



REPUBLIC OF KENYA



KENYA LAW
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**JA v Republic (Criminal Appeal 175 of 2019)
[2025] KECA 609 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KECA 609 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 175 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MARCH 28, 2025**

BETWEEN

JA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kakamega
(Cherere, J.) dated 26th September, 2018 in HCCRA No. 178 of 2010)*

JUDGMENT

1. The appellant, Jackson Asiachi, was charged before the Senior Resident Magistrate's Court at Butere in Criminal Case No. 356 of 2010 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on 15th May, 2010, in Butere District, within Western Province, the appellant intentionally caused his penis to penetrate the vagina of RM (name withheld), a child aged one year and five months.
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 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 life imprisonment, the mandatory minimum sentence provided under section 8(2) of the *Sexual Offences Act*.
4. 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 Kakamega *via Criminal Appeal No. 178 of 2010*.
5. The High Court (T.W. Cherere, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 26th September, 2018.



6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised three (3) grounds in his Supplementary Memorandum of Appeal which are that:
 - a. The appellant's constitutional rights under Article 50(2)(g)(h)(j) on legal representation were violated or denied as he was never availed a counsel by the State throughout the proceedings.
 - b. The life sentence meted out upon the appellant is unconstitutional and should be placed aside and substituted with an appropriate sentence.
 - c. Section 333(2) of the Criminal Procedure Code be considered when determining the appellant's sentence.
7. The facts of the case are as follows. On 15th May, 2010, at around 4.30pm, the appellant, who is a brother-in-law to MW, the complainant's mother (PW1), arrived at her house as it was his custom to visit her. Later, at around 6.00pm, PW1 informed the appellant that she was going to the posho mill to mill some maize. She also informed MW (PW2), who is also her brother-in-law, to check up on the complainant while she was gone. At the time, the complainant was asleep in her room. Thereafter, it started raining and PW2 went out to collect rain water and left the appellant at PW1's house. After a short while, the appellant called PW2 and told him to go and get the complainant as she was crying. When he went to pick her, she saw that she was bleeding from her private parts. He then went and informed his father, Abdallah Odinga (PW3) who told him to take the complainant to him.
8. At that time, the complainant was bleeding profusely and PW3 asked PW2 to wash off the blood so that he could check her. It was then that they found out that she had been raped. The appellant was also present and participated in cleaning the complainant; and then left for his place of work. When PW1 returned, PW3 informed him about the incident and advised her to take the complainant to hospital for treatment.
9. The complainant was referred to Western General Provincial Hospital in Kakamega whereby she was examined and it was found that: the vagina was torn and bleeding slightly; the hymen was broken; and the labia majora was swollen. She was admitted at the hospital for treatment where she stayed for eleven (11) days.
10. The following morning, PW3 reported the matter to the chief who went and arrested the appellant. He was then taken to hospital for examination and it was found that: his underwear was blood stained; he had bruises on his penis; and there were blood stains on his pubic hair. His age was also assessed and was found to be over 18 years old. He was then charged with the offence of defilement.
11. The appeal before us was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned prosecution counsel, Mr. Chacha appeared for the respondent. Both parties relied on their submissions.
12. The appellant submitted that his rights under Article 50(2)(g)(h) and (9)(h) were violated as the State did not allocate a counsel to represent him throughout his trial, yet he was only 19 years old at the time of trial, and a lay man.
13. The appellant also submitted that being a first offender, the life sentence imposed upon him is unconstitutional, harsh and excessive. He relied on Paul Odhiambo Mbola vs. Republic (2019) eKLR and Republic vs. Breber (2009) 1 WLR 223, which he said, held that life sentences do not meet the aim or objective of sentencing, which is to enable the offender return back to the society. He also relied on Julius Kitsao Manyeso vs. Republic, Malindi Criminal Appeal No. 12 of 2021, which he said, declared life sentences as unconstitutional.



