



**MB v Republic (Criminal Appeal 219 of 2019)  
[2024] KECA 324 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KECA 324 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 219 OF 2019  
HM OKWENGU, JM MATIVO & JM NGUGI, JJA  
MARCH 15, 2024**

**BETWEEN**

**MB ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Bungoma  
(Sitati, J.) dated 13th May, 2019 in HCCRA No. 52 of 2016)*

**JUDGMENT**

1. The appellant was convicted by the Chief Magistrate at Bungoma of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act*. He was sentenced to life imprisonment. He appealed to the High Court against both Conviction and sentence but the High Court dismissed the appeal. He has now lodged this second appeal before this Court.
2. In his memorandum of appeal and written submissions, the appellant raised 5 grounds of appeal challenging the judgment of the High Court on both conviction and sentence. When the matter came up for plenary hearing, the appellant who was in person opted to withdraw the appeal against conviction and indicated to the Court that he was only appealing against sentence.
3. He argued that the sentence of life imprisonment that was imposed upon him was excessive and unconstitutional. He urged the Court to review the sentence and take into account the period that he had taken in remand before he was convicted.
4. Mr. Oyiembo of the ODP who appeared for the respondent opposed the appeal. He drew the Court's attention to the fact that the complainant who was only 9 years old, was the step daughter of the appellant, and therefore the sentence of life imprisonment was deserved. He urged the Court to uphold the sentence.



5. We have considered the appellant's appeal against sentence.

Under Section 361 of the [Criminal Procedure Code](#), our jurisdiction as a second appellate court is restricted to matters of law only. Section 361(a) interprets severity of sentence as a matter of fact. This means that severity of sentence per se would not be open to our jurisdiction on second appeal. However, where the issue raised relates to the legality of the sentence or any other matter of law it would fall within our jurisdiction.

6. In this matter, three main issues arise in regard to the sentence that was imposed upon the appellant, that would in our view qualify as issues of law. First, is the issue whether the trial magistrate exercise his discretion in sentencing the appellant to the mandatory sentence provided under Section 8(2) of the [Sexual Offences Act](#). Second, is whether the learned judge of the High Court properly address the appeal in regard to the sentence of life imprisonment that was imposed upon the appellant. And finally, is whether the sentence of life imprisonment that was imposed upon the appellant was unconstitutional.

7. The circumstances leading to the appellant's conviction as per the concurrent findings of the two lower courts were that: the appellant who was the complainant's stepfather went into the room where the complainant was a sleep at night, removed her underpants, pulled up her skirt and inserted his penis into her vagina. The complainant tried to scream but the appellant gagged her mouth. The appellant's wife went into the room and found the appellant in the act. He took the complainant to her uncle's home for safety and thereafter the matter was reported to the police.

8. In sentencing the appellant to life imprisonment, the trial magistrate noted that he had considered the nature of the offence and the mitigation by the appellant, but there was only one mandatory sentence which was life imprisonment. This means that the trial magistrate did not exercise his discretion as he felt obligated to impose the mandatory sentence of life imprisonment. This was a matter that ought to have been addressed by the learned judge on first appeal.

9. The learned judge of the High Court did not address the issue of the appellant's sentence even though one of the grounds of appeal before her was that the sentence imposed on the appellant was harsh and excessive, was based on wrong sentencing principles, and did not take account of the appellant's mitigation. It is evident that the learned judge erred in failing to consider this ground of appeal and this would justify our intervention in the issue of sentencing.

10. In addition, the emerging jurisprudence in the High Court and in this Court is that mandatory minimum sentences provided under the [Sexual Offences Act](#) are unconstitutional as they inhibit the exercise of discretion by the trial court. This is reflected in [Maingi & 5 others v. Director of Public Prosecution and Another](#) Petition E017 of 2021 [2022] KEHC 13118; [Joshua Gichuki Mwangi v Republic](#) NYR (Court of Appeal) Criminal Appeal No. 84 of 2015 (unreported); and [Julius Kitsao Manyeso v Republic](#) -Malindi (Court of Appeal) Criminal Appeal No. 12 of 2021. In addition, the Court in the [Julius Kitsao Manyeso](#) case (*supra*); and [Evans Nyamari Ayako v. Republic](#) (Court of Appeal at Kisumu) Criminal Appeal No. 22 of 2018, has held that the sentence of indefinite life imprisonment is unconstitutional.

11. For the afore stated reasons, we allow the appellant's appeal against sentence to the extent of finding that the mandatory nature of the sentence of life imprisonment provided under Section 8(2) of the [Sexual Offences Act](#) is unconstitutional, as is the indeterminate term of the life imprisonment.

12. Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.



13. In accordance with our decision in *Evans Nyamari Ayako v Republic* (*supra*), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the *Criminal Procedure Code*.

It is so ordered.

**DATED AND DELIVERED AT KAKAMEGA THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MATIVO**

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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.**

