



REPUBLIC OF KENYA



**Alugaya v Republic (Criminal Appeal 71 of 2015)  
[2024] KECA 216 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KECA 216 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 71 OF 2015  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 29, 2024**

**BETWEEN**

**GERISHON ALUGAYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Kakamega, (R.N. Sitati, J.) dated and delivered on 11th June, 2015 in Kakamega HCCRA No. 55 of 2013)*

**JUDGMENT**

1. The appellant was convicted by the SRM’s Court at Vihiga of defiling a seven-year-old girl. He was sentenced to life imprisonment in accordance with Section 8(2) of the [Sexual Offences Act](#). His appeal to the High Court against conviction and sentence was dismissed.
2. The appellant is now before us in this second appeal in which he has appealed against sentence alone. In his memorandum of appeal filed through his counsel, Ms. Anyango Ida Rayner, the appellant has raised one ground of appeal, contending that the learned Judge erred:

“in sentencing the appellant to life imprisonment regard being given to the emerging jurisprudence on the minimum mandatory sentences provided in the [Sexual Offences Act](#)”.
3. Ms. Anyango pointed out that at the time the appellant was sentenced, the life imprisonment sentence was the only prevailing and recommended sentence, but that the emerging jurisprudence has frowned upon the mandatory minimum sentences in the [Sexual Offences Act](#). In this regard, counsel relied on this Court’s decisions in [Dismus Wafula Kilweke -vs- Republic \[2019\] eKLR](#), [Daniel Kipkosgei Letiny -vs- Republic \[2021\] eKLR](#) and the decision of Odunga, J (as he then was) in [Maingi & 5 others -vs- Director of Public Prosecutions & another, \(Petition No. E017 of 2021\) \[2022 KEHC\]](#)



4. During the plenary hearing of the appeal, learned counsel, Ms. Anyango appeared for the appellant while Ms. Busienei from the office of the Director of Public Prosecutions appeared for the respondent. Ms. Anyango urged the Court to review the appellant's life sentence. She pointed out that the appellant, who has been in prison for the last ten years, is now 84 years old, and has eye sight problems.
5. Ms. Busienei conceded the appeal against sentence. She relied on written submissions that she had filed in which she pointed out that the constitutionality of the mandatory minimum sentence had been deprecated by this Court in *Julius Kitsau Manyeso -vs- Republic*, Criminal Appeal No. 12 of 2021 (unreported), wherein the Court declared the indeterminate life sentence as unconstitutional. Ms. Busienei urged the Court, in imposing a term sentence, to consider the seriousness of the offence of defilement particularly the tender age of the victim. Ms. Busienei urged that in view of the appellant's age a sentence of 30 years imprisonment would be sufficient.
6. We have considered the appeal and submissions made in regard to sentence. We take cognizance of the fact that this is a second appeal and that under Section 361 of the Criminal Procedure Code, the appeal is restricted to matters of law only and severity of sentence is identified as matter of fact not open to this Court to address. Nevertheless, where an issue of law arises in regard to sentence, the Court has the mandate to intervene.
7. In this case an issue has been raised regarding the legality of the sentence of life imprisonment that was imposed upon the appellant. There is also an issue regarding the constitutionality of the minimum mandatory sentence that was subject of the appellant's sentence under Section 8(2) of the [Sexual Offences Act](#). These are legal issues that provide the key for this Court to enter into the arena of the appeal on the issue of sentence.
8. The issue of the constitutionality of the mandatory minimum sentences provided under the [Sexual Offences Act](#) has been addressed by the High Court (Odunga J as he then was) in [Maingi & 5 others vs. Director of Public Prosecutions & another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR), and [Edwin Wachira & Others v Republic](#) – Mombasa Petition No. 97 of 2021, (Mativo J. (as he then was)), as well as this Court in [Manyeso vs Republic](#) (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) and Joshua Gichuki Mwangi CR Appeal No 84 of 2015. The bottom line is that the Courts have consistently held that the mandatory nature of the minimum sentences in the [Sexual Offences Act](#) render the sentences unconstitutional as the trial court is denied the power to exercise its discretion in sentencing, taking into account the peculiar circumstances of the case before it.
9. In the appellant's case, the trial court, in sentencing him to life imprisonment, took into account the appellant's mitigating circumstances, being the fact that he was a first offender and that he was aged 70 years old. The trial court also took into account the circumstances of the offence, being that the victim was a seven-year- old girl who would live with the stigma of the defilement for the rest of her life. Thus, notwithstanding the mandatory nature of the sentence provided under Section 8(2) of the [Sexual Offences Act](#), the trial magistrate exercised her discretion and the appellant was not prejudiced by the mandatory sentence.
10. Notwithstanding the exercise of discretion by the trial court, this Court in [Julius Kitsau Manyeso -vs- Republic](#), Criminal Appeal No. 12 of 2021 (unreported), held that a sentence of indeterminate life imprisonment is unconstitutional. The sentence imposed upon the appellant which was an indeterminate life sentence, cannot therefore be upheld.
11. Without losing sight of the fact that the victim of the appellant's heinous act was a minor of tender age, and taking note of the fact that the appellant has already been in prison for about 10 years, is an 84- year-old man, and currently has eye sight problems, we find it appropriate to set aside the sentence



of life imprisonment that was imposed upon the him and substitute it with a sentence equivalent to the period that he has already served. The appellant shall, therefore, be forthwith released from prison unless otherwise lawfully held. The appellant's appeal against sentence is accordingly allowed.

**DATED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