14. Thus, he urged this Court to re-evaluate the evidence on record and the circumstances thereof, and either substitute his sentence or acquit him; as he has spent twelve (12) years in prison, during which time he has reformed and is rehabilitated, and has even attained a certificate in carpentry.
15. Lastly, the appellant urged this Court to take into account the period he has spent in custody pursuant to section 333(2) of the Criminal Procedure Code should the Court be minded to impose a definite term sentence.
16. Mr. Chacha opposed the appeal on sentence and reminded this Court of its jurisdiction as a second appellate court which is limited by dint of section 361(1) (a) of the Criminal Procedure Code to deal with matters of law only and not delve into matters of fact which have been dealt with by the trial court and re- evaluated by the first appellate court as was held in Njoroge vs. Republic [1982] KLR 388.
17. Counsel submitted that the appellant’s ground on violation of his constitutional rights due to lack of legal representation during trial was raised in the High Court and the learned judge dismissed the same.
18. Lastly, counsel took cognizant of the declaration of the unconstitutionality of life sentences in Julius Kitsao Manyeso vs. Republic, Malindi Criminal Appeal No. 12 of 2021, and conceded the appeal on sentence. However, he implored this Court to consider the fact that at the time of the incident, the complainant was one year and five months old; and that during mitigation, the appellant showed no remorse. For these reasons, counsel recommended a term sentence of thirty (30) years imprisonment.
19. We have carefully considered the appeal, the rival submissions by the parties and the authorities cited.
20. This is a second appeal. Our jurisdiction is limited by dint of Section 361(1)(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.
21. The High Court considered the appellant’s argument that it was a violation of Article 50(2)(h) of the Constitution for the State to have failed to assign him a lawyer and rendered itself thus:

“The appellant was never availed counsel by the State throughout the proceedings. Article 50(2)(h) provides that an advocate ought to be assigned at State expense if substantial injustice would otherwise result. This issue first came up for interpretation before the Court of Appeal in the case of David Njoroge Macharia v Republic [2011] eKLR

....The Court of Appeal was of the opinion that where the accused faced a capital offence, then the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided.

In my view, a case such as this one where the appellant was facing a life sentence is a serious case, and I would, indeed, place it at the same level as a case in which the penalty as loss of life, so that ideally, legal representation ought to be provided at the state expense if the accused cannot afford counsel.

However, the provisions of Article 50, part of which relate to the right to be provided with legal representation at the State’s expense are yet to be fully enforceable. This was, indeed, the basis of the decision in the case of John Swaka v DPP & 2 Others, Constitutional Petition No. 318 of 2011 [2013] eKLR. I am therefore not convinced that there is any violation of



the constitutional rights of the appellant in not having been accorded legal representation at the State's expense given the above reason.”

22. We agree with the outcome of the learned Judge's analysis but would slightly differ with the analysis itself. Article 50(2)(h) of *the Constitution* stipulates that an accused has the right “to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result.” As David Njoroge Macharia vs. Republic [2011] eKLR held, this provision does not automatically grant state-funded legal representation for all offences but is contingent upon the potential for substantial injustice.
23. The position presently obtaining in Kenya is that an accused person is only entitled to legal representation provided by the State where he can demonstrate, in the unique circumstances of his case, that he cannot afford an advocate, and that he would suffer substantial injustice if he is not represented by counsel in his case. The potential penalty upon conviction is one of the factors that the court considers in determining if substantial injustice would be occasioned if a State-appointed counsel is not provided at trial. The other factors include the accused person's own circumstances such as his ability to understand the nature of the case he is facing. In the present case, there is nothing on the record that demonstrates that the appellant had any difficulties in understanding the charges he was facing.
24. Turning to the issue on sentence and that it was unconstitutional, we note that the appellant did raise it in his grounds at the first appellate court wherein he alleged that the trial court erred in sentencing him to life imprisonment; but quoted a provision that does not exist in *the Constitution* in relation to that ground. Unfortunately for the appellant, the Supreme Court has now spoken with binding authority on that topic 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 mandatory 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.
25. 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.”

26. 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.
27. The upshot is that the appeal fails and is dismissed in its entirety.
28. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 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

