**Sinda v Republic (Criminal Appeal 277 of 2019)**
**[2025] KECA 484 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 484 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 277 OF 2019**

**HM OKWENGU, HA OMONDI & JM NGUGI, JJA**

**MARCH 7, 2025**

**BETWEEN**

**FRED CHACHA SINDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Migori (Mrima, J.) dated 6th June 2017 in HCCRC No. 22 of 2015)***

## JUDGMENT

1. The appellant herein was charged and convicted at the Senior Resident Magistrate's Court in Kehancha with two counts of the offence of defilement contrary to sections 8(1) and 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 24th May 2014, at [Particulars withheld] Trading Centre in Kuria East, the appellant intentionally caused his penis to penetrate the vaginas of NGD[1] and WRD[2] minors aged 9 and 7 years respectively. He further faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The appellant pleaded not guilty and the case proceeded to full trial. Upon conclusion, he was found guilty on both counts was convicted of the offence in the main charge and sentenced to life imprisonment.

2. The appellant, dissatisfied and aggrieved with both conviction and sentence appealed to the High Court which affirmed and upheld the decision of the subordinate court. Being dissatisfied and aggrieved with the judgment of the High Court, the appellant has now filed this appeal.

3. We have carefully considered the record of appeal, submissions by counsel, the authorities cited, and the law. This being a second appeal, this Court is mindful of its duty as a second appellate court, that a second appeal must only be confined to points of law and this court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal

[1] Initials used to protect the identity

is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others vs. Republic [1982] eKLR.

4. The evidence that was presented to the trial court, and also considered for evaluation and analysis was as follows. The two minors are sisters and the evidence of ABD[3], their mother who testified as PW1 was that on the evening of 24th May, 2014 at about 6.0pm, she sent her two daughters NGD and WRD to buy milk from a homestead within the neighbourhood. The girls had taken long to return so PW1 went to the homestead she had sent them for milk, only to learn that they had been served a while back and left. PW1 then rushed back home to secure her other children, before she embarked on a search for the two girls.

5. Just when she was ready to start the search, PW1 heard some children running towards her home – it turned out to be the two girls. The girls narrated to her their ordeal in the hands of the appellant inside a maize farm while on their way back home. One of the girls, namely NGD who testified as PW2, was carrying her panty. PW1 took the girls into the house examined them and realized that both girls had blood-stained panties and blood oozing from their vaginas. PW1 and her husband then took the girls to Chinato Health Center where they were treated.

6. Upon report of the incident, Sgt John Jazrui, PW6, was deployed together with his colleague AP, PW5 to search for and arrest the [3] Initials used to reduce the risk of identifying her, and compromising the privacy of the minors.

   appellant. As they were headed to PW1's house they met someone running in the opposite direction. PW5 stopped him and the person obliged, it turned out to be the appellant, so he was arrested.

7. PW4 a Clinical officer at Kegonga sub-district hospital, medically examined the two girls and filled the post-rape care forms and P3 forms in relation to the girls where his findings confirmed that there was partial penetration of the vaginas of the girls.

8. In his sworn defence, the appellant denied the offences and testified that on the date of the alleged offences he was in the company of his employer DW2 from 5.30 pm to 11.30 pm, drinking at Mzalendo bar at Senta market then later while on his way home, he was arrested by some police officers and taken into custody and that the medical examination at Chinato Health Centre vindicated him. PMM, the appellant's witness testifying as DW2 confirmed that he was with the appellant on the material date. It was also his testimony that the appellant's brothers wanted to fix him over a piece of land.

9. In convicting the appellant, the learned trial magistrate was satisfied that all the ingredients necessary to prove the offence, namely age, penetration, and identification of the perpetrator, had been adequately met, thus sentencing him to life imprisonment on both counts to run consecutively.

10. Aggrieved by the outcome both on conviction and sentence, the appellant appealed to the High Court on grounds that: the testimony of the two girls was fabricated and he was not positively identified; the trial court did not order for a D.N.A examination which he had requested for; the medical evidence was contradictory as the ages of the two girls was not settled; the trial court failed to consider that there was no way he could have defiled the two complaints consecutively without them raising an alarm; and the sentence was harsh and excessive.

