



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mangi v Republic (Criminal Appeal 61 of 2020)  
[2024] KECA 203 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KECA 203 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL 61 OF 2020  
AK MURGOR, M NGUGI & GV ODUNGA, JJA  
MARCH 1, 2024**

**BETWEEN**

**KITSAO KIDUDE MANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Malindi  
(R. Nyakundi J.) dated 14th April 2020 in CR. Appeal No. 21 of 2019)*

**JUDGMENT**

1. In this second appeal, the appellant challenges the judgment of the High Court of Kenya at Malindi (R. Nyakundi J.), dated April 14, 2020 in which the first appellate court upheld his conviction for the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence of which he was convicted were that on the 18<sup>th</sup> day of March 2015 in Malindi sub-county, he caused his penis to penetrate the anus of RC, a child aged 11 years. He also faced an alternative charge of committing an indecent act with a child, the particulars of the offence with respect to the victim of the offence and the time and place thereof being the same as in the main count. He was convicted on the main charge of defilement.
2. The prosecution evidence before the trial court was that the appellant, whom the complainant (PW1) referred to as ‘uncle’, had been hired by the complainant’s father to build a makuti house. On the material night, he shared a room with the complainant at the complainant’s father’s home. The room was separate from the complainant’s parents’ room. The complainant testified that on the material night, he was woken up at 1.00 a.m. by the smell of fecal matter; that he felt the appellant’s ‘manhood’ slide into his anus; that he screamed for help but the appellant held him down. He testified that he knew that it was the appellant because he turned and confirmed it was him. It was his further testimony that the appellant jumped and ran out of the house while the complainant went to his mother’s house and reported the incident to his parents.



3. According to PW2, the father of the complainant, he was woken up by the complainant at about 1.00 a.m. The complainant told him that the appellant, whom PW2 had given work at his compound, had defiled him. PW2 examined the complainant and found that he had spermatozoa oozing out from his anus. He reported the incident to a village elder (PW3), and left the appellant with the village elder. The appellant was later taken to Malindi Police Station while the complainant was taken to Malindi General Hospital where he was examined and a P3 form filled.
4. Lawrence Shoka Nyambu (PW3), the village elder, was at home when PW2 knocked on his door. He opened to find PW2, his wife, the complainant and the appellant. PW2 informed the village elder that the appellant had defiled the complainant. When PW3 asked the appellant what had happened, the appellant stated that he 'did not know what he was doing until the young boy screamed', that perhaps it was 'the devil' (that made him do it). PW5, Ibrahim Abdullahi, who examined the complainant at the Malindi General Hospital and filled the PW3 form, confirmed that he had been sodomised. PW5 testified that he found that the complainant had bruises on his anus.
5. When placed on his defence, the appellant gave an unsworn statement in which he stated that he had been contracted by the complainant's father to build a house; that after he completed the house, the complainant's father failed to pay him and asked him to wait; that the evening before the material day, the complainant's father came home drunk and he and his wife took him to the village elder and asked him to stay there; that in the morning, the complainant's parents claimed that their child had been defiled and took the appellant to Malindi Police Station.
6. Upon considering the evidence before it, the trial court noted that in his evidence, the complainant had indicated that he was awoken by the smell of faeces; that he felt the appellant's penis slide into his anus; that he had turned and seen the appellant, whom he called 'uncle'. The court further noted that the complainant maintained his testimony even in cross examination; that when he reported the assault to his father, his father, upon examining him, saw spermatozoa oozing from the complainant's anus and noted that the complainant was not walking normally. The clinical officer indicated that the complainant had bruises on his anus, and he concluded that the complainant, who was 11 years old (born on May 12, 2004 as indicated in his birth certificate produced in court), had been sodomised. The court concluded that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to life imprisonment.
7. In his appeal before the High Court, the appellant raised four grounds of appeal in which he impugned the decision of the trial court on the basis that the trial Magistrate had erred in law and fact by failing to consider that the prosecution had not disclosed all the evidential material necessary for the appellant to take plea in accordance with the threshold set in article 50(2)(j) of the *Constitution*; failing to consider [that] the legal provisions for mandatory minimum sentence under section 8(2) of the *Sexual Offences Act* were 'in violation of article 25(c) and 50 of the *Constitution*' since the minimum sentences denied a judicial officer discretion in sentencing; failed to consider that the visual identification was not free from error, taking into account the absence of light at the time of the incident; and failing to consider the appellant's defence.
8. Upon considering the appellant's appeal, the first appellate court noted that there was nothing to discredit the complainant's evidence, from examination in chief to cross-examination; that the trial court had noted independent evidence which supported the complainant's evidence; that his evidence, even though it did not need corroboration, was supported by the evidence of his father, PW2, who inspected him and noted spermatozoa oozing from his anus; and by the clinical officer (PW4) who examined him and found he had been sodomised. The first appellate court concluded that the appellant



