



REPUBLIC OF KENYA



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**Kazungu v Republic (Criminal Appeal E082 of 2023)
[2025] KECA 47 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 47 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E082 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JANUARY 24, 2025**

BETWEEN

JOSEPH KITSAO KAZUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) delivered on 15th September 2021 in HCCRA No. 57 of 2019)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) dated 15th September 2021 in Criminal Appeal No. 57 of 2019. In his decision, the learned Judge upheld the judgment of the Principal Magistrate's Court in Hola (B. N. Kabanga, RM) dated 1st October 2019 in Criminal Case No. 4 of 2019 in which the trial court convicted the appellant as charged with the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* and sentenced him to 20 years imprisonment.
2. The particulars of the offence were that, on diverse dates between June 2018 and January 2019 within Tana River County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of GKK, a child aged 15 years. In addition, he faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the alternative charge were that on the diverse dates and at the place aforesaid, the appellant intentionally and unlawfully touched the vagina, breast and the buttocks of GKK with his hands contrary to section 11(1) of the Act.
3. The appellant denied the charges whereupon the trial proceeded with the prosecution calling four (4) witnesses, including the complainant.



4. The prosecution's case was that the appellant defiled the complainant (PW1) on diverse dates between the months of June 2018 and January 2019. PW1 gave sworn evidence after a *voire dire* examination and testified that she attended [Particulars Withheld] Church close to her home where the appellant was a youth teacher; that the appellant would occasionally remain behind to play the church keyboard; that, sometime in June 2018, PW1 went to the church at night to check who was playing the keyboard and found the appellant; that the appellant called PW1 aside and gave her a letter - requesting her to "love him"; and that the appellant requested PW1 to give him an answer the following day. It was PW1's testimony that, the following day, the appellant visited PW1's home and later left for church; that he asked her to follow him; and that PW1 obliged. PW1 further testified that, when she got to the church, the appellant undressed her and himself; that PW1 lay on the floor; that the appellant took his penis and inserted it into her vagina; that, thereafter, the appellant gave her Kshs. 200; and that they dressed up and PW1 went back home.
5. PW1 further testified that, after that incident, the appellant continued to have sex with her on several occasions until November 2018 when she missed her periods; that the appellant gave her some drugs to prevent pregnancy; that they continued having sex until February 2019 when her mother, JAA (PW2), confronted her and asked her if she was pregnant; and that PW1 admitted that she was, and that the appellant was responsible. Thereafter, PW1 was taken to Hola Referral Hospital for examination and found to be 4 months pregnant.
6. PW2 testified that, on 24th February 2019 while in town, one JJ asked her if she knew that PW1 was pregnant; that, when PW2 got home, she confronted PW1 about what she had learned, and PW1 replied that she had not been getting her periods from around December 2018; that PW1 disclosed that the appellant was responsible for her pregnancy; that PW2 proceeded to the said church to confront the appellant to confirm PW1's assertions; that the appellant denied being responsible; and that, thereafter, PW2 reported the matter at Hola Police Station where they were referred to Hola Referral Hospital. In conclusion, it was PW2's testimony that PW1 was 15 years old; and that she and the appellant attended the same church.
7. PW3, Ismail Hirsi, a Clinical Officer at Hola Referral Hospital, testified that, upon examining PW1 on 25th February 2019, he established that her hymen was broken; that she was suffering from a UTI (urinary tract infection); and that she was 4 months pregnant. It was his testimony that he recorded his findings in treatment notes which he subsequently used to complete PW1's P3 form, both of which he produced as exhibits before the trial court. In addition, PW3 produced an age assessment report dated 25th February 2019 prepared by one Jared Obada, a Community Oral Health Officer at Hola Referral Hospital as an exhibit by which PW1's age was assessed at 15 years.
8. The investigation officer, and one of the arresting officers, Corporal Mildred Agiza (PW4) of Hola Police Station's Crime Office, testified that, on 25th February 2019, PW1 accompanied by her parents, reported that PW1 had been defiled and impregnated by someone she knew; that she recorded PW1's statement; that PW1 disclosed that she was a student at Hola Primary School; that she had been having sex with the appellant for "a long time inside PEFA Church"; that, every time they had sex, the appellant would give her between Kshs. 200 and 300; and that the appellant would also give her some drugs to prevent pregnancy. PW4 testified that she escorted PW1 for a medical examination at Hola Referral Hospital; that PW1 identified the appellant as the perpetrator; and that she thereafter investigated, arrested and charged the appellant.
9. At the close of the prosecution case, the learned magistrate found that the appellant had a case to answer and put him on his defence.



