



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sawe v Republic (Criminal Appeal 3 of 2019)  
[2024] KECA 1444 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1444 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 3 OF 2019  
MA WARSAME, JM MATIVO & WK KORIR, JJA  
OCTOBER 11, 2024**

**BETWEEN**

**DANIEL KIPKEMOI SAWE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Kericho (Mumbi Ngugi J.(as she then was)) delivered on 18th December 2018 in High Court Criminal Appeal No. 1 of 2018 originating from Kericho CM'S Sexual offences CR NO S/O 48 of 2013)*

**JUDGMENT**

1. Daniel Kipkemoi Sawe, (the appellant), has preferred this appeal against the judgment of the High Court (Mumbi Ngugi J., as she then was), delivered on 18<sup>th</sup> December 2018 in Kericho High Court Criminal Appeal No 1 of 2018 in which the appellant had appealed against conviction and sentence imposed upon him in Kericho Chief Magistrate's Court Criminal Case number 48 of 2013. In the said case, the appellant was charged, tried and convicted of the offence of defilement contrary to section 8 (1) of the Sexual Offences Act and sentenced to life imprisonment on 26<sup>th</sup> January 2018. The particulars of the offence were that on 30<sup>th</sup> and 31<sup>st</sup> August 2013 at Kericho County, he caused his penis to penetrate the vagina of JC a Child of 8 years.
2. In a nutshell, the prosecution case was that on 30<sup>th</sup> August 2013, the complainant (PW2) who had been chased by her mother met the appellant who took her into his house and offered her a seat where she slept. However, while she was asleep the appellant took her to his bed, removed her skirt and her underwear. He also removed his trouser and laid on her and inserted his penis in the complainant's vagina causing her to experience some pain.
3. On 31<sup>st</sup> August 2013, the complainant returned home and her mother chased her again armed with a panga. She returned to the appellant's home where she slept again on the seat, only to find herself in the



appellant's bed without her inner wear and the appellant lying on her. The appellant inserted his penis into her vagina and she felt pain. In the morning, she did not go to school, instead, she went to her home and the appellant forcefully escorted her to school where she informed her teacher that the appellant had sexually defiled her. The complainant was taken to Kipkelion sub-district Hospital where she was examined by PW3 Mr. Weldon Mutai a clinical officer. PW3 stated that the complainant's labia and majora was swollen and had bruises. The hymen was swollen and there was a whitish discharge. PW3 concluded that the complainant was defiled.

4. In his defence, the appellant gave sworn evidence and stated that he was merely a good Samaritan to PW2, JC because she was a vagabond in Chepseon town. He claimed that he informed the local chief and one Ann, a children's officer. The appellant also stated that he purchased school uniform for PW2. He maintained that PW2 was injured on the head and leg by young boys at Dandora and he was blamed for defiling her since she was last seen at his place. The appellant called PW2's mother Regina Chemutai, as his witness. Her evidence was that the appellant only helped a street child.
5. When this appeal came up for hearing before us on 3<sup>rd</sup> July 2024, the appellant appeared in person while learned counsel Mr. Omutelema appeared for the respondent. Both parties had filed their written submissions. The appellant's submissions are undated while the respondent's submissions are dated 6<sup>th</sup> May 2024.
6. In support of his appeal, the appellant submitted that the appellant's age was not proved to the required standard. In support of this assertion, he argued that the complainant told the court she was aged 11 years old in 2016 yet her age assessment report confirmed that she was 16 years in 2016 and since the incident occurred on 30<sup>th</sup> and 31<sup>st</sup> August 2013, it is evident that she was aged 13 year and a half years at as the time of the alleged defilement. Consequently, the learned judge erred in law by upholding the appellant's conviction without considering the age assessment report.
7. Regarding the mandatory life sentence, the appellant maintained that the same did not meet the constitutional threshold since an indeterminate life sentence falls afoul the provisions of Article 27 and 28 of the *Constitution*. The appellant cited the case of *Julius Kitsao Manyeso v Republic* in support of his argument that life sentence is unconstitutional.
8. On his part, the respondent's counsel Mr. Omutelema maintained that the findings of fact and law by the trial court were based on a well thought out reasoning. He submitted that the complainant's age was proved to be 8 years as at the time of the incident, and pointed out that on 8<sup>th</sup> February 2016, the complainant told the court she was 11 years old and the trial court ordered that she be taken to Kericho County Referral Hospital for age assessment, where she was examined, and PW4 CPL. Mululu Sangura produced the age assessment report which according to Dr. Langat's, she was 11 years old. Consequently, the totality of the above evidence was sufficient to prove PW1 was 8 years old at the time of the incident.
9. Mr. Omutelema also submitted that the court considered the appellant's sworn defence, DW2's evidence and rightly rejected the appellant's defence which did not displace the prosecution evidence against him. He urged this Court not disturb the concurrent findings of fact arrived at by the two courts below.
10. Regarding the sentence, Mr. Omutelema contended that the appellant was allowed to present his mitigation before being sentenced to life imprisonment. Furthermore, counsel submitted that the appellant never challenged his sentence before the first appellate court. Nevertheless, Mr. Omutelema had no objection to this Court imposing a definite sentence of imprisonment.



