



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maurice v Republic (Criminal Appeal 217 of 2019)  
[2024] KECA 1112 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1112 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 217 OF 2019  
HM OKWENGU, JM MATIVO & JM NGUGI, JJA  
AUGUST 30, 2024**

**BETWEEN**

**PETER JUMA MAURICE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((An appeal from the judgment of the High Court of Kenya at Bungoma  
(R. Sitati J.) dated 14th May 2019 in HCCRA No. 105 of 2017))*

**JUDGMENT**

1. On 11<sup>th</sup> February 2016, the appellant was arraigned before the Chief Magistrate's Court at Bungoma in Criminal Case No. 377 of 2016, charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The allegations against him were that on 9<sup>th</sup> February 2016 at [particulars withheld] within Bungoma County, he caused his penis to penetrate the vagina of HLS, a Child aged 1 year and 8 months.
2. After hearing the case, the learned magistrate, by a judgment dated 29<sup>th</sup> June 2017, found that the prosecution had proved its case against the appellant, convicted him and sentenced him to serve life imprisonment. Aggrieved by the said verdict, the appellant appealed against both the conviction and sentence in Bungoma High Court Criminal Appeal No. 105 of 2017. After hearing the appeal, Sitati J., in the impugned judgment dated 14<sup>th</sup> May 2019, upheld the conviction and sentence, and dismissed his appeal.
3. Undeterred, the appellant filed this second appeal to this Court. In his undated supplementary memorandum and grounds of appeal, the appellant is essentially appealing against the sentence only. In that regard, the appellant is challenging the constitutionality of the life sentence imposed upon him on the grounds that indeterminate sentences have been held to be unconstitutional. To buttress his argument, he cited *Reyes v The Queen* [2002] 2 AC 335. He urged this Court, in the event it agrees with



him, to invoke section 333(2) of the *Criminal Procedure Code* and order that the period he was held in custody be taken into account. In support of this position, he cited this Court in *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR. Lastly, the appellant urged the Court to be guided by Article 27 (1) and (4) of the *Constitution* and Article 10 Clause 3 of the *ICCPR* which guarantees equality and protection before the law.

4. Ms. Kibet, learned counsel for the respondent, submitted that section 8(2) of the *Sexual Offences Act* provides for life imprisonment upon conviction for the offence of defilement under section 8 (1). Counsel argued that the sentence that was imposed on the appellant conforms with the law as provided. Counsel also argued that there is nothing to show that the learned Judge overlooked material considerations while passing the sentence. Consequently, counsel urged this Court to uphold the sentence.
5. We have considered the grounds of appeal and the parties' submissions. Under section 361(1) (a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact, and this Court cannot hear a second appeal on a matter of fact. Under section 361(1)(b), the Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court, unless the trial court had no power to pass the sentence in the first place. This was not the case here.
6. However, there are several decisions of this Court holding that determining the constitutionality of a sentence imposed in a criminal trial is a matter of law. For example in *Kijana v Republic* (Criminal Appeal E275 of 2019) [2024] KECA 404 (KLR) (5 April 2024) (Judgment) this Court stated:-

“... 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.”
7. In this case, two hurdles stand on the way of the appellant's appeal. We have read the grounds of appeal cited by the appellant in his appeal before the High Court, and it is evident that the appellant did not raise any ground against his sentence nor did he challenge the constitutionality of the life sentence imposed upon him before the High Court. He is raising it here for the first time in his submissions before this court, but he is precluded from raising new grounds at this second appellate stage.
8. The other hurdle the appellant's case faces is that recently, in a decision that is binding on us, the Supreme Court, in Petition No. E018 of 2023, *Republic v Joshua Gichuki Mwangi and Others*, affirmed the lawfulness of minimum/mandatory sentences in the *Sexual Offences Act* when it held that:-

“(57) In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...



(62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.”

9. In the circumstances, and for the reasons stated herein above, we find that this appeal lacks merit. Accordingly, we dismiss it.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF AUGUST, 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**

