



**JM v Republic (Criminal Appeal 22 of 2019)
[2024] KECA 1109 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1109 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 22 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
AUGUST 30, 2024**

BETWEEN

JM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Busia (F. Tuiyott, J.) dated 15th May, 2014 in HCCRA No. 44 of 2012)

JUDGMENT

1. The appellant, JM, was the accused person in the trial before the Senior Resident Magistrate’s Court at Busia in Criminal Case No. 1320 of 2011. He was charged with the offence of incest by male person contrary to section 20(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 26th day of December, 2010, in Busia County, the appellant, being a male person, caused his penis to penetrate the vagina of JOW, a girl aged 16 years who was to his knowledge his niece. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.
2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to mandatory life imprisonment, according to the law at the time.
3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court at Busia *via Criminal Appeal No. 44 of 2012*.
4. The High Court (F. Tuiyott, J.) (as he then was) dismissed the appeal and upheld the conviction and sentence in a judgment dated 15th May, 2014.



5. The appellant was, again, dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised nine (9) grounds in his self-crafted Memorandum of Appeal, all of which impugned his sentence.
6. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Busienei appeared for the respondent. Both parties relied on their submissions and provided brief oral highlights.
7. First, the appellant decried the constitutionality of his sentence and relied on the Supreme Court case of Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR and this Court's decision in Christopher Ochieng v Republic [2008] eKLR, where, he says, the courts held that mandatory minimum sentences are unconstitutional since they deprived courts jurisdiction to exercise their discretion on sentencing accused persons. In this regard, the appellant argued that the discretion of the trial court to mete out a sentence that was commensurate with the circumstances of the offence he committed was curtailed due to the mandatory minimum sentence provided for by statute. He further argued that the trial court failed to consider his mitigation and submitted that there were no aggravating circumstances to warrant a sentence to life, given the fact that the victim was not below the age of 11 years.
8. Second, while admitting that he committed the offence, the appellant argued that at the time of the incident, he was ignorant of the law and was under the "influence of his culture" which, he claims, disregards children born out of wedlock, such as the survivor in this case. In any event, he submitted that he was remorseful and pleaded with the Court to give him a second chance in life, so that he could sensitize "the ignorant community on the rights of children and their protection in law." Additionally, he argued that he was a first offender and was only 19 years old at the time of his arrest and was, hence, a young man with a long way to go in life. He also submitted that he is an orphan and had a wife and two children who fully depended on him as their sole breadwinner.
9. Third, the appellant submitted that he has been in prison for the last ten (10) years and has undergone various rehabilitation programs while in prison. Hence, the skills he has acquired will enable him earn an honest living and live a life that is crime free.
10. Lastly, the appellant submitted that pursuant to section 333(2) of the Criminal Procedure Code, he was entitled to a discount of the time he was in custody during the pendency of his case. He pointed out that he was in custody from 26th October, 2011 when he took plea until the day he was convicted, which is 29th March, 2012 as he was unable to raise the bail set by the Court.
11. Ms. Busienei submitted in conceding the appeal on sentence. Counsel cited our recent cases impugning the constitutionality of mandatory minimum sentences under the *Sexual Offences Act* and indeterminate life sentences. In particular, she cited the case of *Maingi & 5 others vs. Director of Public Prosecutions & Another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR), in which Odunga, J. (as he then was) addressed the issue of the mandatory nature of sentences in the *Sexual Offences Act* and held that they impede the exercise of judicial discretion. She also cited this Court's decision in Nyeri Criminal Appeal No. 84 of 2015 Joshua Gichuki Mwangi vs. Republic (unreported), wherein the unconstitutionality of mandatory sentences was affirmed. Counsel further relied on this Court's decision in Julius Kitsao *Manyeso vs Republic Malindi, Criminal Appeal No. 12 of 2021*, wherein it was held that mandatory life imprisonment is unconstitutional due to its indeterminate nature which renders it inhumane and violative of the right to dignity of the person.
12. However, in conceding the appeal on sentence, counsel urged the Court to mete out a severe sentence based on the circumstances of the case as evident in the testimony of the complainant, PW1. Counsel



argued that the appellant did not show any remorse during his mitigation and only asked for forgiveness and a second chance in life. In particular, counsel asked the Court to consider the “shocking” contention by the appellant that children born out of wedlock are discriminated against to the point of being defiled in the appellant’s cultural setting. If true, counsel argued, this should be an aggravating not a mitigating factor as the Court should signal opprobrium to such repugnant cultural beliefs. Ultimately, counsel proposed a term sentence of twenty- five (25) years imprisonment. She conceded that section 333(2) of the Criminal Procedure Code should be applied in favour of the appellant.

