



**Amare v Republic (Criminal Appeal 295 of 2019)  
[2025] KECA 17 (KLR) (10 January 2025) (Judgment)**

Neutral citation: [2025] KECA 17 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 295 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JANUARY 10, 2025**

**BETWEEN**

**DANIEL KOECH AMARE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kisii (R Langat Korir, J.) dated 27th September 2012 in HCCRA NO. 280 of 2010)*

**JUDGMENT**

1. Daniel Koech Amare, the appellant herein, was charged in the Chief Magistrate’s Court at Kisii for the offence of defilement contrary to section 8(1) & (2) of the *Sexual Offences Act*, that on 30<sup>th</sup> July 2009, at 1PM within Nyanza Province he intentionally and unlawfully penetrated the genitals organ namely vagina of CN<sup>1</sup> a girl aged 6 years with his genital organ namely penis. He faced an alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
2. When the charge was read to the appellant, he pleaded guilty to the main charge, but denied the correctness of the facts as narrated to him by the Prosecutor. The alternative charge was then read to him, and he admitted; a plea of guilty was entered, and the trial court directed that the facts be narrated on 4<sup>th</sup> August 2009. On 4<sup>th</sup> August 2009, it seems that witnesses attended court, but the matter did not proceed, instead the matter was fixed for hearing on 15<sup>th</sup> October 2009 when the appellant requested that the charges be read to him afresh, which was done; and he confirmed the main charge that it was true he had defiled the complainant. A plea of guilty was entered, then the trial court read to him the alternative charge, which he also admitted, in essence pleading guilty on both counts. The facts were narrated, and the appellant confirmed that the facts were correct; he was convicted on his own guilty

<sup>1</sup> Initials used to protect her identity



plea. He was then given a chance to make his plea in mitigation. Thereafter, he was sentenced to serve life imprisonment.

3. The appellant, dissatisfied and aggrieved with the sentence, appealed to the High Court at Kisii, on the grounds that he was illiterate and, therefore, he did not know the consequences of his actions, saying he was remorseful; and also prayed for reduction of sentence, which he deemed harsh and excessive.
4. The High Court upon considering evidence on record affirmed and upheld the decision of the subordinate court, pointing out that the appellant pleaded guilty to the offence and was precluded by section 348 of the *Criminal Procedure Code* from challenging the conviction. In affirming the sentence, the learned judge pointed out that it was the only sentence provided under the law.
5. Being dissatisfied and aggrieved with the sentence, the appellant has now filed this appeal on sentence only, lamenting that the sentence was excessive, harsh, unconstitutional and unlawful.
6. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, this Court is mindful of its duty that a second appeal must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See *Karingo & 2 Others v. Republic* [1982] eKLR.
7. Although an issue that piqued our attention in this matter, did not arise at the first appeal, it would be remiss of us not to point out, as an obiter, the need to be clear, on the issue of plea taking. The court must be keenly intentional in recording a guilty plea. In this regard, section 207 of the *Criminal Procedure Code* is instructive. Courts have had occasion to elaborate on the procedure and the manner in which a guilty plea ought to be recorded by the trial court. In the case of *Adan v. R* (1973) EA 445 and in the Court of Appeal case of *Kariuki v. R* (1954) KLR 809 the rendition of the Court was as follows:
  - i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.
  - ii. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
  - iii. the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.
  - iv. If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.
  - v. If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

Further in the case of *Kariuki v R* (*supra*) the Court further stated that:

The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading.”

8. The trial court record indicates that upon the charges being read to the appellant, afresh, on the main charge of defilement, he stated, ‘it is true that I committed the defilement.’ Then the alternative charge was also read out to him, and he responded: “it is true I carried out the indecent act.” This, in our



considered view, amounted to a procedural error. The reading of the alternative charge served no purpose. As the term suggests, it was an alternate to the main charge, that if the person charged denies the main count, then he is informed of the alternate. However, reprieve springs up from the facts narrated, which clearly established defilement. Both the learned magistrate and the learned judge fell in error in failing to record which offence the conviction was related to, but this error did not result in a reversible error as to warrant declaring the proceedings a nullity, or ordering for a retrial; In any event this is not an issue in this appeal.

9. With regard to the severity of sentence, sentence having been identified under section 361(1) of the *Criminal Procedure Code* as a matter of fact, the appellant's appeal would only be open to our consideration if an issue of law arises in regard to the sentence. Indeed, sentencing has been recognized as a discretionary power exercised by the trial court, taking into account the facts before the court and the mitigation factors advanced by an accused person. It has been acknowledged in several decisions that an appellate court will not interfere with the sentence meted out, unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. We draw from the case of *Bernard Kimani Gacheru v Republic* (2002) eKLR, where the Court of Appeal stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist.”

10. The appellant, in his submissions, describes the mandatory life sentence as harsh and inappropriate as it deprives the court of judicial discretion and that it is also unconstitutional; and he urges us to make a finding in his favour, but not remit the matter to the trial court for sentence, but rather to consider his mitigation, and impose an appropriate sentence. He alludes to his reformed character in the more than 10 years that he has been incarcerated, plus a host of previous decisions where courts, including this Court, had adopted the approach in the decision by the Supreme Court in the case of *Francis Karioko Muruatetu & Another v. Republic* [2017] eKLR.
11. In questioning the appropriateness of the sentence, we understand the appellant to be challenging its legality, as well as its constitutionality, thus rendering it an issue within our mandate as a 2<sup>nd</sup> appellate court, to deal with.
12. The High Court upheld the sentence as provided under section 8(2) of the *Sexual Offences Act*, and for clarity we reproduce the provision creating the offence, and the penalty as follows:
  - 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - 8(2) 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.

Emboldened by the case of *Francis Karioko Muruatetu and Anor v. R* [2017] eKLR which declared the mandatory death sentence unconstitutional, many courts applied the ratio decidendi thereon, in all offences carrying a mandatory minimum sentence; see for instance *Maingi & 5 Others v. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and this Court



in *Joshua Gichuki Mwangi v. Republic*, Nyeri Criminal Appeal No 84 of 2015, both of which declared the mandatory sentences under the *Sexual Offences Act* to be unconstitutional.

13. However, this newfound approach, which was applied with much zeal, has since been reversed by the Supreme Court in *Republic v. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 KLR, which declared the mandatory sentences under the *Sexual Offences Act* to be lawful. The Supreme Court while acknowledging the nature of mandatory sentences and their effect on judicial discretion, stated that:

“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.”

14. The effect of this pronouncement is that, although sentencing is a power entrusted to the discretion of the trial court, apparently that discretion is limited where the statute has provided a mandatory sentence. The sentence imposed on the appellant of life imprisonment was the mandatory maximum sentence as provided in section 8(2) of the *Sexual Offences Act*. the trial court had no option, but to impose that sentence, and this was confirmed by the High Court.
15. The appellant argues that the sentence of life imprisonment is unconstitutional, but our perusal of the record shows that the appellant did not raise this issue in the High Court. Therefore, the issue was not preserved for our consideration, since there was no finding by the High Court upon which it can be anchored. Ultimately, we find that the appellant has not laid a basis upon which to interrogate the constitutionality of the sentence that was imposed upon him. The upshot of the above is that the appellant has failed to establish any grounds upon which the Court can interfere with his sentence. His appeal therefore lacks merit and is accordingly dismissed.

**DATED AND DELIVERED AT KISUMU THIS 10<sup>TH</sup> DAY OF JANUARY, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

