



REPUBLIC OF KENYA



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**Obiero v Republic (Criminal Appeal 64 of 2020)
[2025] KECA 994 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KECA 994 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 64 OF 2020
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MAY 30, 2025**

BETWEEN

SHADRACK OWINO OBIERO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of the High Court of Kenya at Siaya
(Aburili, J.) dated 13th November, 2019 in Criminal Appeal No. 94 of 2017)*

JUDGMENT

1. The appellant, Shadrack Owino Obiero, was tried before the Principal Magistrate's Court at Siaya for the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act*. The particulars of the charge were that on 24th July, 2016, at around 20.00 hours, at Nyandiwa Sub Location in Gem Sub-County within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of A.J.O.¹, a child aged 10 years.
2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(A) of the *Sexual Offences Act*. The particulars of the charge were that on the same date, time and place, the appellant intentionally touched the vagina of A.J.O, a child aged 10 years, with his penis.
3. The appellant pleaded not guilty to the charges when he was arraigned before the trial court. Upon hearing the evidence of the five prosecution witnesses, and the appellant's sworn defence, the trial magistrate found the appellant guilty as charged in the main count, and upon conviction, sentenced him to life imprisonment.
4. The appellant appealed to the High Court against his conviction and sentence. The first appellate court (Aburili, J.), having heard the appeal, dismissed it on conviction. The learned Judge, however, set aside



- the life imprisonment sentence meted by the trial court, in light of the then prevailing jurisprudence on the mandatory nature of minimum sentences provided by the [Sexual Offences Act](#), and substituted the same with a custodial sentence of eighty-two (82) years.
5. The appellant is now before us on second appeal. His appeal is against sentence only. He challenges his sentence on grounds that: the sentence of 82 years imprisonment was excessively harsh and unjust in the circumstances; the sentence offended paragraph 4:1 of the Judiciary Sentencing Policy Guidelines; the appellant is remorseful and regrets his actions; the appellant has a wife and is a father to two school going children who need him for sustenance; and that the provisions of Section 333(2) of the [Criminal Procedure Code](#) were not considered. The appellant urged us to set aside the sentence awarded by the first appellate court, and substitute it with a lesser sentence, or in the alternative order that the appellant serve a non-custodial sentence.
 6. The appeal was canvassed by way of written submissions of both the appellant and respondent. The appellant appeared in person. It was his submission that the custodial sentence of 82 years offended the objectives of sentencing contained in the Judiciary Sentencing Policy Guidelines, and that the circumstances of the case were not aggravating to warrant the harsh sentence. He stated that he has two school-going children, a wife and elderly parents who depend on him. He urged that he has undertaken rehabilitative courses, that he is a young man, and not a danger to society. He submitted that he was only 26 years old when he was arrested, and that a sentence of 82 years will have him serve the rest of his life behind bars. It was his submission that no notice of enhancement was served upon him before the first appellate court enhanced his sentence. He reiterated that the time he spent in remand custody was also not taken into account.
 7. The appeal was opposed. Learned Prosecution Counsel, Mr. Okango submitted that when the first appellate court reviewed the appellant's sentence from life imprisonment to a custodial sentence of 82 years, the Supreme Court was yet to issue guidelines for its decision on the constitutionality of the mandatory death sentence for the offence of murder in the Muruatetu case, specifically that the principles of the Muruatetu case were only applicable in murder cases. He submitted that the learned Judge set aside the life imprisonment sentence awarded by the trial court in this case due to its mandatory nature, which had been successfully challenged before this Court at the time, and that she was bound by the decisions of this Court. Counsel urged that the Supreme Court recently, in *R v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12th July 2024) (Judgment), reaffirmed the legality of the mandatory minimum sentences prescribed under the [Sexual Offences Act](#). He reiterated that the mandatory life sentence prescribed by Section 8(2) of the [Sexual Offences Act](#) remained legal.
 8. Counsel for the respondent further stated that given this Court's pronouncement in *Evans Nyamari Ayako v Republic* Criminal Appeal No.22 of 2018, which found that a life sentence equates to a custodial sentence of thirty (30) years, as well as the decision of the Supreme Court in *R v Mwangi* (supra) which determined that mandatory sentences under the [Sexual Offences Act](#) remained valid, then this Court is faced with the question of whether the custodial sentence of 82 years imposed by the first appellate court is less severe to a life imprisonment sentence prescribed by under the [Sexual Offences Act](#). Counsel was of the view that this Court ought to reinstate the sentence of life imprisonment that was originally awarded by the trial court.
 9. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See *Kaingo v Republic* [1982] KLR 213.



