Ndungu alias Baba Jayden v Republic (Criminal Appeal E076 of 2025) [2026] KEHC 4828 (KLR) (16 April 2026) (Judgment)

Neutral citation: [2026] KEHC 4828 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E076 OF 2025

WM KAGENDO., J

APRIL 16, 2026

BETWEEN

JAMES NDUNGU ALIAS BABA JAYDEN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the sentence of Hon A. Ithuku (CM) in Mombasa SO Case number E129 of 2022)

JUDGMENT

1. The Appellant herein James Ndungu alias Baba Jayden was charged with the offence of defilement of a girl contrary to Section 8 (1) as read with 8 (2) of the *Sexual Offences Act* no.3 of 2006. Particulars are that on the diverse dates between May 2022 and 16th October 2022 at [Particulars Withheld] of Jomvu sub-county within Mombasa County he intentionally caused his penis to penetrate the vagina and anus of A.A a child aged 11 years.
2. In the alternative charge the appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* no. 3 of 2006. Particulars are that on the diverse dates between May 2022 and 16th October 2022 at [Particulars Withheld] of Jomvu sub-county within Mombasa County, he intentionally touched the vagina and anus of A.A a child aged 11 years with his penis.
3. He pleaded not guilty to the offense and after a full trial he convicted for the offence of defilement and he was sentenced to serve a life sentence.
4. The appellant was not satisfied with the trial court decision and and thus sought this appeal.
5. The appellant's grounds of appeal are as follows; -

a. That the trial court did not fully appreciate my mitigation submission which I presented before the court.

b. The trial court erred in law and fact by construing the relevant penal law as a minimum mandatory provision.

6. In light of the above, this court is tasked to determine two issues only being;

i. Whether the trial court appreciated the appellant's mitigation before passing the sentence herein.

ii. Whether the trial court erred in law and fact by construing the relevant penal law as a minimum mandatory provision.

Analysis and Determination

7. The duty of this court as a first appellate court is well settled in the case of Okeno v Republic [1972] EA 32 at 36 where the court held that: -

> " ....an appellant on a first appeal is entitled to expect the Evidence as a whole to be submitted to a fresh and exhaustive examination(Pandya v Rep [1957] EA 336 and to the appellate court's own decision on the Evidence. The first appellate must itself weigh conflicting evidence and draw its own conclusions. (Shentilal M. Ruwala v R [1957] E.A 570. It is not the function of the first appellate court to merely scrutinize the Evidence to see if there was Some evidence to support lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses, See Peters v Sunday [1958] E.A424."

Whether the trial court appreciated the appellant's mitigation before passing the sentence herein

8. From the record of appeal at page 48 reads: -

> " .....
>
> Accused in mitigation
>
> I am a parent. I seek leniency. Hon. Alex Ithuku –CM
>
> Court
>
> Mention on 15.5.2025 for victim impact statement...."

9. Further at page 50 of the record of appeal reads: -

> " Court
>
> I have seen the victim impact statement. I have also considered the statement in mitigation. The accused person has been convicted under Section 8 (1) and (2) of the *Sexual offences act*...."

10. A clear reading of the above extract from the lower court judgment indicates the trial court considered and appreciated the appellant's mitigation before passing the sentence herein.

Whether the trial court erred in law and fact by construing the relevant penal law as a minimum mandatory provision

11. The appellant was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8 (1) as read with section 8 (2) of the *Sexual offences act*. The sentence is the minimum mandatory sentence provided for under the Act.

12. In Republic vs Mwangi; Initiative for strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (judgement) the Supreme Court considered the constitutionality of the minimum sentence under the *Sexual Offences Act* and categorically and emphatically held that the same are constitutional and the courts must impose the same unless and until they are declared unconstitutional.

13. In the case of Charles & Another vs Republic (Criminal Appeal 38 of 2019) [2024] KECA 1902 (KLR) (25th October 2024) (Judgement) the Court of Appeal ceded to the binding nature of the decision of the Supreme Court and stated; -

> " 35. We will now come to the final issue: sentence. The appellants complain against the mandatory nature of the minimum sentence terming it unconstitutional for not permitting individualized mitigation. In the circumstances of the case, they both complain that the minimum sentence was harsh and excessive since they were both of extreme youth; first offenders; and were remorseful. Additionally, they showed great capacity for reform and rehabilitation.
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> 36. All these extenuating factors are true. It is also true that our jurisprudence had taken a turn to impugning the constitutionality of the minimum sentences prescribed in the *Sexual Offences Act*. Unfortunately for the appellants, that jurisprudential trajectory was halted by the recent decision by the Supreme Court in Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR)(delivered on 12th July, 2024). In that case, the Supreme Court held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences.
>
> 36. The Supreme Court held:
>
> > "56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. 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. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. 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."

36. This decision is binding on us under the doctrine of stare decisis. In the present case, the appellants were convicted under section 8(2) of the *Sexual Offences Act*. The statutory minimum sentence under that sub-section is twenty (20) years imprisonment. That was the sentence imposed on the appellants. Given the Supreme Court's binding precedent, we cannot interfere with that sentence whatever our views on the extenuating circumstances."

14. Considering the above precedents, it is now crystal clear that the mandatory minimum sentence in the *Sexual Offences Act* are not unconstitutional. Trial Courts have no discretion to go below the minimum statutory sentences in sexual offences.

15. Further in the case of Republic vs Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (judgement) the supreme court stated:

" 46. In Muruatetu I, faced with a similar question of ascribing a term sentence to life imprisonment, this Court considered Article 51 of *the Constitution* which provides for the rights of detained persons. Sub article 3 thereof specifically tasks Parliament with enacting legislation for the humane treatment of detainees, persons in remand and convicts. We, therefore, held that while life imprisonment ought not necessarily mean a prisoner's natural life, it is for the Legislature to prescribe what constitutes life imprisonment and the parameters applicable, if at all. In that connection, we did, as the Supreme Court, recommend that the Attorney General and Parliament ought to commence an enquiry on this issue, and develop legislation on what constitutes a life sentence. Despite making this recommendation on 14th December 2017, and making an order that the Judgment be placed before the Speakers of the National Assembly and the Senate to, among other things, set the parameters of what constitutes life imprisonment, we note this recommendation has not been given consideration by the two offices of Parliament.

47. In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers."

16. In a nutshell, the decisions of the Supreme Court and the Court of Appeal are binding on this court and the lower court. Therefore, the invitation to interfere with the sentence is declined. It is ironical that the appellantS mitigation , which he says was not consindere was thst he widhed to be seeing his children. These children are the victims of of his heineous acts. What Kind Of Seeing Was He Asking For? The kind of abuse he was subjecting them to ? The appellant was clearly a danger to those children and to the society and the trial court was right in keeping him away as per the the sentencing objectives if detrerence and community safety

17. The appeal lacks merit, the same is dismissed.

18. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF APRIL 2026.

WENDY KAGENDO JUDGE

In The Presence

The Appellant In Person Mr Sirima For The State Bebora Court Assistant

Signed By/for:

Mombasa High Court

Date: 2026-04-16 17:16:04