



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lemong v Republic (Criminal Appeal E093 of 2023)  
[2025] KECA 39 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 39 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL E093 OF 2023  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
JANUARY 24, 2025**

**BETWEEN**

**DANIEL NGOMA LEMONG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of the High Court at Voi  
(Dulu, J.) dated 29th June 2023 in HCCRA No. E057 of 2021)*

**JUDGMENT**

1. This is a second appeal preferred by the appellant, Daniel Ngoma Lemong, from the judgement of the High Court of Kenya at Voi (Dulu, J.) dated and delivered on 29<sup>th</sup> June 2023. The appellant was first charged before Voi Senior Principal Magistrate’s Court with the offence of defilement of a child contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) (the Act). The particulars of the offence were that, on 6<sup>th</sup> day of April 2020 within Taita Taveta County, the appellant intentionally caused his penis to penetrate the vagina of RG, a child aged 14 years (the complainant).
2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Act in that he intentionally caused the contact between his genital organ, namely penis and the genital organ, namely vagina of RG, a child aged 14 years.
3. The appellant was first arraigned before Hon. D. Wangeci, PM on 29<sup>th</sup> April 2020 for plea taking. Part of the proceedings on this day read:

“The substance of the charge (s) and every element thereof has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge (s) replies: -

Count I:



I did not commit that offence.

Alternative Charge:

Si Kweli.”

4. It is evident that the appellant denied the charge on both the main and the alternative counts. The trial court set down the hearing for 29<sup>th</sup> July 2020. The hearing did not proceed as anticipated and was subsequently marred by numerous adjournments. The record is not clear on what would have prompted the appellant to be subjected to take a second plea on the same charges on 30<sup>th</sup> September 2020. During this second plea, the interpretation was done in the local dialect of the appellant, the Maa language. The appellant re-affirmed his earlier response and denied committing the offence on the main and the alternative counts.
5. On 17<sup>th</sup> November 2020, the matter came up for mention, on which date the appellant expressed his intention to change his plea and admit the offence. The record shows that the substance of the charge and the consequential sentence the charge attracts were read to the appellant, to which he responded and insisted that he wishes to admit the charges. A plea of guilty was accordingly entered.
6. The prosecution then read out the facts of the case which, in brief, were that, on 6<sup>th</sup> April 2020 at around 11 a.m., the complainant was on her way to fetch firewood in the company of two other children. When they got to Bondeni Forest, they saw the appellant and started running away from him in different directions; that the appellant pursued the children, and unfortunately caught up with the complainant; that he then dragged the complainant to the forest and defiled her; that the other children went home to report the incidence to their parents; that the complainant’s parents made a formal report at Maungu Police Station and were issued with a P3 form and advised to seek treatment; and that the appellant was later arrested by members of the public and handed over to the police.
7. According to the P3 form (P. Exhibit 2), the injuries the complainant sustained are indicated as: small bruises on the vaginal area; the hymen was intact; and semen was visible on the vagina. The prosecution also produced the Birth Certificate (P. Exhibit 1) which shows that the complainant was born on 14<sup>th</sup> August 2006, thus confirming her age as 14 years as at the time of the incidence.
8. The appellant affirmed that the facts as read out to him were correct, and the learned trial Magistrate then proceeded to convict him on his own plea of guilty.
9. In mitigation, the appellant stated that he was tired of staying in remand prison. The trial court sentenced him to serve 20 years imprisonment.
10. Being dissatisfied with both the conviction and sentence, the appellant preferred an appeal to the High Court premised on 4 grounds. The appellant complained that his rights to a fair trial under Article 50(2) (g) and (h) of *the Constitution* were violated; that the prosecution failed to discharge its burden of proof under section 107 of the *Evidence Act*; that the learned Magistrate failed to analyse his defence in addition to his application for the conduct of a DNA test; and that the sentence imposed was harsh and excessive in the circumstances.
11. On the issue of the alleged breach of the appellant’s rights under Article 50(2) (g) and (h) of *the Constitution*, the High Court (Dulu, J.) held that, much as the appellant was not informed of his right to legal representation, that, in itself, was not fatal to the proceedings as there was no evidence on record that he did not know of his right to legal representation; that the right to legal representation at the State expense envisaged in *the Constitution* is best suited where substantial injustice would otherwise



