



**Waithiegeni v Republic (Criminal Appeal 2 of 2019)
[2025] KECA 121 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KECA 121 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 2 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JANUARY 23, 2025**

BETWEEN

ELIAS GAKUYA WAITHIEGENI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court at Nyeri (R. N. Sitati, J.)
delivered on 20th December, 2018 in H. C. Criminal Case No. 23 of 2018)*

JUDGMENT

1. This is a second appeal, the appellant, Elias Gakuya Waithiegeni, having been tried by the Magistrates' Court at Mukurwe-ini for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. It was alleged that on the date and place named in the charge sheet, he had intentionally caused his penis to penetrate the vagina of LWI, a child aged 6 years. He was alternatively charged with committing an indecent act with a child contrary to section 11(1) of the said Act. He was convicted on the main charge and was sentenced to serve life in prison and his first appeal to the High Court of Kenya at Nyeri was dismissed by Sitati, J. in a judgment delivered on 20th December, 2018.
2. Our mandate in a second appeal is circumscribed by section 361 (1)(a) Criminal Procedure Code to consider only issues of law if we find that there are some raised in the appeal and avoid the temptation to consider matters of fact that have been tried and retried by the two courts below - See, for judicial pronouncement on that mandate the case of Stephen M'Irungi & Another vs. Republic [1982-88] 1 KAR 360 where the following passage appears:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no



reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

3. We shall briefly look at the facts of the case to appreciate them and to satisfy ourselves that the two courts carried out their mandates as required in law.
4. The prosecution called as first witness LWM (PW1), the mother of the child, who testified that the child was 6 years old; that on 2nd May 2018 she had been informed by her last born son (aged 2½ years):

“... that Kuya who is Gakuya, has put Wamuyu's 'susu' in the soil. I held the child and we sat down. I was interrogating him. He is not able to talk properly but he repeated the same. He said that Gakuya's penis put Wamuyu in the soil. ...”
5. She explained that the child referred to Gakuya as “Kuya” and that “susu” means the private parts. When her daughter arrived home from school she interrogated her and established that her daughter had been defiled under a mango tree as the 2½ year old child watched. When she examined the girl, she found a whitish discharge in her private parts. The incident was reported at Mukurwe-ini Police Station where the child was escorted to Mukurwe-ini Sub-County Hospital where she was examined and treated. PW1 identified the appellant as their immediate neighbour and had various medical documents and the child's Certificate of Birth which were marked for identification.
6. Samuel Kamau Gatuma (PW3), the Assistant Chief of the area, testified that he received a report of defilement of PW1's daughter, how he advised her to report to the police and how he arrested the appellant on 6th May, 2018.
7. When the child (PW2) was recalled after she had been unable to testify earlier, she stated how the appellant, who she knew as a neighbour had removed her clothes and defiled her as her young brother watched. After the ordeal she informed her mother (PW1) and grandmother of what had happened. Of promises made by the applicant before he defiled her:

“He had told me that he would buy me a cake and that the money was at home. But he did not buy the cake for me. It is Gakuya who did this to me.
...”
8. Dr. Michael Gachara (PW4) of Mukurweini Sub County Hospital produced P3 Form in respect of the examination of PW2 who he found to be 6 years old. On examination he found labia majora and minora inflamed with hymen broken. He produced P3 Form and PEC Form into evidence.
9. The last witness called by the prosecution was PC (W) Mwikali attached to Mukurwe-ini Police Station who testified how a report of defilement was made. It is she who escorted the minor to hospital and later established the facts of the case after interrogating the minor and her mother, leading to the charge against the appellant. At the close of the prosecution case and upon being put on his defence the appellant stated in an unsworn statement that he was a carpenter; that PW1 always gave him jobs to work at her farm which he had rejected leading to a grudge between the two of them. On the material day he was at work and upon reaching home in the evening he found PW1 and PW2 waiting for him saying that he had defiled the child. He was arrested and assaulted to admit the charge but he refused. He denied the charges.
10. As we have seen the appellant was convicted and his first appeal dismissed.
11. There are 4 grounds of appeal set out in the homegrown “Memorandum Grounds of Appeal” where the appellant says that the High Court erred “in law and facts” while upholding conviction by the



trial court and “... failed to consider the act of penetration was not adequately proved with the words used in evidence by the complainant and the doctor’s testimony ...” The Judge is faulted for relying on the doctor’s evidence who is said to have examined the child on 17th May, 2018 when defilement had taken place on 1st May, 2018; that the Judge erred by relying on evidence of PW1 who had received information from her 2½ year old child who had not been called as a witness and finally:

“THAT, the trial magistrate further lost direction while becoming influenced by the adduced evidence of the prosecution and in rejecting my defence which was not displaced by the prosecution side as per section 212 of the C.P.C Cap 75 Laws of Kenya. ...”

