



**Damba v Republic (Criminal Appeal 272 of 2019)
[2025] KECA 989 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KECA 989 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 272 OF 2019
MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA
MAY 30, 2025**

BETWEEN

CHARLES OUMA DAMBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Homabay
(D.S. Majanja, J.) dated 23rd May 2016 in HCCRA No. 8 of 2016)*

JUDGMENT

1. Charles Ouma Damba (“the appellant”), was charged with the offence of defilement contrary to section 8(1) as read with section 8
(3) of the *Sexual Offences Act*. The offence allegedly took place at [Particulars Withheld] in Gwassi South Location, Suba Sub-county of Homa Bay County, Kenya, on 4th March 2014. The appellant was alleged to have unlawfully and intentionally caused his penis to penetrate the vagina of BAO, a 12-year-old girl. He also faced an alternative charge of committing an indecent act by touching the child’s vagina and breast with his penis.
2. The facts of the case, as presented by the prosecution witnesses are fairly straightforward. On 4th March 2014, BAO (PW1) was on her way to the lake when she met the appellant, who pulled her into his house and sexually assaulted her overnight. The following day, her uncle BOO (PW4), found her sweeping the appellant’s house and suspecting that she may have been up to some sexual mischief, took her to Magunga Hospital, where she was treated and a P3 form filled.
3. Aden Chanjima Omwoyo, the clinical officer attached to Magunga Hospital, examined PW1 and found that her hymen was torn and also noted some discharge from the vaginal tract. A high vaginal swab revealed the presence of epithelial cells, leucocytes, and blood confirming that she had engaged in a sexual activity. PC Julius Kithamba (PW6) investigated the case and was persuaded from his



investigations that the appellant had defiled PW1 multiple times since May 2013. It was then that he preferred the charges.

4. Upon the appellant being put on his defence, he elected to give a sworn testimony without calling any witnesses. He denied the offence and even knowing the PW1. He claimed that a debtor, John Benjamin, had threatened him and orchestrated his arrest.
5. On 22nd June 2015, the trial court found him guilty of the main charge and sentenced him to 20 years of imprisonment.
6. The appellant, dissatisfied with the trial court's decision, appealed to the High Court. Notably, out of the seven grounds of appeal raised, the appellant only pursued the ground on the sentence imposed by the trial court. Ultimately, in a judgment delivered on 23rd May 2016, the first appellate court dismissed the appeal in its entirety, thereby upholding the conviction and sentence. Aggrieved by the first appellate court's decision, the appellant filed this second appeal to this Court in which he has raised seven grounds, all of which are basically on sentence. He claims that the sentence imposed was manifestly harsh and excessive and that the trial court did not factor in the period he had spent in remand custody while undergoing trial in sentencing.
7. During the plenary hearing of the appeal on 18th December 2024, the appellant, who appeared in person on our virtual platform, relied on his written submissions filed on 4th June 2024, and confirmed that his appeal was solely on sentence. In support thereof, he argued that he was a first-time offender, remorseful, and had abided by prison rules. He had participated in rehabilitation programs and earned several certificates, including the NITA Grade II test. He highlighted his young family's separation and stigmatization, as he was their sole provider. He also mentioned psychological torture due to long incarceration following the death of his parents and grandparents. He pleaded that the period he spent in remand custody be considered in accordance with the provisions of section 333 (2) of the [Criminal Procedure Code](#).
8. Mr. Okango, learned Assistant Director of Public Prosecutions, appeared for the respondent. In opposing the appeal, he submitted that this Court's jurisdiction on a second appeal is limited to matters of law only under section 361(a) of the [Criminal Procedure Code](#) as opposed to factual issues already addressed by the trial court and affirmed by the first appellate court. That sentence was a matter of fact not amenable to the jurisdiction of this Court. Counsel maintained that the trial court considered the appellant's mitigation and imposed the minimum sentence of 20 years' imprisonment. The first appellate court upheld the sentence, reaffirming the legality of mandatory minimum sentences in the [Sexual Offences Act](#).
9. Regarding section 333 (2) of the [Criminal Procedure Code](#), Mr. Okango had no objection to us considering the period the appellant had spent in remand custody as demanded by the appellant. That the appellant was arrested on 6th March 2014 and remained in remand custody throughout his trial as he was unable to meet the bond terms. Counsel, therefore, conceded that the 20-year sentence should be computed from the date of arrest, being 6th March 2014. Ultimately, counsel submitted that the appeal on sentence should be dismissed. However, the sentence should run from 6th March 2014.
10. We note that the appeal is basically on sentence. We also note that the trial court considered the appellant's mitigation and imposed the mandatory minimum sentence as required by section 8 (3) of the [Sexual Offences Act](#). The first appellate court upheld the sentence, affirming its legality. The appellant's plea for a non-custodial sentence based on his personal circumstances and rehabilitation efforts does not outweigh the mandatory minimum sentence stipulated by law.



11. We are therefore satisfied that the sentence imposed by the trial court and affirmed by the first appellate court was not illegal or unlawful.

No palpable misdirection on the same by the trial court has been demonstrated to our satisfaction. Neither do we discern any material factors that the trial court overlooked or any immaterial factors that it took into account. Similarly, it has not been shown that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. Accordingly, the appeal on harshness and excessiveness of the sentence fails and is dismissed.

12. However, in *Ahmad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR, this Court held that:

“By dint of section 333(2) of the *Criminal Procedure Code*, the court is required to take into account the period spent in custody before sentencing. Failure to do so, impacts on the fairness of the sentence imposed and amounts to an error of principle.”

Further, the Sentencing Policy Guidelines, 2023, provides inter alia:

“2. Section 333 (2) of the *Criminal Procedure Code* obligated the court to take into account the time already served in custody. Failure to do so impacts to overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with Offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail/bond.

2. Upon determination of the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATSat Part V). This period must be carefully calculated-and courts should make an enquiry, particularly with unrepresented offenders-for example, there may be periods served where bail was interfered with and a short remand in custody was followed by a re-issuance of bail e.g. where a surety is withdrawn and a new surety is later found. This calculation must include the time spent in police custody”

13. Counsel for the respondent conceded that the trial court did not consider this aspect when sentencing the appellant. Similarly, the first appellate court did not interrogate the issue whilst dismissing the appeal in its entirety. This failure was a breach of the clear provisions of the law and calls for our intervention. The appeal therefore succeeds to the limited extent that the 20 years imprisonment imposed on the appellant by the trial court shall be computed from 6th March 2014, the date of the appellant's arrest.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

L. KIMARU

.....



. JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