10. We have carefully considered the record of appeal, the submissions by both parties, and the law. This is an appeal against sentence only. The only issue arising for our determination is whether the sentence of eighty-two (82) years imprisonment meted upon the appellant by the first appellate court is legal. Its trite law that sentencing is at the discretion of the trial court, and as this is a second appeal, we cannot interfere with this exercise of discretion, unless it is shown that the court awarded an illegal sentence. In addition, Section 361(1)(a) of the [Criminal Procedure Code](#) provides that severity of sentence is a matter of fact, and as such, outside the scope of this second appeal.
11. The conditions upon which the appellate court may interfere with the sentence of a trial court were set out in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where this Court held as follows:

“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 feels that the sentence is heavy and that 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.”
12. The appellant was sentenced by the trial court to serve life imprisonment, upon his conviction, which is the penalty prescribed by Section 8 (2) of the [Sexual Offences Act](#). This sentence was set aside by the learned first appellate court. The learned Judge noted that the mandatory nature of minimum sentences provided by the [Sexual Offences Act](#) had been successfully challenged before the Court of Appeal in *Jared Injiri Koita v Republic* [2019] eKLR, by application of the decision of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment). The learned judge, after considering the appellant’s mitigation and the nature of the offence, set aside the sentence of life imprisonment, and substituted it with a custodial sentence of 82 years, to run from the date the appellant was arrested.
13. The Supreme Court has since clarified that their decision in the *Muruatetu* case (*supra*) only related to the mandatory death sentence for murder cases under section 204 of the [Penal Code](#), and did not apply to any other statutory mandatory death sentences or mandatory minimum sentences. See *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions).
14. Further, the Supreme Court in *R v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment) affirmed as legal mandatory minimum sentences provided for under the [Sexual Offences Act](#). The Court held that imposing the mandatory minimum sentences does not, of itself, deprive the sentencing court power to exercise judicial discretion. The apex court further noted that the sentences imposed under the [Sexual Offences Act](#) are lawful, and remained lawful, as long as the penalty sections remained valid. The apex court directed that the constitutionality or otherwise of the said sentences would need to be tested through the hierarchy of courts before ultimately reaching the Supreme Court for consideration and determination.
15. A question was posed by the learned prosecution counsel as to which sentence was more severe between the custodial sentence of 82 years imposed by the first appellate court, and the life imprisonment



sentence prescribed under Section 8(2) of the *Sexual Offences Act*, considering the decision of this Court in *Ayako v Republic (Criminal Appeal 22 of 2018)* [2023] KECA 1563 (KLR) (8 December 2023) (Judgment), which determined that the indeterminate nature of life sentences rendered the same unconstitutional, and that the sentence of life imprisonment translates to thirty (30) years' imprisonment.

16. We are aware that in a recent decision by the Supreme Court in the case of *Republic v Julius Kitsao Manyeso* Petition No. E013 of 2024, the Supreme Court noted that the constitutionality or otherwise of a life imprisonment sentence was yet to be determined by the High Court in the first instance, and cascaded through the proper channels, and that it was the duty of the Legislature to enact legislation on what constitutes a life sentence, and not the courts. In the premises therefore, this decision, being binding on us, a life sentence cannot be said to translate to thirty years imprisonment, as that would be usurping the legislative power to define sentences.
17. In the instant appeal, the appellant was not served with a notice of enhancement of sentence prior to the hearing of this appeal, and further, no cross appeal was filed by respondent against the appellant's sentence. In the circumstances, we cannot enhance the appellant's term sentence to a life imprisonment as prescribed by the *Sexual Offences Act*. In the circumstances, the custodial sentence of eighty-two (82) years imposed by the first appellate court is hereby affirmed. The sentence shall run from the date of the appellant's arrest as directed by the first appellate court.
18. In the end, this appeal fails and we order that it be dismissed.

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

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H.A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

