Mogusu v Republic (Criminal Appeal 326 of 2019)
[2025] KECA 1286 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1286 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 326 OF 2019

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

JULY 11, 2025

BETWEEN

PETER OCHOKI MOGUSU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court at Migori (Mrima J.) dated 19th October 2019 in HCC Appeal NO. 11 of 2019)

JUDGMENT

1. Peter Ochoki Mogusu, the appellant, was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* (SOA), by the Senior Resident Magistrate's Court at Rongo (Hon. Kamau C. M). The particulars of the offence were that on 22nd September 2018, at South Kamagambo Location in Rongo Sub County in the Republic of Kenya, he intentionally and unlawfully caused his penis to penetrate the vagina of FAO, a child aged 14 years. He was thereafter sentenced to serve 30 years' imprisonment.

2. Aggrieved by the conviction and sentence, the appellant lodged an appeal in the High Court at Migori. Upon considering the appeal, Mrima J. upheld the appellant's conviction and sentence in a judgment delivered on 19th October 2019. The appellant was still dissatisfied with the decision of the court, hence this second appeal.

3. In the supplementary grounds of appeal dated 21st May 2024, the appellant did not contest his conviction, but raised several points in mitigation praying that the 30 years' imprisonment imposed upon him be reduced. The mitigating factors raised were that:

    i. He is 72 years old and reducing the sentence will enable him to have prospects of being released;

ii. Section 333 (2) of the *Criminal Procedure Code*. be applied to reduce the sentence by the period he spent in custody after arrest;

iii. He has been rehabilitated and reformed and has pursued theological training and acquired certificates in biblical studies.

iv. He is a first offender, who is remorseful and has been incarcerated for the last five years;

v. He has a recommendation letter as proof of rehabilitation.

4. The background of this appeal briefly stated, is that at the material time FAO. the complainant was, a 14-year-old child living with her 80 years old grandmother TO, (PW1). The appellant was their neighbour. On the day of infamy PW1 noticed that FAO was not with her in the house. She went to look for her at her neighbour Mary Otieno's, (PW2) house and when she did not find her, PW2 joined her in the search for FAO.

5. They entered a sugarcane plantation near their homestead and heard noises that they recognized as those FAO would make. As they moved towards the noises PW2 was the first to see FAO and the appellant, lying on the ground. FAO was in a supine position and the appellant was lying on top of her. They were engaged in a sexual act. PW2 screamed and the appellant stood up and threw a stone at her as he fled. PW2 ran to the child and embraced her.

6. PW1 also testified that she saw the appellant lying on top of FAO. He had lifted one of her legs to expose her genitalia and his penis was penetrating into her vagina. Both women saw FAO's panty and shoes on the ground beside her.

7. At the close of the prosecution case the appellant was put on his defence. He gave a sworn statement and denied having committed the offence. He asked the court to acquit him and let him get back to his normal life.

8. In the appellant's written submissions dated 21st May 2024 and filed in Court, he merely reiterated and expounded on the mitigating factors already set out elsewhere in this judgment.

   Suffice to add that he pleaded for to the mercy of the Court for the reduction of the sentence to a more lenient one, stating that the longer the period of incarceration, the more difficult it will be for him to restart his life after release.

9. Ms Ikol Esaba, learned Assistant Director of Public Prosecutions, filed submissions dated 30th May, 2024 on behalf of the respondent, in opposition to the appeal. Counsel asserted that according to section 361 of the *Criminal Procedure Code* (CPC) the jurisdiction of the second appellate Court is limited to matters of the law only.

10. Counsel submitted that the appellant was convicted under Section 8 (1) of the SOA, which provides that a person who commits an act which causes penetration with a child is guilty of the offence of defilement, and if the child is between the age of twelve (12) and fifteen (15) years the person is liable, upon conviction, to imprisonment for a term of not less than twenty years pursuant to Section 8(3).

11. Counsel urged that the appellant's case was deserving of the 30 years' imprisonment if not more, since he defiled a minor who is dumb and of unsound mind and is therefore, vulnerable. Counsel referred

us to the case of Julius Kitsao Mangeso vs Republic, Criminal Appeal No. 12 of 2021 where the Court stated that:

> " Sentencing is a discretion of the trial court, and as a second appellate court we cannot interfere with this exercise of discretion unless it is shown that the court has passed an illegal sentence."

