



**Wambati v Republic (Criminal Appeal E037 of 2020)
[2025] KECA 202 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 202 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E037 OF 2020
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 7, 2025**

BETWEEN

LABAN SIMIYU WAMBATI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at
Bungoma (Kiarie, J.) dated 4th October, 2018 in HCCRA No. 236 of 2015)*

JUDGMENT

1. The appellant, Laban Simiyu Wambati, was arraigned before the Chief's Magistrate's Court at Bungoma in Criminal Case No. 3875 of 2015 charged with a single count of 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 between the 27th and 28th November, 2015, within Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of NW, a child aged 13 years.
2. 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.
3. The appellant pleaded guilty to the main charge and the learned trial magistrate convicted and sentenced him to the minimum sentence of twenty (20) years imprisonment.
4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the sentence before the High Court.
5. The High Court (K.W. Kiarie, J.) dismissed the appeal and upheld the sentence in a judgment dated 4th October, 2018.



6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. In his memorandum of appeal, he has raised four (4) grounds all attacking the sentence. In summary, he argued that: the mandatory nature of his sentence denied him a fair hearing and also denied the trial court the discretion to sentence him; he was a first offender; he is rehabilitated and reformed; he is remorseful and pleads for leniency and a reduced sentence. He, therefore, urged this Court to consider his mitigation and allow the appeal in its entirety.
7. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned prosecution counsel, Ms. Mwaniki, appeared for the respondent. Both parties relied on their submissions.
8. 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 v Republic* [2016] eKLR.
9. The appellant argued that due to the mandatory nature of his sentence, he was denied a fair hearing and the trial court was also denied the discretion to sentence him. This, he argued, defied the main aim of sentencing which is to rehabilitate and reform the offender so that he can be re-integrated back to the society. In this regard, it was his submission that during his incarceration, he joined the rehabilitation institute and undertook a course in theology and has so far attained a certificate and a diploma. He urged that the sentence imposed was severe and prayed for leniency and a reduced sentence; He relied on the decision in *Daniel Onyango Ochar v Republic*, Criminal Appeal No. 35 of 2019, wherein the court set aside the minimum mandatory sentence of 20 years and substituted it with 15 years' imprisonment.
10. Ms. Mwaniki opposed the appeal on sentence and rejected the appellant's submission that the mandatory nature of his sentence deprived the trial court its discretion to sentence him. She relied on the Supreme Court's decision in *Republic v Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR), wherein it was held that mandatory minimum sentences in sexual offences do not deprive judicial officers the power to exercise their judicial discretion.
11. Lastly, she submitted that the appellant's mitigation was considered by the two lower courts, therefore, the same ought not to be considered at this stage. She further submitted that sexual offence cases have dire post-traumatic consequences on the survivor and the 20 years sentence that was imposed on the appellant was lawful and should not be interfered with.
12. We have considered the appeal, the grounds urged in support thereof, and the rival submissions and authorities cited by both parties.
13. The admitted facts which formed the basis of the guilty plea and conviction were as follows:

“The facts of the case are that on 27/11/15 the complainant JNW had attended a funeral at [Particulars Withheld] village Bungoma County. The funeral was for her grandfather. The complainant excused herself at 8.00pm to go for a short call outside. The accused then appeared and grabbed her and pulled (sic) to a sugarcane plantation, removed her pants and clothes, covered her mouth and then inserted his male genital organ into her vagina and defiled her. In course of the act, he heard footsteps by members of the public and fled the scene. The complainant explained to members of the public what had befallen her. Community policing members took up the issue, pursued the accused and arrested him. He was known to the complainant and she revealed his name. The accused was taken to



Ekitale Police Post and locked up. The complainant was referred to Ekitale Health Centre where she was attended to and on 28/11/15 she was issued with a P3 form. It was filled at Bungoma District Hospital and it was ascertained that the victim had been defiled. There was no hymen, there was tenderness on her private parts and thick whitish discharge. An age assessment was conducted on 30/11/15 ascertaining that she was 13 years old. The accused was charged with the offence. I produce the treatment notes for Bungoma (P. Ex.1), treatment notes from Ekitale (P. Ex.2) and the P3 form as Exhibit (P. Ex. 3). I also produce her age assessment as an exhibit (P. Ex.4).”

14. The appellant admitted the charge and confirmed the facts to be correct. He was then given an opportunity to mitigate, whereby he stated that he was 22 years old, an orphan and was unmarried.
15. Upon considering the offence, the circumstances thereof, the mitigation and the fact that the appellant was a first offender, the learned trial magistrate stated thus:

“Accused has pleaded guilty to the charge and is treated as a 1st offender. Mitigation is noted but offence is quite notorious. The accused appears remorseful and deserves the minimum sentence. Accordingly, I sentence him to serve 20 years imprisonment.”

16. In considering twenty (20) years imprisonment as the minimum sentence, the learned magistrate was not wrong. Indeed, the Supreme Court in the *Joshua Gichuki Mwangi* Case (supra) confirmed that the minimum sentences in the *Sexual Offences Act* are constitutional; and that a sentencing court cannot lawfully go below them. The apex Court stated that:

“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 recognized 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.”

17. 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. In the present case, the appellant was



convicted under section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The minimum sentence that can be imposed under section 8(3) – notwithstanding the extenuating circumstances – is twenty (20) years imprisonment. This was the sentence imposed on the appellant. By dint of the binding precedent in Joshua Gichuki Mwangi Case, the sentencing court could not go below that sentence. Neither can we.

18. Consequently, we dismiss the appeal in its entirety. The upshot is that we uphold the sentence imposed by the subordinate court and upheld by the High Court.

19. 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