12. He prays that the appeal succeeds in its entirety.
13. When the appeal came up for hearing before us on 16th October, 2024 the appellant was unrepresented and appeared from Nyeri Prison while learned counsel Mr. Naulikha appeared for Office of Director of Public Prosecution. Both sides had filed written submissions which they relied on entirely with counsel for the State reminding us of the decision of the Supreme Court of Kenya in [*Republic vs Joshua Gichuki Mwingi Petition No. 018 of 2023*](#) on the mandatory nature of sentences in sexual offences.
14. The appellant in written submissions talks of a grudge between him and PW1 where he alleges that the latter offered him casual jobs on various occasions which he had rejected. He further submits that penetration was not proved to the required standard in defilement cases; that it was wrong for the prosecution not to have called the 2½ year old child who had reported the incident to his mother PW1. He submits that his defence was not considered and concludes by questioning the sentence that was awarded submitting that it is harsh, excessive and unconstitutional.
15. In opposing the appeal, the respondent in written submissions argues that all the ingredients of the offence of defilement were proved. It is submitted that the first appellate court properly carried out its mandate as required in law. The respondent submits that the appellant cannot avail himself of the provision of section 212 Criminal Procedure Code because he gave an unsworn statement in defence.
16. We have considered the whole record, submissions and the law and this is how we determine this appeal.
17. The appellant complains that he was convicted when the offence of defilement he was charged with had not been proved to the required standard.
18. The trial magistrate considered the provisions of sections 8(1) and 8(2) of the [*Sexual Offences Act*](#) and properly held that the ingredients of the offence of defilement include penetration, the minority of age of the victim and identification of the perpetrator of the offence. The age of the child victim was properly established through the evidence of PW1 and that of the doctor. The child knew the appellant as a neighbour. He defiled her after promising to buy her a cake. She repeatedly stated that it was the appellant who had defiled her and that she had informed her mother and grandmother of what had happened to her.
19. The High Court on first appeal found on whether defilement had been proved:

“... I am of course aware of the fact that sexual intercourse is not the only reason for broken hymen but in the instant case the sum total of the doctor’s findings coupled with the complainant’s own testimony strongly suggest that there was penetration and so I find ”



20. We agree. The totality of the evidence by the child, her mother and the doctor proved to the required standard that the appellant had defiled the child on the material day. This ground of appeal has no merit and is dismissed.

21. The appellant complained that the 2½ year old child who first reported the incident to her mother (PW1) was not called as a witness. It is true that the prosecution is obligated to call witnesses in a case against an accused person as was held in the case of *Bukenya vs. Uganda* [1972] EA 549, at page 550 that:

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

22. Section 143 of the *Evidence Act* provides:

“143 Number of witnesses.

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

23. The High Court found on first appeal that the evidence of the child, her mother and medical evidence proved to the required standard that the appellant had defiled the child. We agree. It would not have added any value to call the 2½ year old child. The evidence placed before the trial court proved to the required standard that the appellant had defiled the child.

24. We have looked at the record and are satisfied that the appellant’s defence was properly considered and dismissed in view of the strong prosecution case that faced the appellant.

25. The sentence awarded was lawful as provided by the *Sexual Offences Act* that the appellant was charged. The appellant has an opportunity to challenge that sentence through a different forum, not this appeal. This is what this Court stated in *Kisumu Criminal Appeal No. 150 of 2016 John Odongo vs. Republic (UR)*.

“On the question of sentence, this Court has now held that the rationale of the Supreme Court decision in *Francis Karioko Muruatetu & others v Republic* [2017] eKLR applies in equal measure to the minimum sentences prescribed in the *Sexual Offences Act*. For example, in *Okello v Republic (Criminal Appeal 189 of 2016)* [2022] KECA 1034 Section 143 of the *Evidence Act* (KLR) (23 September 2022 (Judgment) this Court held:

“14. We turn to the question of sentence. The Supreme Court in the Directions in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR stated:

‘[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law



prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.

- (15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

15. Perhaps taking a cue from those directions, a challenge to the constitutional validity of the minimum sentences prescribed in the *Sexual Offences Act* was taken up in Philip Mueke Maingi *& 5 others v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEELC 2936 (KLR) (17 May 2022) (Judgment), where Odunga J (as he then was) held:

‘107. In my view, even without the application of the ratio in Muruatetu 1, based on what I have stated hereinabove, I find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same as the minimum mandatory sentences does not meet the constitutional threshold particularly section 28 of *the Constitution*....

111. My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of *the Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of *the Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.

112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete



out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed.”

16. Even more recently, Mativo J (as he then was) weighed in on the matter in *Edwin Wachira & 9 others v Republic: Mombasa Petition Nos. 97, 88, 90 and 57 of 2021 (Consolidated) (Unreported)*:

‘35. Lucky for me the Supreme Court in *Muruatetu one* was categorical that mitigation forms an intergyral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate curtails his rights under Article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences take deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused unfair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the circumstances of each offence. Lastly, unlike in other offences, the mandatory minimum sentences are discriminatory because they deprive the accused person the full benefit of the law contrary to Article 27 as earlier discussed.

36. For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.”

17. We think there is merit in these holdings and observe that in a long line of cases this Court had, before *Muruatetu 2*, held that the prescription of a minimum sentence could not fetter the judicial power of a court at sentencing. See for example *Dismas Wafula Kilwake v Republic* [2019] eKLR, *Jared Koita Injiri v Republic* [2019] eKLR, *Christopher Ochieng v Republic* [2018] eKLR and *Daniel Kipkosgei Letting v Republic* [2021] eKLR.”

26. We think in the circumstances where the appellant defiled a 6 year old child that the sentence awarded was well deserved. The appeal has no merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF JANUARY, 2025.

S. ole KANTAI



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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

