



REPUBLIC OF KENYA



**Sagwe v Republic (Criminal Appeal 69 of 2019)
[2025] KECA 154 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 154 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 69 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 7, 2025**

BETWEEN

BERNARD ONDIKI SAGWE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii, (Majanja, J.) dated 14th August, 2018 in HCCRA No. 28 of 2017)

JUDGMENT

1. The appellant, Bernard Ondiki Sagwe, was tried and convicted by the Chief Magistrate's Court at Kisii, of the offence of defilement of a thirteen-year-old girl, contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act*. In accordance with Section 8(3) of the *Sexual Offences Act*. The appellant was sentenced to serve twenty years imprisonment.
2. Being dissatisfied, he appealed to the High Court against his conviction and sentence. Upon hearing the appeal, the High Court (Majanja, J.), dismissed the appeal against both conviction and sentence, finding that the offence was proved to the required standard, and that the child having been thirteen years old, the sentence of twenty years imprisonment fell within the bracket provided by Section 8(3) of the *Sexual Offences Act*, and was, therefore, legal.
3. The appellant is now before us in this second appeal in which he has filed a memorandum of appeal which purports to have seven grounds, but in effect, there is only one ground of appeal against sentence, wherein the appellant urges the Court to consider reducing the sentence that was imposed against him. The other six grounds are basically mitigating circumstances, such as the appellant being the sole breadwinner of his family which is composed of his unemployed wife and six children; that he has already been behind bars for six years; that he is a first offender, remorseful and repentant, reformed,



trained and a law-abiding citizen, who should be given another chance; and that the Court should, therefore, substitute his prison term with a non-custodial sentence.

4. The respondent opposed the appeal through written submissions that were duly filed on behalf of the Director of Public Prosecutions (DPP) by Mr. Joseph Kimanthi, Senior Assistant Director of Public Prosecutions. The respondent maintained that under Section 361 of the Criminal Procedure Code, a second appeal can only be heard on matters of law, and severity of sentence is identified in that section as a matter of fact. Mr. Kimanthi further submitted that the appellant was sentenced to twenty years imprisonment in accordance with Section 8(3) of the *Sexual Offences Act*, and therefore, the sentence that was imposed upon him was proper and legal.
5. We have considered the record of appeal, the written submissions and the oral submissions that were made before us. This being a second appeal, our primary duty is to reconsider the evidence and the law and arrive at our own conclusion. In this case, our work has been made easy because the facts are no longer in issue, the appellant having limited his appeal to sentence only. As this Court stated in *Dzombo Mataza vs Republic* [2014] eKLR:

“Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno v Republic* (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. We do not discern such misgivings in this appeal.”

6. The facts as per the concurrent findings of the two lower courts, were that the minor complainant, a child whose age was established to be between thirteen and fourteen years, was on her way to school, when she entered an incomplete house, and the appellant suddenly pounced on her, covered her mouth and pulled her into a room in the house where he removed his clothes and her clothes, then inserted his male organ into her vagina. He only left her when he heard someone coming, and he quickly pulled up his trouser, zipped and left. The person who entered the incomplete house took the minor to the landlord and her mother, who was contacted, took her to the hospital where she was examined and a P3 form filled indicating that her labia major was bruised and hymen torn. A high vaginal swab revealed epithelial cells and further investigations confirmed that she was HIV positive. The appellant was subsequently arrested and charged.
7. Under Section 361(1)(a) of the Criminal Procedure Code, this Court’s jurisdiction on second appeal is limited to matters of law only, and this excludes severity of sentence which is identified as a matter of fact. In this appeal, the appellant is urging us, in light of his mitigating circumstances, to reduce the sentence of twenty years imprisonment that was imposed upon him. Unfortunately, this Court does not have jurisdiction to review his sentence given our circumscribed jurisdiction.
8. Moreover, even assuming that the Court had jurisdiction to hear the appeal against sentence, the appellant’s appeal is doomed to fail because the sentence that was imposed against him is in accordance with Section 8(3) of the *Sexual Offences Act* which provides for a minimum sentence of twenty years imprisonment. As was stated by the Supreme Court in *Republic -vs- Mwangi: Initiative for Strategic Litigation in Africa (ISLA) & 3 others* [2024] (amicus curiae) KESC 34 KLR.

“Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law. Minimum sentence 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 court to impose a harsher sentence.”

9. The upshot of the above is that this appeal has no merit. It is accordingly dismissed.

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

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

