



REPUBLIC OF KENYA



**Kitunyi v Republic (Criminal Appeal 41 of 2020)  
[2025] KECA 240 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KECA 240 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 41 OF 2020  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 13, 2025**

**BETWEEN**

**ALEX RIZIKI KITUNYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Bungoma  
(R.P.V. Wendoh, J.) dated 23rd May, 2018 in HCCRA No. 27 of 2014)*

**JUDGMENT**

1. The appellant, Alex Riziki Kitunyi, was tried before the Principal Magistrate's Court at Kimilili for 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, L.A<sup>1</sup>, a 14-year-old girl.  
<sup>1</sup> Initials used to protect her identity
2. Upon hearing the evidence of five prosecution witnesses and the appellant's unsworn defence, the trial magistrate found the offence of defilement proved convicted and sentenced him to 20 years imprisonment.
3. The appellant appealed to the High Court against his conviction and sentence, but the learned Judge of the High Court (Wendoh, J.) having heard the appeal, dismissed it.
4. The appellant is now before this Court on a second appeal in which he has appealed against sentence only. His memorandum of appeal in effect presents mitigating circumstances that the time spent in custody during the trial was not considered, he is a first-time offender, and that while in custody, he attained a K.C.S.E certificate, has undergone bible studies, and attained life skills.



5. In support of the appeal, the appellant explained that he has already served 11 years in prison and would wish to have the period he spent in custody following his arrest before his conviction factored in computing his sentence.
6. The respondent opposed the appeal on sentence. However, regarding the period spent in custody during trial, the respondent conceded to the same being factored in computation of the sentence.
7. During the plenary hearing, the appellant was present in person, while Ms. Mwaniki from the office of the Director of Public Prosecutions was present for the respondent. The appellant reiterated that his appeal is against the sentence only.
8. This being a second appeal, section 361(1)(b) of the Criminal Procedure Code bars this Court from entertaining appeals against sentence unless the subordinate court had no jurisdiction to pass the sentence, or the sentence was enhanced by the first appellate court. Additionally, sentencing is a matter of discretion by a trial court and an appellate court must not interfere with the decision of the trial court unless there are concrete grounds for doing so. This position of the law was recently restated by the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR)* as follows:

“Thus, 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.”

9. Having carefully considered the record of appeal, the written and oral submissions made by both parties, the law, and the Court’s mandate, we find that the main issue for determination is whether there is any justification for this Court to interfere with the sentence of 20 years imprisonment imposed upon the appellant.
10. 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.”

11. The sentence of twenty (20) years imposed by the trial magistrate upon the appellant was the minimum sentence provided under section 8(3) of the Sexual Offences Act. We have already alluded to what the Supreme Court said in the case of *Republic vs. Joshua Gichuki Mwangi (Supra)* regarding the jurisdiction of this Court when dealing with sentences in a 2<sup>nd</sup> appeal. In the instant appeal, the appellant has not stated any grounds that would justify any interference by this Court on second appeal with the sentence imposed upon him by the trial court and upheld by the first appellate court. Further, this issue was not a ground of appeal before the High Court as such the appellant is accordingly



precluded from raising it in this appeal. In *Alfayo Gombe Okello vs. Republic* [2010] eKLR it was held that:

“Firstly, the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

12. The Supreme Court has also addressed this issue of the limited jurisdiction of this Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [supra] as follows:

“(47) The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the respondent. Having combed through the record of appeal and proceedings, we note that the constitutionality of the respondent’s sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum.”

13. The Court must therefore shy away from the appellant’s invitation to have a say on matters that were not before the first appellate court. There is no merit in the appeal against sentence.

14. As for his request that the period that he was in remand between the time of his arrest and the time of conviction be factored in computing his sentence, the same has not been opposed by the respondent. In any case, it is consistent with the proviso to Section 333(2) of the Criminal Procedure Code which allows the period spent by a convict in custody before his conviction, to be taken into account in computing his sentence.

15. In accordance with Section 333(2) of the Criminal Procedure Code, we direct that computation of the appellant’s sentence of 20 years imprisonment commences from 18<sup>th</sup> March 2013, which was the date that he was charged in the magistrate’s court and remanded in custody throughout his trial.

**DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the Original.

**DEPUTY REGISTRAR**