11. The learned judge, having considered the evidence, pointed out that the key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration, and proof that the

appellant was the perpetrator of the offence. As regards the age of the complainants, the learned judge stated that:

> The *Sexual Offences Act* promulgated some rules towards the achievement of its objectives. Those rules came to be known as "The *Sexual Offences Act* (Rules of Court) 2014 which came into force on 11th July 2014 under Legal Notice No. 101. Under Rule 4 thereof, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document.
>
> In this case I have no hesitation in finding that the Child Health Cards produced as exhibits fall under the category of 'any other similar document' under Rule 4 aforesaid and that the same are in proof of the ages of PW2 and PW3. If one is still in doubt, there is the evidence contained in the P3 Forms at pages 3 where the ages were approximated as 9 years and 7 years by the Medical Officer who filled in the same.
>
> I therefore find that PW2 was born on 15th February 2006 and PW3 was born on 23rd October 2008 and as such they were about 8 years 3 months old and 5 years 7 months old respectively when the offences were allegedly committed on 24th May 2014."

12. As regards penetration, drawing from the statutory definition, and fortified by this Court's pronouncement in the case of Mark Oiruri Mose vs. R (2013)eKLR which acknowledged that the attacker does not have to fully complete the sexual act during the commission of the offence, nor is the absence of spermatozoa fatal in proving the offence; and that as long as there was penetration even if just on the surface, it was sufficient to sustain a charge the learned judge held that the two minors gave clear testimony describing in graphic detail what the appellant did to them which amounted to partial penetration; that the fact of penetration was corroborated by the stained underwear of the complainants; blood oozing from the complainants' vaginas, and the medical testimony of PW4, as evidenced by the P3 and treatment notes all produced at the hearing. In this regard, the learned judge stated that:

> " Having scrutinized all the medical documents and reconsidered the evidence of PW1, PW2, PW3, PW4 and PW7, this Court is satisfied that there were partial penile penetrations into the vaginas of PW2 and PW3. The contention by the appellant that there was need to carry out a D.N.A. examination is therefore misplaced. The evidence on record was enough to prove the ingredient and that examination was not a necessity. Further, the appellant is reminded that a case of defilement can be approved by any other evidence and not necessarily by conducting a D.N.A. examination. This ingredient is hence answered in the affirmative.

13. With regard to the identity of the appellant the learned judge was satisfied that the identification was proper and not a case of mistaken identity. It was the court's finding that the fact the appellant defiled the girls one after another, gave them ample time to see what was happening, who the assailant was and the girls even knew the appellant's name. The incidents happened at around 6.30 pm, it was not dark and PW2 and PW3 could see the appellant clearly and they identified the appellant to PW1 as well as identifying the appellant in their evidence in court.

14. The learned judge found that from the evidence on record, the charge was proved and upheld the conviction and sentence and dismissed the appeal.

15. Aggrieved by this outcome the appellant filed this appeal on grounds that he had raised an alibi defence which was not dislodged by the prosecution, and citing an emerging jurisprudence on the constitutionality of the minimum mandatory sentences, argued that the mandatory nature of the

sentence meted took away the discretion of the court. He thus urged us to quash the conviction, set aside the sentence and order for his release.

16. In opposing the appeal in its entirety, the respondent submitted that the evidence presented proved the ingredients of the offence, that the age of the two (2) minors in the instant case was established by documentary evidence and the testimony of the PW1 (their mother) who testified as captured in the record that NGD was aged 9 years old, as she was born on 15th February 2006. WRD aged 5 years and 4 months, was born on 23rd October 2016; that the clinical officer also testified and produced the P3 form which indicated their approximate ages; and the child health cards of both minors were produced as Exhibits 7 and 8. It is contended that the documentary evidence as well as oral evidence, clearly showed that the two minors were of very tender age. In support of this limb, the respondent drew from this court's pronouncement in Mwalango Chichoro Mwajembe vs. Republic (2016) that:

> " The question of proof of age has finally been settled by decision of this Court to effect that it can be proved by documentary evidence such as birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof".

17. With regard to the other ingredient of penetration, it is submitted that the two girls were very detailed and graphic in describing what happened, pointing to PW2's testimony that:

> " the appellant removed her pant, he laid her on the ground. He did bad things...He then held me and laid me on the ground. He removed my panty. He did bad things to the part of my body I use to urinate. He used the part of his body that is used by boys to urinate... I cried. I felt pain".

18. That PW3 also testified that the appellant put his "kidude" to her groin area and that their evidence was corroborated by that of the Clinical Officer who examined both minors and concluded that they had been defiled.