10. In his defence, the appellant gave a sworn statement and stated that he had been promoted to the position of church secretary after one NK (the husband to PW2 and father to PW1) was demoted; that this led to “ill will and malice” against him by N; that N began to question why the appellant was promoted and yet he was not even a local resident; and that, soon thereafter, the appellant was appointed to oversee the digging of a borehole in the church compound next to N’s house, and was also tasked to be in charge of the well. The appellant further testified that, on 23rd February 2019, he went to the church and found N, PW2 and PW1; that PW2 told him that PW1 had informed them that she was pregnant, and that the appellant was responsible; that, on the same day at 8pm, the appellant, accompanied by a pastor, met with PW1 and her parents; and that PW1 was insistent that the appellant was responsible for her pregnancy.
11. The appellant went on to testify that, as a youth leader, he had warned PW1 against receiving money from a boy, one O, who attended Kone School; that PW1 and her friends were summoned before other leaders whereupon PW1 confessed receiving money from O; that PW1’s father refused to allow the church leaders to discipline PW1; that, as a consequence, he was not on speaking terms with PW1’s father; and that there were witnesses to these facts, but who were afraid of testifying to avoid victimization since most of them come from the complainant’s family.
12. The appellant called his wife, SK, who testified as DW2. She told the court that PW2 had reported PW1 to the church leaders for having received some money from a boy; that, incidentally, PW1’s sister had also been given money and disclosed the boy’s name, which she could not recall; that PW1’s parents insisted that these monies be refunded to the boy; that, since PW1 had already spent the money, the appellant and other church leaders were forced to fundraise to refund the boy’s money; that, in another instance, PW2 had told her that PW1 had eloped with that boy who had allegedly promised to marry her; that she investigated and was informed by a witness, who did not wish to be mentioned that there was a plot to fix any of the church members so that the responsible boy would not be jailed; that a man named J had informed her that he once found PW1 with “boys in the bush at night”; and that other witnesses had refused to testify on the appellant’s behalf because they were PW1’s relatives.
13. In its judgment delivered on 1st October 2019, the trial court (B. N. Kabanga, RM) noted that the evidence of PW1 identifying the appellant as the one who committed the offence was satisfactory and beyond doubt; that it was highly unlikely that a leadership dispute in church would have led the victim to implicate the appellant; and that the defence evidence was too weak to dislodge the solid case presented by the prosecution. Accordingly, the court convicted the appellant and sentenced him to 20 years imprisonment.
14. Aggrieved by the trial court’s decision, the appellant lodged an appeal to the High Court faulting the learned trial Magistrate for: not considering that no original or certified copies of the age assessment report, P3 form and treatment notes were produced in evidence; not considering that no DNA test was conducted; and for imposing the mandatory minimum sentence.
15. In its judgment dated 15th September 2021, the High Court (R. Nyakundi, J.) held: that Section 77 of the [Evidence Act](#) allows the court to admit medical evidence in circumstances where the maker is not called as a witness, provided that the trial court is satisfied with the reasons given for the non-attendance of the maker; that a DNA test is not mandatory, and that failure to adduce such evidence does not weaken the prosecution case; that the identification of the appellant by the complainant was by recognition and was therefore more reliable than it if it was of a stranger; and that the mandatory minimum sentences are not unconstitutional, but that they are valid and constitute the law. Accordingly, the court dismissed the appeal.