Counsel asserted that the sentence imposed is proportionate to the gravity of the offence, in line with legal precedents and reflects the serious nature of the crime, accounting for both the age and mental condition of the victim.

12. The appeal came before us for plenary hearing via electronic platform on 20th May 2025. The appellant appeared in person and confirmed that he had abandoned the appeal on conviction and was seeking only the review of his sentence. Ms Kitoto learned state counsel held brief for Ms Ikol for the respondent. Ms Kitoto also relied on the filed submissions and conceded that section 333 (2) of the CPC, was applicable in the circumstances of this appeal.

13. The singular ground of this appeal is the severity of the sentence imposed upon the appellant and he has offered mitigation in the hope that this would persuade this Court to review his sentence downward. Under Section 361(1)(a) of the, CPC severity of sentence is a matter of fact. It is therefore, not a legal issue open for consideration by this Court on second appeal unless it is demonstrated that the trial court acted in error.

14. The appellant abandoned his appeal on conviction and pursued the appeal on sentence only. Nonetheless, we are satisfied that the requisite elements to found a conviction in an offence of defilement were sufficiently proved by the prosecution. The age of the minor was proved vide the age assessment report, while penetration and the identity of the perpetrator were proved by the evidence of PW1 and PW2 who found the appellant in the act and properly identified and recognized him and the medical evidence.

15. The principles that guide interference with sentencing by the appellate Court were set out in S vs. Malgas [2001] (1) SACR 469 (SCA) at para 12 as follows:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

16. In Bernard Kimani Gacheru vs. Republic (2002) eKLR the Court of Appeal reiterated that:

> "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 stated is shown to exist."

17. We are however, cognizant that the law is always evolving. In the recent past, courts have interpreted the holding in Francis Karioko Muruatetu & Another v Republic [2017] eKLR to mean that they could lean towards interfering with sentences whose mandatory nature appeared to fetter the discretion of the sentencing court. More recently however, on 12th July 2024, the Supreme Court in Republic V Joshua Gichuki Mwangi, Petition No. E018 OF 2023, allowed an appeal to the extent of setting aside the judgment of the Court of Appeal, which declared the mandatory minimum sentences for sexual offences unconstitutional, for limiting the discretion of the court. The Supreme Court set aside the sentence of 15 years imprisonment substituted by the Court of Appeal, and ordered the respondent to complete the 20-year sentence from the date of imposition by the trial court.

18. In the judgment, the Supreme Court reiterated that its decision in Muruatetu (supra) did not invalidate mandatory sentences, or minimum sentences in the *Penal Code*, or the SOA, or any other Act. The Court referred to the relevant paragraph in the Muruatetu Directions wherein it pronounced itself on the application of its decision in Muruatetu case to other statutes prescribing mandatory or minimum sentences as follows:

> "Reading this paragraph and the judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the judgment is only made to section 204 of the *Penal Code* and it is the mandatory nature of the death sentence under that section that was said to deprive the 'courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases'"

19. Section 8(3) of the SOA stipulates that:

> " 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."

20. The appellant urged that the sentence of 30 years is harsh and excessive, considering that he is a first offender, has spent 5 years in prison, is reformed and rehabilitated, has completed several theological courses and acquired a Certificate of Prisoner's Journey and a Recommendation letter. He urged for the reduction of the sentence to a more lenient one.

21. The respondent on the other hand urged that the appellant was deserving of the 30 years' imprisonment if not more, since he defiled a minor who is dumb and of unsound mind and is therefore vulnerable. In her view, the sentence is proportionate to the gravity of the offence, is in line with legal precedents and reflects the gravity of the crime, accounting for both the age and mental condition of the victim.

22. We have considered the appellant's mitigation and the respondent's reply. We note that the victim was not only a 14 year-old minor, but she was also dumb and mentally challenged. No doubt the appellant took advantage of her condition, knowing that his nefarious secret was safe, as the minor had no capacity to relate it to anyone else. For the foregoing reasons, we find that the sentence of 30 years imprisonment imposed by the trial court and upheld by the High court was lawful, constitutional and justified in the circumstances. We decline the invitation to interfere with it.

23. Accordingly, this appeal is found to lack merit and is hereby dismissed. The period spent in custody from the date of arrest on 22nd September, 2018 until sentencing, shall be taken into consideration as stipulated under Section 333 (2) of the CPC.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR