



**Kijana v Republic (Criminal Appeal E275 of 2019)  
[2024] KECA 404 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KECA 404 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL E275 OF 2019  
HM OKWENGU, JM MATIVO & JM NGUGI, JJA  
APRIL 5, 2024**

**BETWEEN**

**RAMADHAN AMUKOYA KIJANA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the Judgement of the High Court of Kenya,  
Kakamega (Njagi J.) dated 3<sup>rd</sup> August, 2017 CRA No. 167 of 2014)*

**JUDGMENT**

1. On 30<sup>th</sup> October 2014, the appellant, Ramadhan Amukoya Kijana was convicted and sentenced to life imprisonment by the Senior Resident Magistrate’s Court at Mumias (S.K. Ngetich) in Criminal Case no 766 of 2013, for the offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act*, 2006. The appellant’s appeal to the High Court at Kakamega being Criminal Appeal no 167 of 2014, Ramadhan Amukoya Kijana v Republic, was dismissed on 3<sup>rd</sup> August 2017 by Njagi J and his sentence was confirmed.
2. Undeterred, the appellant has filed this second appeal challenging the sentence based on the grounds contained in his self-drawn undated memorandum of appeal. The grounds are that the sentence imposed by the trial magistrate and subsequently upheld by the High Court was harsh. That the courts below did not take into account the fact that he was a first offender and, therefore, under Article 27(1)(2) and 50(2)(p) of the *Constitution* he is guaranteed and/or qualified for the benefit of a least severe punishment. In addition, the appellant faults the two courts below for sentencing him without invoking sections 329 and 216 of the *Criminal Procedure Code* and, as a result, unfairly discriminating against him contrary to Article 25 (c) of the *Constitution*.
3. On 14<sup>th</sup> March 2024, when the appeal came up for hearing before us, the appellant relied on his written submissions. The cornerstone of his submissions is that the mandatory nature of his sentence



- prescribed under section 8(1) & (2) of the [Sexual Offences Act](#), deprived the trial magistrate the discretion to impose a suitable sentence bearing in mind his peculiar circumstances.
4. The appellant cited this Court's decision in [Julius Kitsao Manyeso v Republic](#), Malindi CA CRA no 12 of 2021, (Nyamweya, Lesiit & Odunga, JJA), in support of the proposition that the mandatory life sentence is unconstitutional. In the said case the Court substituted the sentence of life imprisonment with 40 years in jail, for an offender who had defiled a child of tender years. In conclusion, the appellant stated that he was a first offender and at the time of his arrest, he was only 20 years old, therefore, he was ignorant and peer pressure was a contributing factor to his offence. However, he is now reformed and ready to be reintegrated to the society if given a second chance in life.
  5. Ms. Busienei, learned Senior Principal Prosecution Counsel, agreed with the appellant's submissions on the unconstitutionality of life sentence. While conceding to the setting aside of the mandatory life sentence imposed upon the appellant, counsel cited this Court's decision in Kisumu Criminal Appeal no 157 of 2017, [Frank Turo v Republic](#) (Judgement dated 6/10/2023) (unreported) in which this Court determined the indeterminate life sentence to be equivalent to thirty years' imprisonment.
  6. Ms Busienei also submitted that the appellant deserved a deterrent sentence and urged this Court to consider the aggravating circumstances of the offence and particularly that the victim was at the material time aged 6 years.
  7. We have considered the appeal and the submissions. As regards sentence, we are cognizant of the provisions of section 361(1)(a) of the [Criminal Procedure Code](#) which provides that severity of sentence is a matter of fact; and this Court cannot hear a second appeal on a matter of fact. Similarly, we are alive to provisions of section 361(1)(b) of the [Criminal Procedure Code](#), which provides that this Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court, or where the trial court had no power to pass the sentence in the first place.
  8. The sentence imposed upon the appellant is the mandatory sentence provided under the law. Therefore, in passing the said sentence, the trial Magistrate owing to the mandatory nature of the penalty had no room to exercise her discretion in determining an appropriate sentence considering the peculiar circumstances of the offender before her. In addition, owing to the mandatory nature of the sentence, the appellant could not have his mitigation considered. Even if the mitigation was considered, the sentence was cast on stone and therefore, no amount of mitigation could sway the mind of the court no matter how compelling the mitigation could have been. Undeniably, exercise of judicial discretion is a matter of law. Similarly, an accused person's right to be heard in mitigation is a matter of law. The fair trial process jealously guaranteed under Article 50 does not end upon conviction. The truth is sentencing is part of the fair trial process and, therefore, it is as a matter of right for a convict to be heard in mitigation. It follows that whether the appellant's rights were violated by being deprived the opportunity to be heard in mitigation or by not having his mitigation considered before passing of the sentence imposed against him, is a matter of law. We have said enough to affirm that before us are matters of law and therefore the bar erected by section 361 (1) (a) of the [Criminal Procedure Code](#) cannot stop us from considering the appeal on sentence before us.
  9. Regarding the Constitutionality of mandatory life sentences, this Court sitting in Malindi in [Julius Kitsao Manyeso v Republic](#) [2023] KECA 827 (KLR) (7 July 2023) held thus:

“This fact notwithstanding, we are of the view that the reasoning in [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser



sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

See also in Kisumu Criminal Appeal no 157 of 2017, Frank Turo v Republic (*supra*). note that the appellant was a first offender.

10. He is now remorseful and is reformed as can be gleaned from the letter of recommendation dated 16<sup>th</sup> August 2021 from the Officer in Charge Kibos Maximum Security Prison. We have also considered the aggravating circumstances of the offence and the fact that the victim was only 6 years at the time of the incident. In cases where there is sufficient address on mitigation on record, this Court avoids needlessly congesting the High Court by remitting such cases for resentencing.
11. Upon considering the circumstances of this case and the law, we reiterate that the life sentence imposed on the appellant herein is no longer tenable. Accordingly, we hereby set aside the life imprisonment sentence and substitute it with a period of 30 years' imprisonment to run from 9<sup>th</sup> September 2013, the date of the appellant's first arraignment in court.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J MATIVO**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