19. As regards the identity of the perpetrator, it is submitted that the victims knew the appellant and recognized him physically, and also by name as Chacha Sinda, that when the defilement was committed, it was about 6.30 p.m. which is ordinarily still light so the two minors had no difficulty in identifying and recognizing the appellant. Further, that the moment they got home, they told their mother what had been done to them and who the perpetrator was.

20. We are urged not to interfere with the sentence, and the respondent contends that this was a case deserving of mandatory sentence provided, considering that the appellant defiled two minors of tender years and by his cruel act took the innocence of the two minors. We reiterate that this being a 2nd appeal we cannot begin to delve into issues of fact, indeed our jurisdiction is limited to consideration of matters of law only, by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. For instance, in Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong vs. R, [1984] KLR 611".

21. The appellant in one of his grounds of appeal argues that his defence was not considered. We take note that PW2 and PW3 knew the appellant not just by physical appearance, but also by name, described their ordeals and even identified the appellant in court. The opportunity for identification was duly considered by the learned judge who observed that the incident occurred at about 6.30 pm before darkness enveloped the area and the two children had ample time to see the appellant as he took turns at them before fleeing the scene and leaving them traumatized and in tears. We agree with the learned judge that the appellant was properly identified and placed at the scene, thus dislodging his alibi defence.

22. From the record, we take note that the appellant maintained that between 5.30 pm to 11.30 pm, he was at a bar with PMM who testified as DW2. This was supported by DW2 who even went further to state that the appellant was framed because of a land dispute. However, the arresting officer, PW5 confirmed that the appellant was arrested at about 8.00 pm and booked in the cells by 11.40 pm. The learned Judge took into account the sequence of events and time span in dismissing his alibi defence as not being reasonably possible. The reason for rejecting the appellant's alibi defence is cogent and we find no error on the part of the learned judge. We therefore agree with the 1st appellate court that the appellant's defence was not credible and that the conviction was safe.

23. The appellant's other grounds of appeal relate to the sentence which he laments as being excessive, harsh, unconstitutional and unlawful. This being a second appeal, under Section 361(1) of the *Criminal Procedure Code*, our jurisdiction is limited to consideration of matters of law only. Severity of sentence is clearly outside our mandate as it is identified in that provision as a matter of fact. However, the appellant before us has questioned the exercise of discretion by the trial court in sentencing him, and the mandatory nature of the sentence that was imposed upon him. The appellant is therefore not just questioning the severity of the sentence imposed upon him, but has raised issues of law that call for determination by this Court.

24. As concerns the discretion in sentencing, as stated by the Court of Appeal in Bernard Kimani Gacheru vs. Republic [2002] eKLR:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court.
>
> Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

25. The appellant draws from the decision in Francis Muruatetu & Another vs. Republic, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, to argue that the sentence imposed of life imprisonment was the mandatory maximum sentence as provided in section 8(3) of the *Sexual Offences Act*, and the discretion of the two courts below to mete out a sentence to the appellant that was commensurate with the circumstances of the case was curtailed by the maximum mandatory sentence. The appellant is persuaded that this Court can interfere with the mandatory minimum sentence which was meted out on the strength of a legislative enactment, leading to a conflict in separation of powers.

26. We acknowledge that in previous decisions, there was a shift in the Court's jurisprudence on mandatory minimum sentences in the *Sexual Offences Act*. This was as a result of the pronouncement

in Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 (Muruatetu1) that a minimum mandatory sentence takes away the jurisdiction conferred on judicial officers to exercise their discretion when meting out a sentence. This ushered a flood of decisions departing from fidelity to the minimum and mandatory sentences in sexual offences, and ushering a very enthusiastic departure by the courts from the mandatory minimum sentences under the *Sexual Offences Act* to a newfound approach, meting shorter sentences than the statutory minimum.

27. This new-found approach did not last long, as stated by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] 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 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 court to impose a harsher sentence."

28. We agree that the appellant is right that there was jurisprudence from this Court to the effect that mandatory sentences are unconstitutional, that trajectory has been dislodged by the Supreme Court, to the extent that mandatory sentences are clearly provided for in the *Sexual Offences Act*, and the trial court has no option, but to impose it. The upshot of the foregoing is that the appellants' appeal lacks merit and is dismissed.

It is so ordered.

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

**HANNAH OKWENGU**

**.....**

**JUDGE OF APPEAL**

**H. A. OMONDI**

**.....**

**JUDGE OF APPEAL**

**JOEL NGUGI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**