PW2's mother went to her farm within [Particulars Withheld], leaving PW2 alone with her younger brother at home. As PW2 was going about her domestic chores the appellant accosted her. He grabbed her and took her into the bush nearby, where he proceeded to undress her, forced her to lie on the ground and defiled her. The cries of the younger child who had been left unattended attracted some members of public to the scene, causing the appellant to stop what he was doing and run into his house. Later in the day, PW2 saw the appellant enter her home and into her bedroom where he removed the latch and nails that secured the connecting door to the two houses from her end.
6. The following night at about 8.00p.m, PW2 retired for the night in her bedroom. A short while later when her mother PW1 went to check on her, she found her bed empty. She called out to the father, PW3, to help her search for PW2. They suspected that PW2 was in the appellant's house and stood guard at the doors leading into his house as they raised an alarm seeking assistance from the neighbours.
7. The neighbours responded and eventually forced the appellant to open his door. They went in and found PW2 under a seat. They recovered her under garments under the same seat. PW1 examined her and noted injuries on her inner thighs and a discharge from her genitals. PW2 told her parents that she had been asleep and was the voice of her mother calling out to her that woke her up, only to find the appellant in the process of defiling her.
8. The appellant was escorted to Kehancha Police Station as PW2 was taken to Kuria West Sub County Hospital where a medical examination revealed that she had bruises and lacerations on the external genitalia and her hymen was worn out. There was also dry blood on her external genitalia and thighs. Edwin Omahe (PW4), the Clinical Officer concluded that she had been defiled and that she was 9 years old. He presented her Child Health and Immunizations Card in evidence.
9. The investigating officer, PC Paul Mursol (PW5), recorded the statements of the witnesses and escorted PW2 and the appellant to the hospital and for the P3 and PRC forms to be filled. He visited the crime scene and subsequently charged the appellant as set out above.
10. When put on his defence, the appellant denied committing the offence. He stated that PW1 engaged him to dig a pit latrine for her, but later refused to pay him his dues. That instead, she incited a group of youth to attack him when he demanded payment and later framed him of committing the instant offence.
11. Upon considering the matter before him, Hon. Maina, learned Principal Magistrate, found that the prosecution had proved its case beyond reasonable doubt. He convicted the appellant as charged and sentenced him to life imprisonment in accordance with the law.
12. Aggrieved by the judgment, the appellant filed a Memorandum of Appeal on 14th February 2018, in the High Court of Kenya at Migori, assailing the judgment on grounds that the trial court erred in failing to find that he was framed and failing to acquit him even after PW1 indicated that she wished to withdraw the case.
13. The learned Judge considered the appeal before him and found that it had no merit. He dismissed the appeal and upheld the conviction and sentence imposed by the trial court.
14. Undeterred, the appellant filed an undated Memorandum of Appeal to commence this second appeal on grounds that:



1. The courts below erred in law by imposing and subsequently upholding a harsh sentence:
 - i. Considering the appellant's mitigation.
 - ii. Without considering that being a first-time offender the appellant is, under Article 27 (1)(2) and 50(2)(p) of *the Constitution*, guaranteed and/or qualified to benefit from the least severe punishment.
 - iii. Without invocation of section 216 and 329 of the Criminal Procedure Code hence imposing a sentence without informatio, which amounted to unfair discrimination in application of the said law contrary to Article 25 (c) 27 (1) (2) and 50 (2) (p).
 2. That section 333(2) of the Criminal Procedure Code be considered when determining the sentence.
15. The appellant filed undated submissions in person and urged that the sentence of life imprisonment meted upon him was harsh, cruel, excessive and degrading punishment and was unconstitutional. He posited that imposing a mandatory sentence is not ideal as judicial officers should be given the discretion to impose a sentence depending on the circumstances of the case. Further, that the main aim of sentencing is to rehabilitate and reform the offender and to allow him back into the society. He urged the Court to consider that he is reformed and rehabilitated and allow him to go back to the society. Further, that when determining the appropriate sentence, we should consider the time spent in custody as provided for under section 333(2) of the Criminal Procedure Code, (CPC).
 16. Ms. Ikol Esaba, learned Senior Assistant Director of Public Prosecution, (SADPP), filed the submissions dated 4th December 2024 on behalf of the respondent and opposed the appeal. Counsel contended that the trial court had no discretion but to mete the sentence of imprisonment for life in view of the Supreme Court decision in Petition No. E018 of 2023, Republic vs Joshua Gichuki Mwangi where sentence under sections 8(2), 8(3) and 8(4) of the SOA were all held to be legal and were affirmed. Counsel urged that this case was deserving of the mandatory sentence considering that the victim was a child of tender years, whom he had taken advantage of twice.
 17. Counsel submitted that the appellant had not raised any reasonable ground to warrant the Court's interference with the sentence and reiterated the provisions of section 361 (1) of the CPC, which bars this Court from considering matters of fact on second appeal.
 18. When the appeal came before the Court for plenary hearing via the virtual platform on 2nd July 2025, the appellant was present in person and he indicated that he solely wished to rely on his filed submissions. In addition, he stated that he had since acquired certificates in metal work and tailoring. Ms Ikol, learned Assistant Director of Public Prosecutions, appeared for the respondent and also relied on her filed submissions. She added that all the ingredients of the charge were proved and urged the Court to disallow the appeal.
 19. This is a second appeal, and as correctly stated by the respondent, under section 361(1) of the CPC, our jurisdiction is circumscribed to matters of law and severity of sentence is a matter of fact, not law. Where the right of appeal is confined to the question of law, an appellate court must be loyal to the findings of fact by the lower courts and resist the temptation to treat findings of fact as holdings of fact and law. The appellate court will not interfere with the decision of the trial court or the 1st appellate court, unless it is apparent that given the evidence, no reasonable tribunal could have reached that conclusion. Simply put, this means that the courts reached a decision that was bad in law. (-See M'Riungu v. Republic [1983] KLR 455).



20. The appellant’s appeal is solely on sentence. He was charged for the offence of defilement contrary to section 8(1) as read with section 8 (2) of the S.O.A which provides that:

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

21. The appellant assailed the decision of the two courts below for imposing a mandatory sentence which is harsh, excessive, and unconstitutional. In reply, the respondent urged that the sentence was lawful and constitutional.

22. The judicial discretion in the sentencing exercise reposes in the trial court. The appellate court can only interfere with it if the trial court acted on some wrong principles, or overlooked some material facts. This was restated in the case of *Bernard Kimani Gacheru V Republic* [2002] KECA 94 (KLR), where this Court stated as follows:

“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, a sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a 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 anyone of the matters already stated is shown to exist.”

23. Further, in the more recent case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR), the Supreme Court rendered itself regarding the sentences prescribed by section 8 of the SOA as follows:

“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.”



24. In the end, we find that the appellant has not established any grounds upon which this Court can interfere with his sentence. Consequently, we find and hold that the appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH, 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

