

**IN THE COURT OF
APPEAL AT MOMBASA**

(CORAM: TUIYOTT, LAIBUTA & NGENYE,

JJ.A.) CRIMINAL APPEAL NO. E018 OF 2024

BETWEEN

DICKSON MSHAMBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the sentence meted in the Judgment of the High Court of Kenya at Mombasa (**Mativo, J.**) delivered on 25th March 2022*

in

Criminal Appeal Case No. E023 of 2021)

JUDGMENT OF THE COURT

[1] This second appeal is against sentence only.

[2] **Dickson Mshamba** (the appellant) was convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act, No. 3 of 2006**.

The victim was a child aged 7 years. Applying the rationale in **Muruatetu &**

another v Republic; Katiba Institute & 5 others
(Amicus

Curiae) (Petition 15 & 16 of 2015 ____ (Consolidated))

[2017] KESC2 (KLR) (Muruatetu 1), the trial

court imposed an

imprisonment sentence of 30 years. The appellant appealed against that sentence to the High Court.

- [3] Although the High Court (**Hon. Mativo, J.** (as he then was) did not interfere with the sentence, it observed;

“Regarding the sentence, Section 8(2) of the Sexual Offences Act provides that “a person who commits an offence of defilement with a child aged eleven years or less is liable upon conviction to be sentenced to life imprisonment.” The learned Magistrate imposed a sentence of 30 years imprisonment “guided by the “Muruatetu case.” The application of the Muruatetu case in a defilement case was informed by an erroneous application of the Muruatetu case. It was rendered per in curium and much as the appellant seeks to upset the sentence, it’s important to mention that the court can perfectly set it aside and impose the correct punishment because, ideally, the appellant is serving an illegal sentence. The above provision prescribes a mandatory life sentence; hence, the trial court had no discretion to substitute the life sentence mandatorily imposed by the law with a prison term of 30 years.”

- [4] Undeterred, the appellant is before us seeking a reduction of that sentence. His written submissions do not set out a jurisprudential basis for the reduction sought. The tone and tenor are, instead, a plea for mercy.
- [5] Learned prosecution counsel Mr. Mbote representing the respondent opposed the appeal and sought orders that the sentence be enhanced so as to align with the minimum

sentence prescribed under **section 8(2)** of the Act and, in the very least, the sentence imposed be maintained.

- [6] The victim of the heinous crime committed by the appellant was a child aged 7 years. The penal liability for such a convict is prescribed in mandatory terms in **section 8(2)** of the Act;

“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.”

- [7] The Directions issued by the apex court in **Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015)** [2021] KESC 31 (KLR) (**Muruatetu 2**) clarified that the decision of **Muruatetu 1** applied only in respect of sentences for the offence of murder. So, while the trial court’s application of the rationale of **Muruatetu 1** to the case at hand may not be unjustified or illogical, the Directions in **Muruatetu 2** shackle, at least for now, the hand of a sentencing court in offences under the Sexual Offences Act. For that reason, we agree with the High Court that the appellant is serving an illegal sentence.
- [8] Regarding whether we should enhance the sentence in view of its illegality, counsel Mbote conceded that the respondent

did not serve a notice of enhancement upon the appellant.

We are

aware that this Court has in various decisions (e.g. **Stanley Nkunja v Republic** [2013] KECA 306 (KLR)) taken the position that, while it is prudent, and fair, to warn or give a notice of enhancement to the appellant, such warning or notice is not required in respect of an illegal sentence. That said, we are reluctant to do so in the circumstances of this case where it is not clear from the record whether the respondent even raised the issue of the illegality of the sentence before the first appellate court. It would be unfair to spring a surprise on this appellant, a layman acting in person, at this very late hour.

[9] As we close, the appellant had also asked that the amount of time spent in custody be considered in computing the term that he should serve. This is a legitimate and reasonable request. Section 333(2) of the Criminal Procedure Code reads:

“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.”

[10] While this provision ought to be applied automatically, we now make a formal order that the period spent by the appellant in custody shall be deducted in computing the jail term that he should serve.

[11] Otherwise, the appeal is hereby dismissed.

Dated and delivered at Mombasa this 15th day of May 2026.

F. TUIYOTT

.....
JUDGE OF APPEAL

K. I. LAIBUTA (DR.)

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.