engaged in sexual intercourse with the victim on the material day while he was spending a night at the complainant's home.

9. With respect to the age of the complainant, the other ingredient necessary for a charge of defilement to be established, the first appellate court found that the complainant's age had been proved. As for the perpetrator, the first appellate court noted that the complainant was a nephew of the appellant; that they had a familial relationship which was cordial at the time of the incident; and further, there was no evidence of any other person being present in the room. It thus found that the appellant was sufficiently identified.
10. Regarding the complaint that the trial court did not consider the appellant's defence, the first appellate court concluded that while it appeared to be a denial, it 'remained far-fetched' and did not weaken the prosecution evidence. The court therefore upheld the conviction of the appellant.
11. The first appellate court also found no basis for interfering with the sentence imposed on the appellant by the trial court. It noted that the appellant had taken advantage of the complainant's vulnerability and the trust placed on him, and the harm done to the complainant outweighed any mitigation that the appellant may offer. The first appellate court therefore dismissed the appellant's appeal on sentence also.
12. In his appeal before us, the appellant raises four grounds of appeal in his undated supplementary grounds of appeal filed with his written submissions. The appellant's first three grounds relate to matters of fact: that the ingredients of the offence of defilement were not proved beyond reasonable doubt; that the appellant was not afforded a fair hearing and trial guaranteed under article 25(c) of the [Constitution](#); and that the court failed to consider that the prosecution did not prove its case against him beyond reasonable doubt.
13. Ground four is worded in rather incomprehensible terms, but this is understandable given that the appellant is acting in person. Its essence, however, appears to be a complaint about the manner in which the complainant's evidence was taken. Again, this is a matter of fact. We remind ourselves that this is a second appeal in which the remit of the Court is circumscribed by section 361 of the [Criminal Procedure Code](#) to matters of law.
14. At the hearing of the appeal, the appellant appeared in person while Ms. Mutua, learned Senior Principal Prosecution Counsel, appeared for the respondent. Both parties indicated that they would rely on their written submissions.
15. In his submissions, the appellant contends, as he argues in his first ground, that the ingredients of the offence of defilement were not proved beyond reasonable doubt. He relies on section 107 and 109 of the [Evidence Act](#) and cites various decisions in support of this submission, among them [George Ochieng Ongule v Republic](#) [2016] eKLR, to urge this Court to find that the ingredients of the offence were not established, and to allow his appeal.
16. In submissions in response, the state observes, first, that as this is a second appeal, this Court has no jurisdiction to delve into matters of fact where there are concurrent findings of fact by the courts below; that it cannot overturn the decision of the first appellate court unless it is demonstrated that there was an error apparent on the face of the record and the first appellate court misdirected itself in material particular on the evidence and the law.
17. With respect to the grounds of appeal, the respondent submits that the three elements of the offence of defilement-the age of the victim, penetration and the identity of the perpetrator- had been proved beyond reasonable doubt; that the victim was 11 years old as evidenced by the birth certificate produced in court; and that the victim's evidence on penetration was corroborated by the evidence of the



clinical officer who produced the medical evidence. With regard to the identity of the perpetrator, the respondent submits that in his evidence, the victim testified that the person who defiled him was his uncle, and the first appellate court had analysed the evidence and found that the offence had been proved beyond reasonable doubt. The respondent therefore asked this court to dismiss the appeal and uphold the conviction and sentence.

