



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangemi v Republic (Criminal Appeal E052 of 2023)  
[2025] KECA 752 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 752 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL E052 OF 2023  
KI LAIBUTA, GWN MACHARIA & FA OCHIENG, JJA  
MAY 9, 2025**

**BETWEEN**

**EDWARD MWANGEMI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Voi  
(Farah S.M. Amin, J.) dated 20th February 2019 in HCCRA No. 74 of 2017)*

**JUDGMENT**

1. The appeal herein originates from an appeal before the High Court in which the court dismissed the appellant's appeal and upheld the decision of the Senior Principal Magistrate's Court at Voi.
2. In this case, the appellant, Edward Mwangemi, was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. He was also charged with an alternative count of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
3. The particulars of the main charge were that, on 8<sup>th</sup> October 2016, at around 2:00 pm at Kaloleni Village in Voi within Taita Taveta County, Edward Mwangemi intentionally inserted his male genital organ (penis) into the female genital organ (vagina) of EN, a girl aged fourteen (14) years.
4. The particulars of the alternative charge were that on the same date and location, Edward Mwangemi intentionally and unlawfully touched the female genital organ of EN, a girl aged 14 years, with his male genital organ.
5. During the hearing, the prosecution called seven (7) witnesses. The appellant gave a sworn statement and called one witness in his defence.
6. The trial court considered the evidence presented, including the medical evidence which indicated a broken hymen with minimal external and internal genitalia, and a white vaginal discharge.



7. The trial court noted inconsistencies in the complainant's testimony regarding penetration, but found that the evidence of the minor complainant, despite some inconsistencies, was corroborated by other witnesses on material facts.
8. The trial court found that the prosecution had discharged the legal onus placed on them by law and found the appellant guilty of the offence of defilement.
9. Subsequently, the trial court considered the gravity of the offence, the circumstances under which it was committed, and the age of the complainant when sentencing the appellant to 20 years' imprisonment.
10. Aggrieved by the judgment of the trial court, the appellant appealed to the High Court against both the conviction and sentence of 20 years imprisonment.
11. The appellant raised several grounds of appeal, including: that the learned trial magistrate erred in law and facts by failing to consider that the charges were fatally and incurably defective; relying on the evidence of a single witness; failing to consider both conviction and sentence; relying on contradictory evidence; and failing to consider that the appellant's defence was not rebutted.
12. The High Court considered the issue of the complainant's age, noting that the birth certificate produced showed that she was born on 31<sup>st</sup> January 2002, making her 14 years old at the time of the offence.
13. The High Court addressed the grounds of appeal and found that the charge sheet was not fatally defective; that the evidence of the complainant was sufficiently corroborated; and that the trial court had considered the appellant's defence.
14. Ultimately, the High Court found that the evidence clearly demonstrated that the appellant changed his behaviour to gain the trust and friendship of the child before defiling her.
15. Regarding the sentence, the High Court considered that, whilst the learned trial magistrate had imposed in the sentence a higher threshold than the very minimum sentence, the appellant had failed to demonstrate any reason for review of the sentence. Therefore, the sentence by the trial court was upheld.
16. Being dissatisfied with the judgment of the High Court, the appellant lodged the present appeal in which he raised four (4) supplementary grounds of appeal. He contended that: critical elements of defilement were not proved; there were material discrepancies and inconsistencies in the prosecution's case; essential witnesses were not called; and the sentence meted out against him was harsh and excessive.
17. However, when the appeal came up for hearing on 25<sup>th</sup> November 2024, the appellant, who was appearing in person, abandoned his appeal on conviction. He prayed that his sentence be reduced.
18. Opposing the appeal, Ms. Nyawinda for the ODPP submitted that, since the appellant had shifted his appeal focus to sentencing, the prosecution pointed out that, because the victim was 14 years old, the sentence of 20-years imprisonment was lawful. The prosecution contended that there was no basis for the Court of Appeal to deviate from this sentence and requested the court to sustain it.
19. This is a second appeal. Section 361(1) of the [Criminal Procedure Code](#) enjoins us to consider only questions of law.

In the case of *Karani vs. Republic* [2010] 1 KLR 73, the court stated thus:

“This is a second appeal. By dint of the provisions of section 361 of the [Criminal Procedure Code](#), we are enjoined to consider only matters of law. We cannot interfere with the decision



of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

20. We have carefully considered the record of appeal, the submissions by both parties, the authorities cited, and the law. The issue for determination is whether the appellant’s appeal on sentence is merited.
21. It is not in dispute that the appellant has abandoned his appeal on conviction. This Court therefore proceeds on the basis that the conviction handed down by the trial court was sound; and the High Court upheld it because it was lawful.
22. The crux of this appeal was whether or not the 20-year sentence was harsh and excessive. The appellant contended that it was disproportionate to the offence given the lack of aggravating factors.
23. Section 8(3) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
24. The section provides for a mandatory sentence of life imprisonment for defilement where the victim is under the age of 12 years. However, where the victim is above the age of 12 years but below the age of 15 years, the statute prescribes a sentence of not less than 20 years. The trial court sentenced the appellant to 20 years, which is the minimum prescribed sentence for the offence.
25. The appellant was of the view that mandatory sentencing laws limit judicial discretion and violate constitutional principles, specifically the right to a fair trial and the proportionality of punishment. While the law mandates a minimum sentence, it does not preclude the court from considering mitigating factors in determining the appropriate sentence. In this case, the trial court considered the age of the complainant, the nature of the offence, and the gravity of the harm caused, which justifies the imposition of the minimum prescribed sentence.
26. We note that the complainant was a vulnerable minor, aged 14, and the appellant exploited her vulnerability for his own gratification. There was no evidence that the appellant showed remorse or sought to make amends for the crime. The seriousness of defilement as an offence, the impact on the victim, and the need for deterrence, support the imposition of a significant sentence.
27. While mandatory sentences can raise concerns about the lack of judicial discretion, the mandatory 20-year sentence for defilement involving a victim between the ages of 12 and 15 is a clear legislative intent. This Court does not have the mandate to alter or invalidate such statutory provisions unless it finds that they are unconstitutional, which is not the case here.
28. In the case of *Christopher Ochieng vs. Republic* [2018] eKLR, this Court held thus:

“ This then leaves the question of the sentence. Arising from the decision in *Francis Karioko Muruatetu & Another vs Republic* SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the *Penal Code* was unconstitutional. The Court took the view that;

‘Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory



nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.’

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

Bearing this in mind, the appellant was provided an opportunity to mitigate in the trial court where he stated that he is a sole bread winner, and was taking care of his two children, as well as his late brother’s wife and three children, he craved for leniency. However, the converse is also true, the appellant has committed a heinous crime, and occasioned severe trauma and suffering to a girl young enough to be his daughter. His actions have demonstrated that around him, young and vulnerable children could be in jeopardy.

Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & Another vs. Republic (supra), we would set aside the sentence for life imposed and substitute it therefor with a sentence of 30 years imprisonment from the date of sentence by the trial court.”

29. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion regardless of whether or not the circumstances so require.
30. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, the mitigating factors, and the Judiciary Sentencing Policy Guidelines, 2023, we find that the trial court’s sentence of 20 years was not harsh or excessive in the circumstances of this case. We hereby uphold the appellant’s sentence of 20 years.
31. Consequently, the appeal on sentence is hereby dismissed, and the sentence is upheld.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**DR. K. I. Laibuta CARb, FCIArb.**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**F. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

Signed



**DEPUTY REGISTRAR**

