



REPUBLIC OF KENYA



**Sichei v Republic (Criminal Appeal 8 of 2020)  
[2025] KECA 152 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 152 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 8 OF 2020  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**ELIUD NDIWA SICHEI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Bungoma  
(Riechi, J.) dated 29th November, 2019 in HCCRA No. 156 of 2018)*

**JUDGMENT**

1. Eliud Ndiwa Sichei, the appellant herein, was tried before the Senior Principal Magistrate's Court at Kimilili for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. It was alleged that he had defiled one, S.C.<sup>1</sup> (name withheld) a child aged 2 years and 7 months.
2. The appellant pleaded not guilty to the charge and a trial ensued, during which five 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 life 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 (Riechi, 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 faulting the learned judge for meting a harsh and excessive sentence, failing to evaluate the evidence, failing to note the inconsistencies and contradictions in the prosecution case, failing to note that crucial witnesses were never called and in failing to consider the defence case.



5. In his submissions in support of the appeal, the appellant contended that the mandatory minimum life sentence is manifestly harsh, excessive, inhuman, and dehumanizing. He also describes it as degrading, as it contravenes Article 28 of *the constitution*; that it deprives the trial court of the discretion in sentencing; and deprives the appellant of the right to a fair trial for failure to consider the mitigation.
6. In opposing the appeal, the respondent contended that in the instant appeal, the victim was 2 years and 7 months a factor that was considered during sentencing. The respondent urged the court not to interfere with the sentence.
7. At the plenary hearing, the appellant appeared in person at Kisumu Maximum Prison while Ms. Mwaniki learned prosecution counsel appeared for the respondent. In his grounds of appeal, the appellant had appealed against both conviction and sentence. However, at the hearing of the appeal, the appellant confirmed that he did not wish to pursue the appeal on conviction. He only wished to argue the appeal against the sentence only.
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. In *Karani vs. Republic* [2010] 1 KLR 73 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.”

9. Having duly considered the record of appeal, the memorandum of appeal, the submissions and authorities referred to by the parties herein, and the Court's mandate, the main issue for determination is whether there is any justification for this Court to interfere with the sentence of life imprisonment that was imposed upon the appellant.
10. The appellant only challenges the sentence of life imprisonment imposed upon him and terms it harsh, severe, and unconstitutional. In principle, and as provided under section 361(1)(a) of the Criminal Procedure Code, the Court's jurisdiction on a second appeal does not traverse the question of severity of sentence which is deemed to be a matter of fact. Under section 361(1)(b) of the Criminal Procedure Code, the Court can only step into the arena of sentencing when a question about the legality of a sentence has been raised.
11. In the case of *Kagere vs. Republic* (Criminal Appeal E031 of 2023) [2024] KECA 1187 (KLR) (delivered 20 September 2024) (Judgment) this Court cited the case of *Dzombo Mataza vs. R.* [2014] eKLR in which it was stated as follows:

“As already stated, this is but a second appeal. Under the law, we are only concerned with matters of law and not fact. 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 vs. 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 is 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.”

12. Section 8(2) of the *Sexual Offences Act* provides that a person found guilty of the offence of defilement of a girl aged 11 years or less shall be sentenced to life imprisonment. The victim herein is a child aged 2 years and 7 seven months. Guided by the provisions of Sections 8(1) and 8(2) of the *Sexual Offences Act*, the appellant was sentenced to life imprisonment for the said offence by the trial court. The sentence is not only lawful but also legal.
13. Sentencing is an exercise of discretion by the trial court. In *Benard Kimani Gacheru vs. Republic* (2002) eKLR it was thus:

“It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.”

14. Further, by dint of Section 361(1) of the Criminal Procedure Code, the appellant is precluded from raising the complaint on the severity of sentence on a second appeal as severity of the sentence is a matter of fact. This position has now been made clear in the Supreme Court decision in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curiae)* [2024] KESC 34 (KLR) where it was held that:

“Before further delving into the question of constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court. We produce the same verbatim as follows: “361. Second Appeals<sup>1</sup>. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

- a. on a matter of fact, and severity of sentence is a matter of fact; or
- b. against sentence, except where a sentence has been enhanced by the High Court unless the subordinate court had no power under section 7 to pass that sentence.”

49. 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."

15. The appellant has not established any grounds upon which the Court can interfere with his sentence. Consequently, we hold that the appeal against the sentence lacks merit and is dismissed.

**DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY, 2025**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