13. We have carefully considered the appeal, the submissions of the parties and the authorities cited in support of the appeal against sentence.
14. We start off by noting our limited remit as a second appeal court. Our jurisdiction is limited by dint of Section 361 of the Criminal Procedure Code to deal with matters of law only and not to delve into concurrent findings of the two courts below. See *Samuel Warui Karimi vs. Republic* [2016] eKLR. Severity of sentence, on its own, is regarded as a matter of fact by dint of that statutory provision. We, therefore, cannot revisit the sentence merely because it is severe, unless we are persuaded that in its severity or manner of imposition it violated *the Constitution* or the law.
15. A brief summary of the facts in the present case are as follows. The appellant was convicted of defiling his niece (PW1) who was aged 16 years at the time of the incident. She testified that on the material day at about 6.00pm, her mother (PW2) sent her to fetch firewood in a swampy area which was about 300 meters away from their home. Whilst there, she met the appellant who beckoned her. She obliged and went to where he was. Suddenly, he grabbed her, covered her mouth with his hands, tore her track suit and panties, lowered his trousers and underwear to his knees and then put his manhood into her private parts and forcefully had sexual intercourse with her. While in the act, PW2 arrived at the scene and confronted the appellant. He was taken aback. He stood up, let PW1 go, then ran away leaving his cap behind. At the time of the incident, PW1 felt immense pain and she also bled. PW2 took her to hospital where she was admitted for one day and treated, as her vagina was torn. Thereafter, they reported the matter to the police. However, the appellant fled to Uganda and was arrested about ten (10) months after the incident occurred.
16. Ms. Busienei was correct that at the time this appeal was argued our jurisprudence on mandatory minimum sentences and indeterminate life sentences had taken a new trajectory where this Court had issued a series of decisions impugning the constitutionality of both. The trend was attributable, if only indirectly, to the Supreme Court’s decision in *Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015* (Muruatetu 1) and found expression in High Court decisions impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in cases such as *Maingi & 5 others vs. Director of Public Prosecutions & Another* (supra) (Odunga J. as he then was) and *Edwin Wachira & Others v Republic – Mombasa Petition No. 97 of 2021*, Mativo J. (as he then was). However, in a recent decision, to wit, *Republic v Joshua Gichuki Mwangi (Petition E018 of 2023)* [2024] KESC 34 (KLR)(delivered on 12th July, 2024), the Supreme Court has held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional. Following the doctrine of stare decisis, this decision by the Supreme Court is binding on this Court and overrules the recent decisions of this Court holding otherwise.
17. However, there is a second aspect of the sentence which the appellant complained against and which, the Joshua Gichuki Mwangi Case at the Supreme Court did not expressly address. This is the question whether a sentence of life imprisonment is unconstitutional due to its indeterminate nature. This Court has so held in *Julius Kitsao Manyeso v Republic Malindi* (supra) and *Evans Nyamari Ayako vs. Republic, Criminal Appeal No. 22 of 2018*. In both cases the Court held that mandatory life imprisonment is unconstitutional due to its indeterminate nature which renders it inhumane and



violative of the right to dignity of the person. In the latter case, the Court translated life imprisonment to a term sentence of thirty (30) years.

18. This aspect of the case – challenging the constitutionality of the indeterminate sentence of life imprisonment under Articles 28 (on human dignity) and 29(f) (on inhuman and degrading treatment or punishment) of *the Constitution* - is different from challenging the sentence imposed as unconstitutional for fettering the discretion of the sentencing court on separation of powers grounds. However, the appellant has raised the matter for the first time on second appeal. As the Supreme Court reiterated in the self-same Joshua Gichuki Mwangi Case, this Court is deprived of jurisdiction to consider a matter which was not first raised at the High Court. Differently put, while this Court may consider the constitutionality of the indeterminate sentence of life imprisonment in a properly presented case, it can only do so where the constitutional question has been preserved for determination by this Court by first raising it in the High Court. The constitutional argument cannot be raised for the first time on second appeal.
19. The upshot is that the appellant’s appeal fails and we must dismiss it. We hereby do so.
20. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 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

