



**Makhanu v Republic (Criminal Appeal 47 of 2020)
[2025] KECA 219 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 219 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 47 OF 2020
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 7, 2025**

BETWEEN

PATRICK SIMIYU MAKHANU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement of the High Court of Kenya at
Bungoma (Kiarie, J.) dated 4th October, 2018 in HCCRA No. 189 of 2016)*

JUDGMENT

1. The appellant, Patrick Simiyu Makhanu, was the accused person in the trial before the Chief Magistrate's Court at Bungoma in Criminal Case No. 2020 of 2014. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 11th day of August, 2014, at T Bungoma County, the appellant intentionally caused his penis to penetrate the vagina of D.N., a child aged 12 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.
2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to twenty- five (25) imprisonment.
3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court at Bungoma via Criminal Appeal No. 189 of 2016.
4. The High Court (K.W. Kiarie, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 4th October, 2018.



5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised two (2) grounds in his self-crafted Memorandum of Appeal, both of which impugned his sentence. They are as follows:
 - a. The trial court erred in law in breaching the appellant's absolute right to a least prescribed sentence entitled to him by law pursuant to Article 25(c), 50(2)(p) and 24(1)(e) of the Constitution.
 - b. The trial court erred in law by not sentencing the appellant pursuant to section 333(2) of the Criminal Procedure Code.
6. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Mwaniki appeared for the respondent. Both parties relied on their submissions.
7. While considering the appellant's appeal against sentence, we are mindful of our remit as a second appeal court. Our jurisdiction is limited by dint of Section 361(a) of the Criminal Procedure Code to deal with matters of law only and not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See Samuel Warui Karimi vs. Republic [2016] eKLR.
8. First and foremost, the appellant impugned the constitutionality of the mandatory nature of the minimum sentences in the Sexual Offences Act and relied on the High Court case of Maingi & 5 others vs. Director of Public Prosecutions & Another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), which was cited with approval by this Court in Joshua Gichuki Mwangi vs. Republic (2022) eKLR.
9. In the second place, the appellant seemed to obliquely argue that as a first offender, he was entitled to the least punishment for the offence which he takes to mean that he should have been sentenced to the minimum sentence prescribed by section 8(3) of the Sexual Offences Act, which is 20 years imprisonment. He relies on section 26(2) of the Penal Code and Article 24(1)(e) of the Constitution to make this argument.
10. Lastly, the appellant submitted that he was arrested on 14th August, 2014, and sentenced on 1st September, 2016. However, he argues that the trial court failed to take into account his period of incarceration as it directed that his sentence was to run from the day he was sentenced; contrary to section 333(2) of the Criminal Procedure Code. He contended that his mitigation was that his children would suffer irreparable loss upon his imprisonment and the fact that his period of incarceration was not considered, only served to lengthen the period of his sentence which ought to be reviewed. He urged that he is profusely remorseful and that he has been reformed and rehabilitated. Therefore, being a first offender, his sentence should be commensurate to his blameworthiness.
11. Ms. Mwaniki, Prosecuting Counsel appearing for the respondent, opposed the appeal on sentence and submitted that section 8(3) of the Sexual Offences Act, under which the appellant was charged, provides for a minimum sentence of twenty (20) years imprisonment; and does not cap the sentence that can be imposed by a trial court. Counsel contended that the survivor in this case was 12 years old at the time the offence was committed, which was proved by an age assessment evaluation report.

Therefore, since both lower courts found that the prosecution proved their case beyond reasonable doubt, the sentence imposed is proper and was based on the circumstances of the case, the age of the survivor, and the injuries suffered which included emotional, physical and long term deprivation of innocence. She further relied on the High Court case of Rotikei vs. Republic, Misc. Criminal Application No. E014 of 2021, wherein it was held that aggravating factors such as the age of a child,



