



REPUBLIC OF KENYA



KENYA LAW
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**Kingara v Republic (Criminal Appeal 93 of 2017)
[2024] KECA 1517 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1517 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 93 OF 2017
FA OCHIENG, JM MATIVO & WK KORIR, JJA
OCTOBER 25, 2024**

BETWEEN

PETER WAINAINA KINGARA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence from the judgment of the High Court of Kenya at Nakuru (S. Githinji, J.) dated 13th October, 2017 in Criminal Appeal No. 343 of 2010 originating from Nakuru CMCR No. 166 of 2009)

JUDGMENT

1. Peter Wainaina Kingara, the appellant, is before us on a second appeal. On 13th September, 2009, he was arraigned before the Chief Magistrate's Court at Nakuru in CMCCR No 166 of 2009 facing two counts of 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 in Count I were that between July and August 2009 within the former Rift Valley Province, he unlawfully had sexual intercourse with EN, a juvenile girl of 10 years without her consent. In Count II, it was alleged that on diverse dates between the year 2008 and 2009 in Nakuru district within the former Rift Valley Province, he unlawfully had sexual intercourse with GW a juvenile of 10 years without her consent.
2. The appellant faced a third count of attempted defilement contrary to section 9 (1) of the [Sexual Offences Act](#). It was alleged that on an unspecified date between July 2009 and August 2009, he did an act which would cause penetration with EN, a juvenile girl of 9 years. However, the trial court dismissed the said count after full hearing for want of evidence and convicted the appellant on counts 1 and 2 and sentenced him to serve life imprisonment in respect of count I, while the sentence on count II was held in abeyance.



3. The appellant appealed to the High Court of Kenya at Nakuru and after hearing the appeal in the full S.M. Githinji, J. upheld the conviction and sentence of the trial court and dismissed the appeal. Undeterred, the appellant filed this second appeal to this Court challenging both his conviction and sentence citing four grounds in his self-drawn undated memorandum of appeal and an undated supplementary memorandum of appeal. In summary, the appellant contends that the learned judge failed to: (a) appreciate that the prosecution evidence was marred by contradictions and inconsistencies; (b) appreciate that crucial witnesses were never called to testify; (c) appreciate that the complainant's age was not conclusively proved; (d) appreciate that the prosecution did not prove the case beyond reasonable doubt, and (e) the sentence is excessive, harsh and unjust considering new jurisprudence.
4. However, a reading of the appellant's submissions shows that he is basically appealing against the sentence of life imprisonment imposed on him. In fact, during the virtual hearing on 16th April, 2024, the court drew his attention to the fact that his submissions were only restricted to the sentence and he confirmed that was the position. He informed this Court that he opted to pursue his appeal against the sentence and that he abandoned his appeal against his conviction.
5. In support of his plea to this Court to tamper with the life sentence and substitute it with a definite term, the appellant argued that the sentence imposed upon him is harsh and urged this Court to sentence him to a lenient definite term since the circumstances that led to the commission of the offence are not harsh to warrant life imprisonment.
6. He stated that he regretted his deeds, that he was rehabilitated, he was remorseful and asked for forgiveness from God, the complainants and to everyone who was affected by his mis-deeds. He promised not to repeat such a crime if he is reintegrated back to the society and cited the High Court decision in *Douglas Mutibaura Ntoribi v Republic* [2018] eKLR in support of the proposition that a good working prison is able to reform convicts and there is no legal research which leads to the conclusion that capital offenders cannot be reformed.
7. The appellant also submitted that his indefinite sentence was unconstitutional and cannot be justified given the emerging norms of human decency and human rights as was held by this Court *Julius Kitsao Manyeso v Republic* [2020] eKLR [2023] KECA 827 (KLR) (7 July 2023) (Judgment) that imposition of a mandatory indeterminate life sentence, constitutes an unjustifiable discrimination, and is unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*. Lastly, the appellant prayed that in sentencing him, this court should take into account the time he spent in custody after he was arrested and the time he spent in custody pending trial.
8. The respondent's learned counsel Mr. Omutelema submitted that the sentence provided under section 8 (1) and 8 (2) of the *Sexual Offences Act* is life imprisonment and therefore the sentence imposed on the appellant was legal and not excessive bearing in mind that the appellant took advantage of the complainants' innocence and vulnerability and demolished their lives by sexually attacking very young girls and inflicted both physical and psychological pain upon them which may not be erased forever. Mr. Omutelema also submitted that the appellant was a sexual maniac and a serial pedophile and it would have been remiss of the court to impose a sentence which would have offered him an opportunity to go back to the society and continue with his sadistic pleasure.
9. The Supreme Court recently affirmed the lawfulness of life imprisonment when it held in Petition No E018 of 2023, *Republic v Joshua Gichuki Mwangi and others* that:

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime



in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in- depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”

10. The appellant offered mitigation in this appeal and urged us to review his sentence. However, the Supreme Court in the above decision affirmed the constitutionality of the mandatory sentences under the *Sexual Offences Act*. In any event, under Section 361 (1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact. It is therefore, not a legal issue open for consideration by this Court on second appeal unless the trial court acted in error. We find no error in this case meriting our intervention nor can we interfere with a lawful sentence imposed by the trial court under section 8 (1) and 8 (2) of the *Sexual Offences Act* and upheld by the first appellate court. Accordingly, we find that this appeal lacks merit and dismiss it in its entirety. Both the conviction and sentence are upheld.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