16. Dissatisfied with the learned Judge’s decision, the appellant moved to this Court on five grounds set out in his undated “Grounds of Appeal,” namely that the “learned trial magistrate” erred in law and fact: by convicting him in the absence of any cogent and tangible evidence; by forming a conviction in reliance of a single witness; in failing to consider the manifest contradictions in the prosecution’s case; by failing to put into consideration the period the appellant spent in remand; and by failing to consider his defence evidence. We hasten to observe that none of the five grounds aforesaid were raised on appeal to the High Court, but that they are raised for the first time on 2nd appeal to this Court.
17. In addition to the grounds aforesaid, the appellant filed an undated “Supplementary Grounds of Appeal” containing eight grounds, five of which are a repetition of some of the grounds originally advanced on appeal. The only additional grounds are that the trial court and the 1st appellate court failed to: observe that visual identification was anchored in “in criminative aspects”; consider that the prosecution did not prove its case beyond reasonable doubt; and to consider his mitigation. Once again, it is noteworthy that, with the exception of the ground relating to recognition/identification of the appellant as the perpetrator of the offence complained of, and the issue as to whether his mitigation was considered in sentencing, the remaining grounds are raised for the first time on 2nd appeal to this Court.
18. In support of his 2nd appeal, the appellant filed undated written submissions citing four judicial authorities, namely: Francis Muchiri Joseph v Republic [2014] eKLR for the proposition that, where identification is based on recognition by reasons of long acquaintance, there is no better mode of identification than by name; Terekali & nother v Republic [1952] EA 259 where this Court held that the evidence of the first report of the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements can be measured; Jared Koita Injiri v Republic [2019] eKLR; and Evans Wanjala Wanyonyi v Republic [2019] eKLR, submitting that mandatory minimum sentences are punitive and were outlawed by the Supreme Court of Kenya.
19. Opposing the appeal, the Principal Prosecution Counsel, Ms. Nyawinda Kernaël, filed written submissions dated 3rd October 2024 citing six judicial authorities, namely: Moses Nato Raphael v Republic [2015] eKLR, requesting this Court to only consider matters of law in this appeal, unless it is shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered, or that they were plainly wrong in looking at the evidence; Edwin Nyambogo Onsongo v Republic [2016] eKLR, submitting that the prosecution sufficiently proved that PW1 was 15 years old by producing her age sssessment report and clinical card before the trial court; A njononi & Another v Republic (1976-1980) KLR 1566 where it was held that, when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger; Sammy Charo Kirao v Republic [2020] eKLR, arguing that sexual intercourse or penetration may be proved by direct or circumstantial evidence; Williamson Sowa Mwangi v Republic [2016] eKLR, submitting that it is now settled law that a DNA test is not proof of penetration; and Republic v Joshua Gichuki Mwangi [2023] eKLR where the Supreme Court of Kenya overturned this Court’s decision declaring section 8 of the [Sexual Offences Act](#) unconstitutional and proceeded to state that section 361(1) of the Criminal Procedure Code explicitly bars this Court from hearing issues relating to matters of fact, and that severity of sentence is a matter of fact – not of law.
20. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the Criminal Procedure Code (see Moses Nato Raphael v Republic [2015]



eKLR). This procedural edict was more succinctly expressed in *Karingo v Republic* [1982] KLR 213 where the Court stated:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence.”

21. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on only two issues, namely: whether the prosecution had proved its case without reasonable doubt to warrant a conviction; and whether the sentence meted on the appellant was lawful. We need not overemphasise the fact that the remaining issues are founded on grounds of appeal raised for the first time on 2nd appeal to this Court and on which, for good reason, we have no mandate to pronounce ourselves. Simply put, they come too late in the day.

22. This Court has had occasion to consider the effect of raising an issue on appeal for the first time in, among other cases, *Kenya Commercial Bank Ltd v James Osede* [1982] eKLR where Hancox, JA. had this to say:

“... that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial judge.”

23. As the Court went on to observe:

“It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the appellant is improper, as the appellant had no fair notice of this issue. Such an issue should not be decided on appeal.”

24. Addressing himself to the prejudicial effect of new points of law or issues raised for the first time on appeal, Forbes VP had this to say in *Alwi A. Saggaf v Abed A. Algeredi* 1961 EA 767 CA 610:

“... these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.

In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it.”

25. In the same vein, this Court in *Sudi Mnalo Mweke v Republic* [2023] KECA 1527 (KLR) identified itself with the holding by the predecessor to this Court in *Alwi Abdulrehman Saggaf v Abed Ali Algeredi* [1961] EA 767 where, in its holding, the Court laid down the guiding principle that the course of taking on appeal a point of law which has not been argued in the court below ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

26. We share the Court’s view and the sound justification for that holding, namely that:

“The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the



judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.