18. We have considered the record of appeal and the appellant's grounds of appeal. Since this is a second appeal, our jurisdiction is limited to a consideration of matters of law, as provided under section 361 of the [Criminal Procedure Code](#) which provides that:

361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

- a. on a matter of fact, and severity of sentence is a matter of fact; or
- b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

19. As we observed above, the appellant's grounds of appeal relate to matters of fact which, as a second appellate court, we are statutorily precluded from entering into. As submitted by the respondent and has been held in several decisions of this Court, on a second appeal, this Court will not interfere with concurrent findings of fact of the two courts below unless it is satisfied that there was in fact no evidence at all to support the finding, or that the courts below wholly misunderstood the nature and effect of the evidence. This position was succinctly enunciated in [Kalameni v Republic](#) [2003] eKLR in which this Court stated:

"We have said before, but it bears repeating, that on a second appeal, it is not the function of this Court to go into a fresh re-evaluation and re- assessment of the evidence to see if the findings of the lower courts are or are not supportable. This Court will not interfere with concurrent findings of fact unless it is satisfied that there was in fact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence."

See also [Aggrey Mbai Injaga v Republic](#) [2014]eKLR and [Athanus Lijodi v Republic](#) [2021]eKLR.

20. In this case, the trial and first appellate court found that the evidence established that the complainant was defiled- sodomised- by his uncle, with whom he was sharing a room in the complainant's parents' home. The medical evidence corroborated the complainant's evidence about the defilement; the complainant's birth certificate established that he was aged 11, and the identity of the perpetrator was found to be beyond doubt- the appellant was known to the complainant, and indeed, the complainant referred to him as 'uncle'. The trial and first appellate court considered the appellant's defence and found that it did not displace the prosecution evidence. We find, in the circumstances, no basis to interfere with the findings of the courts below on the facts, and we uphold the appellant's conviction for the offence of defilement.
21. Though the appellant has not raised the issue of the sentence in his grounds of appeal, he submits at length with regard thereto in his written submissions, which we have considered. The appellant prays that we should consider the life sentence meted out against him and find that it is unconstitutional, null and void.



22. Section 361(a) of the *Criminal Procedure Code* provides that severity of sentence is a matter of fact. We also observe that the first appellate court had considered the appellant’s appeal on sentence. It had held that, in the circumstances, noting that the appellant had taken advantage of the vulnerable position of the complainant, to whom he was related, and the trauma that the defilement had caused the complainant, which would last the complainant’s lifetime, there was no basis to interfere with the sentence meted out on the appellant by the trial court.
23. The appellant asks this Court to interfere with his sentence on the authority of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. The rationale in this decision, in which it was held that the mandatory death sentence for the offence of murder is unconstitutional because it deprives judicial officers of discretion in sentencing, has been extended to apply to mandatory minimums sentences in sexual offences cases- see *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment).
24. The emerging jurisprudence with respect to mandatory minimum sentences under the *Sexual Offences Act* is that while such sentences are not per se unconstitutional, courts have the discretion to impose an appropriate sentence, taking into account the circumstances of each case and the mitigation offered by the convicted person. In his decision in *Edwin Wachira & others v Republic*-Petition No. 97 of 2021, Mativo J (as he then was) considered this issue and stressed the need to take into account the circumstances of each case in sentencing. He stated as follows:
- “26. The core value is to ensure that courts impose a ‘just and appropriate’ sentence. This requires a judge sentencing an offender to ensure that the ‘aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.’ The “just and appropriate sentence” arrived at considering the peculiar circumstances of the case can [not] be arrived [at] if the sentence is fixed and pre-determined regardless of the peculiar circumstances.”
25. We have considered the facts and circumstances of this case.
- We note that, as observed by the first appellate court, the appellant took advantage of a young vulnerable boy and the trust reposed in the appellant by the complainant’s father to perpetrate the offence of defilement against him. The trauma that the complainant experienced, as the first appellate court noted, is likely to last a lifetime. The appellant’s mitigation, ironically, was a plea not to be separated from his two sons. Sadly, he did not think of them when perpetrating the offence of defilement against someone else’s son. In the circumstances, we are satisfied that he was deserving of a severe sentence. We are, however, satisfied that a term sentence, rather than the life sentence to which he was sentenced by the trial court and which was upheld by the first appellate court, is appropriate.
26. The appellant’s appeal accordingly succeeds only to the extent of a reduction in sentence. We hereby set aside the life sentence and substitute therefor a sentence of thirty years’ imprisonment, to run from the date of sentencing by the trial court.
27. This judgment is delivered pursuant to rule 34 (3) of the *Court of Appeal Rules 2022*.

**DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF MARCH, 2024.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