- result, which the appellant did not demonstrate; and that, furthermore, the appellant was warned of the serious consequences that would follow upon pleading guilty.
12. Turning to the proof of the case, the learned Judge observed that the appellant was convicted on his own plea of guilty even after being warned of the severity of the sentence. To the learned Judge, although the appellant gave the impression that he had been convicted after a full trial, the fact is that his plea of guilty was unequivocal, the procedure for taking a proper plea of guilty having been followed to the letter as set out in the renowned case of *Adan vs. Republic* (1972) EA; and that, therefore, the arguments advanced by the appellant challenging his conviction had no basis.
  13. On the sentence, the learned Judge declined to vary the same, holding that the sentence imposed was appropriate and not excessive. The appellant's appeal was found to be devoid of merit and dismissed. Both the conviction and sentence were upheld.
  14. The decision of Dulu, J. provoked this appeal. The grievances of the appellant as gleaned from the amended grounds of appeal are:
    - “ a) Whether the mandatory minimum sentence provided by section 8 (3) of the *Sexual Offences Act*, allows the trial court power of discretion as provided by section 216 and 329 of the Criminal Procedure Code;
    - b. Whether the trial court had powers to consider the appellant's mitigation that he was a first offender;
    - b. Whether the sentence under section 8 (3) of the *Sexual Offences Act* is harsh;
    - b. The court be pleased to reduce the sentence and consider the period the appellant was in remand custody pursuant to section 333 (2) of the Criminal Procedure Code.”
  15. We heard this appeal on 8<sup>th</sup> October 2024 via GoTo Team Virtual platform. The appellant appeared in person whilst learned counsel Ms. Mutua appeared on behalf of the respondent. Both parties confirmed filing their respective written submissions, and none wished to highlight them. It suffices to say that, those of the appellant are undated, and we are also unable to tell the date on which they were filed. The respondent's are dated 1<sup>st</sup> October 2024.
  16. The appellant clustered all his 5 grounds of appeal and argued them together. His written submissions substantially centred around the legality of the sentence meted on him. He urged that the mandatory minimum nature of the sentence as prescribed under section 8(3) of the Act was unconstitutional as was held in the case of *Francis Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* (2017) KESC 2 (KLR).
  17. While referring to the decision of this Court in *Ahmed Abolfathi Mohamed & Another vs. Republic* (2018) eKLR, the appellant urged us to consider the 7 months already spent in remand prison prior to his sentencing while tabulating the sentence to be served, pursuant to section 333(2) of the Criminal Procedure Code.
  18. On her part, Ms. Mutua submitted that the appellant's own plea of guilt was unequivocal. The particulars of the charges and the consequences thereof were read to him in the Maa language, which he understood very well; and that, therefore, he was not prejudiced in any way by the manner in which his conviction was arrived at.



19. On the legality of the sentence, the respondent urged that this Court can only interfere with a sentence if it finds that the same is manifestly excessive, or that the trial court overlooked some material factors as was held by this Court in *Bernard Kimani Gacheru vs. Republic* (2002) KECA 94 (KLR); and that under Section 8(3) of the Act, a person who defiles a child of the age between twelve and fifteen years is liable, upon conviction, to imprisonment for a term of not less than twenty years. The respondent asked us to find that both the trial and the first appellate courts correctly applied the law, both substantive and procedural, in arriving at their respective decisions.
20. We have considered the record of appeal, the written submissions, the cited authorities and the law. This being a second appeal, we are mandated by section 361 (1) (a) of the Criminal Procedure Code to consider matters of law only. We are cautioned not to consider matters of fact which the two courts below considered and were re-evaluated on first appeal, unless it is demonstrated that there was misapprehension of the facts by the two courts below.
21. This appeal mainly turns on the issue of the severity of the sentence imposed on the appellant. Suffice it to note that the issue of the appellant's conviction is not disputed as he was convicted on his own unequivocal plea of guilty.
22. Section 361(1) (a) of the Criminal Procedure Code provides that:
- “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-
- i. on a matter of fact, and severity of sentence is a matter of fact; or
- ii. against sentence, except where a sentence has been enhanced by the High court, unless of the subordinate court had no power under section 7 to pass the sentence.”
18. From the above provision, it is clear that severity of a sentence is a matter of fact and that, therefore, this Court on second appeal will only interfere with a sentence if the same is illegal. It is also trite that sentencing is purely the exercise of discretion of the trial court. This Court has also pronounced itself on its limited power to interfere with the discretion of the trial court in sentencing. For instance, in the case of *Francis Nkunja Tharamba vs. Republic* (2012) KECA 29 (KLR), the Court stated:
- “...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere.”



23. The Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (12 July 2024) whilst restating the powers of the Court of Appeal in sentencing stated:

“48. Before further delving into the question of the 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 that Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court.”

24. With regard to the legality of the mandatory minimum sentences provided for under the *Sexual Offences Act*, the Supreme Court delivered itself in the same decision thus:

“49. 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.

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 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.”

25. Section 8(3) of the Act provides that:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

26. Clearly, the Act sets the minimum ceiling sentence with which this Court cannot interfere. The appellant urged us to find that the mandatory minimum sentence imposed was unconstitutional and,



in that regard, referred us to the Supreme Court decision of Francis Muruatetu (supra). Later on, the Supreme Court in the case of Republic vs. Mwangi (supra) clarified that mandatory sentences under the Act are in no way unconstitutional. The Court reiterated that its decision in the Francis Muruatetu case where it held that the mandatory minimum death sentence under section 204 of the Penal Code was unconstitutional because it denied the trial court the discretion to determine an appropriate sentence based on the circumstances of the case and the mitigating circumstances in favour of an accused only applied to murder charges.

27. Section 8(3) of the Act provides that defilement of a child between the ages of 12 and 14 years carries a sentence of a term of not less than 20 years. The age of the complainant is not disputed. She was 14 years of age at the time of the incident. The sentence of 20 years imprisonment meted on the appellant was therefore proper and in accordance with the law, and we find no reason to disturb it.
28. On the second limb of this appeal, Section 333(2) of the Criminal Procedure Code states that, in passing the sentence, the trial court should consider the period an accused person has spent in remand custody prior to sentencing. The charge sheet reads that the appellant was arrested on 27<sup>th</sup> April 2020 and he was in custody until the time of conviction on 17<sup>th</sup> November 2020. The period during which he remained in custody prior to sentencing should therefore be taken into account.
29. In view of the foregoing, we find that the appellant's appeal partially succeeds with regard to the commencement of the term of imprisonment. But for that, we hereby dismiss the appeal. Consequently, we hereby uphold the conviction and sentence passed by the two courts below, but direct that the term of imprisonment begins to run from the date on which the appellant was taken into custody, namely 27<sup>th</sup> April 2020. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CArb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

