



**PW v Republic (Criminal Appeal 199 of 2019)  
[2024] KECA 1117 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1117 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 199 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
AUGUST 30, 2024**

**BETWEEN**

**PW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the High Court of Kenya at  
Bungoma, (Sitati, J.) dated 14th May, 2019 in HCCRA No. 82 of 2018)*

**JUDGMENT**

1. PW, the appellant herein, was tried before the Senior Resident Magistrate’s Court at Sirisia for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. It was alleged that he had defiled one, HB, a 14-year- old child, who is his cousin.
2. Upon hearing the evidence of five prosecution witnesses and the appellant’s sworn defence, the trial magistrate found the offence of defilement not proved, but using Section 179 of the Criminal Procedure Code convicted the appellant with attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*, and sentenced him to a term of 15 years’ imprisonment.
3. The appellant appealed to the High Court against his conviction and sentence, but the learned Judge of the High Court (Sitati, J) having heard the appeal, dismissed it.
4. The appellant is now before us in a second appeal in which he has appealed against sentence only. He has filed a memorandum of appeal raising seven grounds which, in effect, are mitigating circumstances upon which he urges the Court to reduce his sentence of 15 years imprisonment to a more lenient term.
5. The respondent has filed written submissions through Robert Oyiembo, an Assistant Director of Public Prosecutions, in which it opposed any reduction of the appellant’s sentence, arguing that the appellant escaped conviction on the main charge merely on account of a technicality. The respondent



argued that the circumstance of the offence calls for a severe and deterrent sentence, and the sentence of 15 years imposed on the appellant should, therefore, be confirmed.

6. We have carefully considered this appeal, the submissions and the law. Under Section 361(1) of the Criminal Procedure Code, the jurisdiction of this Court on a second appeal is limited to matters of law only, and severity of sentence is identified as a matter of fact. This means that this Court can only deal with an appeal against sentence where it raises an issue that goes beyond severity.
7. The appellant has restricted his appeal to the issue of sentence only. In effect, he is urging us to reduce the sentence due to his current mitigating circumstances. From the evidence that was adduced in the trial court, the child testified that the appellant, who is her cousin, gave her a drink laced with alcohol, and then offered to escort her home, only to lead her into a bush, then pull her down, tear her panty and defile her. The complainant's mother, who heard a dog barking, went to check what was going on, only to find the appellant on top of her daughter with his trouser half way down. She raised an alarm and a crowd gathered, leading to "mob justice" being inflicted on the appellant.
8. The evidence against the appellant was quite incriminating, but was compromised by the evidence of the doctor whose evidence the trial magistrate found inconclusive on the issue of penetration. It was for this reason that the trial magistrate opted to convict the appellant for attempted defilement. The learned Judge of the High Court similarly concluded that the evidence of penetration was inconclusive. Needless to state that the appellant, who had all the intentions of defiling the child, was interrupted whilst in the course of his heinous undertaking.
9. The trial magistrate, in exercise of her discretion, sentenced the appellant to a term of 15 years' imprisonment, which was more than the mandatory minimum sentence of 10 years, provided under Section 9(2) of the *Sexual Offences Act*. It is clear that, as adverted to above, there were proper aggravating circumstances that justified the sentence that was imposed on the appellant. In any case, in his first appeal, the appellant did not take any issue with the sentence, as all the grounds of appeal were against his conviction, and so it is not open to him to raise it now, nor is it open to us to address the issue of sentence without the benefit of the opinion of the High Court.
10. In the above circumstances, and given our limited jurisdiction in interfering with the sentence on the ground of severity, we find no substance in this appeal. It is accordingly dismissed.

**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**

