



**Ogolla v Republic (Criminal Appeal 267 of 2019)  
[2025] KECA 15 (KLR) (10 January 2025) (Judgment)**

Neutral citation: [2025] KECA 15 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 267 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JANUARY 10, 2025**

**BETWEEN**

**KEVIN RICHARD OGOLLA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the High Court of Kenya at Kisumu  
(Chemitei, J.) dated 23rd September, 2015 in HCCRA NO. 24 OF 2014)*

**JUDGMENT**

1. Kevin Richard Ogolla, the appellant herein, was charged before the Principal Magistrate's Court at Bondo, with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#). It was alleged that he had defiled one, F.A.O. (name withheld) a child aged 15 years.
2. The appellant pleaded not guilty to the charge and a trial ensued, during which seven witnesses testified for the prosecution and the appellant gave a sworn statement. At the conclusion of the trial, the appellant was found guilty of the charge, convicted and sentenced to serve twenty years' imprisonment.
3. The appellant was aggrieved by the judgment of the trial court and preferred an appeal to the High Court. On considering the appeal, the High Court (Chemitei, J.) upheld both the conviction and sentence, and dismissed the appeal in its entirety.
4. Undeterred, the appellant has filed this second appeal in this Court, in which he is appealing against sentence only. The appellant has raised 6 grounds of appeal in his self-crafted memorandum of appeal. In effect the grounds stated are a plea for reduction of his sentence, and the mitigating circumstances which, in his view, justify such reduction.
5. The appellant has also filed written submissions in which he submits that the sentence was disproportionate to the weight of the evidence and the circumstances of the case. He reiterates his



mitigating factors including the fact that he is a first offender; has been rehabilitated having learnt carpentry and acquired trade test qualification of Grades I, II, and III; and pleads that he be given an opportunity to engage in constructive development. He further pleads that he is remorseful.

6. The respondent opposed the appeal through written submissions that were prepared by Mr. Patrick Okango Senior Principal Prosecution Counsel. Mr. Okango relying on *Njoroge vs Republic* [1982] KLR 388, urged the Court in considering the appeal to exercise deference to the factual findings of the trial court, as affirmed by the first appellate court. Learned counsel pointed out that in his first appeal to the High Court the appellant only appealed against his conviction and did not raise any issue in regard to his sentence; that the High Court did not consider the question of sentence as the issue was not before it; and that the matter cannot therefore be raised in this second appeal for the first time. In support of his submission that this Court had no jurisdiction to determine an issue not raised on first appeal, Mr Okango relied on *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR).
7. At the plenary hearing, the appellant who was in person reiterated his plea that his sentence be reduced, pointing out that he has already spent 11 years in prison and has reformed. He also pleaded that the period he was in remand be taken into account. Mr Okango who appeared for the respondent at the hearing, relied on his written submissions, reiterating that the Court had no jurisdiction to reconsider the appeal against sentence as the issue was not raised in the High Court.
8. This being a second appeal, the Court's duty in a second appeal as provided under Section 361(1) of the Criminal Procedure Code is to consider only matters of law. Severity of sentence is categorized under section 361(1) as a matter of fact, and the Court's jurisdiction to hear an appeal against sentence is only limited to where the High Court enhanced the sentence or where the trial court had no power to pass the sentence.
9. In *M'riungu vs Republic* (1983) KLR 455 the Court stated that:

“Where a right of appeal is confined to question of law, 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 fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.
10. The above position was reiterated in *Karani vs Republic* [2010] 1 KLR 73 where the Court stated:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”
11. As regards sentence, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR, the Court of Appeal stated:

“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 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 states is shown to exist.”

12. Having carefully considered the record of appeal, the written and oral submissions made by both parties, the authorities cited, the law, and the Court’s mandate, the main issue for determination is whether this appeal is properly before us and whether there is any justification for this Court to interfere with the sentence of 20 years’ imprisonment that was imposed upon the appellant. As the High Court did not enhance the appellant’s sentence, it is apparent that this appeal does not fall within the exception provided under section 361(1)(b) of the Criminal Procedure Code, that empowers the Court to consider an appeal against sentence, where the High Court has enhanced the sentence. This leaves only the second limb of Section 361(1)(a) of the Criminal Procedure Code that grants this Court jurisdiction on second appeal to entertain an appeal against sentence from the High Court where the appeal raises a point of law regarding the sentence imposed, either on the lawfulness of the sentence, or the power of the Court to impose the sentence.
13. The appellant was sentenced to 20 years’ imprisonment under Section 8(3) of the *Sexual Offences Act*, which 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.”
14. In Republic vs Mwangi (supra) the Supreme Court was emphatic 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. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two word
15. The sentence of twenty (20) years that the trial magistrate imposed upon the appellant was the minimum sentence provided under section 8(3) of the *Sexual Offences Act*. As stated by the Supreme Court in Republic vs Mwangi (supra), the only discretion that the trial magistrate had was to impose a higher sentence if he found it appropriate. In this case the complainant, who was 15 years, had conceived from the defilement incident. The trial magistrate though noting the appellant’s mitigation was aware of the limit of his discretion and, therefore, imposed the minimum sentence provided by the law. The sentence was, therefore, neither excessive nor illegal, nor do we find any demonstration to show that the trial court acted on some wrong principles or overlooked some material factors as to justify this Court’s interference.
16. Furthermore, from the record, it is evident that the appellant’s grounds of appeal before the High Court all challenged only his conviction. That is to say, that the appellant did not in his first appeal, before the High Court, challenge the sentence or the severity of the sentence that was meted out by the trial court. He cannot, therefore, raise the issue regarding the severity of his sentence at this stage. This is because a second appeal to this Court from a first appeal in the Court of appeal can only be anchored on a matter determined by the High Court, in its decision subject of the appeal before the Court.



17. The upshot of the above is that the appellants' appeal is neither properly before us, nor has the appellant demonstrated any justification for this Court to interfere with the sentence that was imposed against him. Consequently, the appeal has no merit and is dismissed.

It is so ordered

**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