- manner of commission of the offence, the harm occasioned immediately, or post physical or emotional, etc, to justify minimum or most severe sentence of life imprisonment is not inconsistent with the Constitution as it leaves the decision to the sentencing court.
12. Counsel for the respondent also cited this Court’s decision in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR, wherein it was held that sentence must depend on the facts of each case and on appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle.
 13. Lastly, counsel conceded that the trial court ought to have considered the time the appellant was in custody as per section 333(2) of the Criminal Procedure Code.
 14. We have carefully considered the appeal, the submissions of the parties and the authorities cited in support of the appeal against sentence.
 15. Before we delve into the substance of the appeal, we find it necessary to state a brief background of the facts of the case which have been established by the concurrent findings of the two courts below, and which are no longer on appeal. The facts are as follows.
 16. On 11th August, 2014, at around 1.00pm, the complainant, a twelve-year old girl, was on her way home from the market when she met the appellant at a posho mill where he used to work as watchman. The appellant lured her to the posho mill with the promise that he would give her money to take to her mother. Once inside the posho mill, the appellant removed his trousers and T-shirt; and also removed the complainant’s skirt and T- shirt. He then tied his T-shirt around the complainant’s neck and threatened to kill her if she screamed. Thereafter, he inserted his penis into her vagina and defiled her. The complainant told the court that she felt pain in her vagina and stomach during the ordeal. After the incident, she went home and immediately told her mother what had happened. Her mother took her to hospital for medical examination and reported the matter to the police. Later, the appellant was arrested and charged with the offence of defilement.
 17. The first ground urged by the appellant – that the minimum sentences imposed by the Sexual Offences Act are unconstitutional – has been definitively determined by the Supreme Court in *Republic vs. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024). In that case, the Supreme Court categorically held that the minimum sentences in the Sexual Offences Act are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.
 18. The apex Court held:
 - “ 56. 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 words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in



similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.”

19. Following the doctrine of stare decisis as provided for under Article 163(7) of the *Constitution*, this decision by the Supreme Court is binding on this Court and overrules the recent decisions of this Court holding otherwise.

20. We note that in this case the trial magistrate imposed a sentence which was above the statutory minimum. In doing so, the learned magistrate remarked that:

“I have considered the fact that the accused is a first offender. He is, however, not remorseful. The offence he committed is serious. In the premises, I hereby sentence him to serve imprisonment for twenty-five (25) years.”

21. It is eminently clear that the learned magistrate utilized her discretion in imposing that sentence after appropriately weighing the extenuating and aggravating factors in the case.

22. In making his second argument about the constitutional requirement that he is entitled to the least prescribed sentence, the appellant misunderstands the constitutional principle. In fact, that constitutional principle is in Article 50(2(p) of the *Constitution*. In essence, that sub-article provides that an accused person is entitled to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing. This provision has no application to the present case. In the present case, the sentencing court formed the opinion, after appropriately considering both the extenuating and aggravating circumstances, that the appellant deserved a punishment higher than the statutory minimum.

23. An appellate court cannot interfere with the sentencing discretion merely because it would have imposed a different sentence. It can only do so where there has been a material misdirection with regard to the sentence. In *Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No.253 of 2003*, this Court in a differently constituted bench observed that:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R (1989 KLR 306)*.”

24. We have considered the circumstances and facts of the present case. We have concluded that it is not possible to rationally say that the sentence of imprisonment for twenty-five years imposed is, in any way, manifestly excessive or perverse. Neither is there any evidence that the learned magistrate failed



to take into consideration any relevant factor or, conversely, took into consideration any extraneous factor in reaching his sentencing decision.

25. The only ground raised by the appellant which minimally meets success is the one pivoted on section 333(2) of the *Criminal Procedure Code*. The appellant submitted that he has been in police custody since 14th August, 2014, when he was arrested. We have confirmed from the record that he was, indeed, arrested on 14th August, 2014, as testified by Corporal Philip Boeni, who was the investigation officer. He remained in custody during the pendency of his trial. Therefore, in compliance with section 333(2) of the *Criminal Procedure Code*, we direct that his sentence shall be computed to begin on 14th August, 2014. Other than this, the appellant's appeal is dismissed.

26. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 7TH 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