11. We have carefully considered the record, the parties' rival submissions, the authorities cited and the law. This being a second appeal the jurisdiction of this Court is limited to consideration of matters of law only as stipulated by Section 361 of the Criminal Procedure Code. As was held in Chemogong v R [1984],

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari S/o Karanja v R* [1956] 1 E.A.C.A. 146)”

12. In our view, this appeal turns on two issues, that is: (a) whether the complainant's age was proved beyond reasonable doubt, and, (b) whether the mandatory sentence imposed on the appellant is legal.

13. Regarding the first issue, this Court, on a second appeal cannot not interfere with concurrent findings of fact by the two courts below unless it is satisfied that there was in fact no evidence at all to support the findings, or that the two courts below wholly misunderstood the nature and effect of the evidence. This position was succinctly underscored by this Court in Kalameni v Republic [2003] eKLR as follows:

“We have said before, but it bears repeating, that on a second appeal, it is not the function of this Court to go into a fresh re-evaluation and re- assessment of the evidence to see if the findings of the lower courts are or are not supportable. This Court will not interfere with concurrent findings of fact unless it is satisfied that there was in fact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence.” (See also *Aggrey Mbai Injaga v Republic* [2014] eKLR and *Athanus Lijodi v Republic* [2021]eKLR).

14. The two Court's below found that the prosecution evidence established that the complainant was aged 8, as at the time of the incident which was on 30<sup>th</sup> and 31<sup>st</sup> August 2013. Also, the age assessment conducted on 23<sup>rd</sup> March 2016 established that the complainant was aged 11. From the foregoing, it is clear that the complaint was aged 8 years as at the time of the incident. Therefore, the indication that she was aged 16 years as captured in the record is evidently erroneous. In the circumstances, we find that there is no basis upon which we can interfere with the factual findings by the two courts below that the complainant was aged 8 years as at the material time.

15. Regarding the mandatory life sentence imposed upon the appellant as provided under section 8 (2) of the Sexual Offences Act, we have considered the record. It is manifestly clear that the appellant did not specifically complain about the legality of the mandatory life sentence imposed upon him. Therefore, the legality of the mandatory life sentence was not an issue placed before the High Court for its determination. Accordingly, the first appellate court did not have the benefit of applying its mind on the said ground. Nonetheless, we see no reason to interfere with the lawful sentence imposed by the trial court and affirmed by the High Court.

16. In any event, 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:

“(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.”

17. Accordingly, we find that the appellant has not established any grounds upon which we can interfere with his sentence. Therefore, this appeal fails both on conviction and sentence. We hereby affirm both the conviction and sentence and dismiss this appeal for want of merit.

**DATED AND DELIVERED AT NAKURU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024**

**M. WARSAME**

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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**