It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court.”

27. Once again, we need not overemphasise the general principle that trial by instalments militate against the discretionary powers of this Court in the administration of justice (see *Alfayo Gombe Okello v. Republic* [2010] eKLR). That this principle continues to hold sway was aptly demonstrated in *Wachira v Ndanjeru* [1987] KLR 252 where this Court spoke to the bar, with Platt, JA. observing that:

“...the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.”
28. For the foregoing reasons, and on the authority of the afore-cited judicial decisions, we respectfully decline to consider or pronounce ourselves on the new issues raised for the first time in the instant appeal.
29. On the 1st issue before us as to whether the prosecution proved its case against the appellant to the required standard, the appellant faults the learned trial Magistrate for not considering that no original or certified copies of the age assessment report, P3 form and treatment notes were produced in evidence; and for not considering that no DNA test was conducted to prove penetration and the appellant’s identity as the perpetrator of the offence. Though clearly articulated in the grounds of appeal, the only points of law raised for our determination essentially relate to proof of the ingredients of defilement and the legality of the sentence meted on the appellant on account of severity, and for the alleged failure to consider his mitigation.
30. As articulated in the case of *George Opondo Olunga v Republic* [2016] eKLR, the ingredients of the offence of defilement are: the age of the victim; penetration; and proper identification of the perpetrator.
31. The mainstay of the appellant’s case was that the conjunctive ingredients of the offence were not proved because no “original or certified copies” of the age assessment report, P3 form and treatment notes were produced in evidence by the makers thereof. It is not in dispute that PW3 prepared and later produced the P3 form and treatment notes as exhibits at the trial. The appellant’s main issue in this regard is that PW3 also produced the age assessment report in proof of the complainant’s age, though prepared by a different medical officer.
32. On her part, and on the authority of *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, the learned Principal Prosecution Counsel submitted that the prosecution sufficiently proved that PW1 was 15 years old by producing her age assessment report and clinical card before the trial court.



33. On the admissibility of the age assessment report produced by PW3, we associate ourselves with the decision of the High Court of Kenya at Garissa (Dulu, J.) in *R epublic v Ronoh Khalif Ahmed* [2015] eKLR where the learned Judge had this to say on the import of section 77 of the *Evidence Act* (Cap. 80):

“In my view section 77 of the *Evidence Act* does not deal with the issue as to who can produce such a document. The section allows the court to presume the genuineness of the document. The section also states that the court may call the maker of that statement to be examined on the same. This means that such a document need not be produced by the maker. It also means that the court may or may not require the maker of the document to come to court. It thus means that the document is admissible whether or not the maker comes to court.”

34. Section 77(1) of the *Evidence Act* reads:

77. Reports by Government analysts and geologists

- (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

35. Section 33(b) of the *Evidence Act* makes provision for admission of documentary evidence by persons other than the makers thereof in circumstances, inter alia, where the maker’s attendance cannot be procured, or whose attendance cannot be procured without unreasonable delay or expense. The section reads:

33. Statement by deceased person, etc.

When statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

- (a)
- (b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

36. Pronouncing itself on the importance to prove the age of the victim in a case of defilement, this Court had this to say in the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR:

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”



37. Taking to mind that no objection was raised on the production of the complainant's age assessment report at the trial, and on the authority of sections 33(b) and 77(1) of the *Evidence Act*, we find that the trial Magistrate was by no means at fault in admitting such report in evidence as proof of the complainant's age. Accordingly, we reach the conclusion that the complainant's age was established as 15 years at the time of the incident.
38. On the second ingredient as to the appellant's identity, we hasten to observe that nothing turns on this issue. The appellant was well known to the complainant, to her parents and, in particular, to PW2 (her mother); and that, apart from denying having defiled PW1, the appellant was positively identified by the complainant by recognition as the person who defiled her on numerous occasions resulting in pregnancy. In *Anjononi & Another v Republic* [1976-1980] KLR 1566 where it was held that, when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger. Evidently, the appellant was not a stranger to the complainant with whom they had a romantic relationship over a long period of time punctuated with financial gifts.
39. The complainant's age and the appellant's identity having been indisputably established, we are left with the question as to whether the third ingredient of penetration was proved to justify the appellant's conviction for defilement as charged.
40. The appellant's case was that no DNA test was carried out to prove penetration. On her part, the Principal Prosecution Counsel submitted that, on the authority of *Sammy Charo Kirao v Republic* [2020] eKLR, sexual intercourse or penetration may be proved by direct or circumstantial evidence; and *Williamson Sowa Mwanga v Republic* [2016] eKLR, submitting that it is now settled law that a DNA test is not proof of penetration.
41. The appellant's argument that penetration was not proved by reason of the fact that no DNA test was carried out does not stand. It is now settled law that a DNA test is not necessary to prove penetration (see *Williamson Sowa Mwanga v Republic* [2016] eKLR. Moreover, sexual intercourse may be proved by other direct or circumstantial evidence. In this regard, this Court had this to say in *Nzau v Republic* [2022] KECA 502 (KLR):
- “The argument that a DNA test was required to prove penetration is not well founded. As this Court stated in *Robert Mutungi Mumbi vs. Republic* [2015] eKLR, Section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples, including DNA testing to establish the linkage between the accused person and the offence. That provision is not couched in mandatory terms and DNA evidence is not the only evidence by which commission of a sexual offence may be proved. See also *Hadson Ali Mwachongo vs. Republic* [2016] eKLR.”
42. While a trial court has power to order that DNA tests be carried out in appropriate cases of sexual offences, such as to establish the identity of a person whose spermatozoa or blood samples are recovered, or the paternity of a child conceived consequent to a sexual offence, this Court in *COI & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR held that:
- “31. Our understanding of Section 36 of the *Sexual Offences Act* is that whereas a court is empowered thereunder to direct examination of an accused person to establish his involvement in a sexual offence, such discretion is subject to limitation. In that, the court can only issue such an order with respect to an offence committed under that Act Further, in exercising that discretion, like



any other discretion, the court is required to act judiciously within the confines of the law.”

43. Having considered the direct evidence of PW1 (the complainant) relating to the long-standing sexual relationship with the appellant; and the testimony of PW3, the clinical officer who examined her and prepared her P3 Form and treatment notes disclosing PW1’s broken hymen, urinary tract infection and four-months pregnancy, we form the view, as did the two courts below, that penetration was proved; and that, on the authority of the afore-cited cases, a DNA test is not a pre-requisite for proof of penetration.
44. The three ingredients of defilement having been proved, we find nothing on record to fault the trial Magistrate’s conclusion that the prosecution had proved its case against the appellant beyond reasonable doubt in discharge of its burden of proof as contemplated in *Moses Nato Raphael v Republic* [2015] KECA 787 (KLR); *Woolmington v DPP* (1935) AC 462; and *Miller v Ministry of Pensions* [1947] 2 ALL ER 372 where Lord Denning emphasized that the term “beyond reasonable doubt” denotes a “high degree of probability”. Likewise, we find nothing on record to suggest that the learned Judge was at fault in upholding the appellant’s conviction.
45. Turning to the 2nd issue as to the severity of the sentence, the appellant submitted that the trial Magistrate erred in “imposing the mandatory minimum sentence”. Citing the case of *Republic v Joshua Gichuki Mwangi* [2023] eKLR, the learned Principal Prosecution Counsel submitted that sentence is a matter of fact which goes beyond the scope of this Court’s mandate on second appeal.
46. It is indubitable that this Court has no discretionary power to reconsider a sentence on second appeal. Section 361 of the Criminal Procedure Code reads:
361. Second appeals
1. 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—
- a. on a matter of fact, and severity of sentence is a matter of fact;
47. This Court in *MGK v Republic* [2020] eKLR authoritatively stated that:
- “16. As regards the sentence, under section 361(1) of the Criminal Procedure Code severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal.”
48. In effect, “the Court is not concerned with the severity of the sentence in a second appeal” unless, for all intents and purposes, the sentence is unlawful (see *Oyoko v Republic* [1982] eKLR. Likewise, this ground of appeal fails.
49. Having carefully considered the record of appeal and the grounds on which it is founded, the rival submissions, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed in its entirety. Consequently, the judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) delivered on 15th September 2021 is hereby upheld. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH 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

