



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**PBM v Republic (Criminal Appeal 115 of 2017)
[2023] KECA 162 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 162 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 115 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
FEBRUARY 17, 2023**

BETWEEN

PBM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at
Kakamega, (Sitati, J.) dated 7th September, 2016 in HCCRA NO. 76 OF 2014)*

JUDGMENT

1. PBM, the appellant, is serving a prison term of 20 years imposed on him upon conviction 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 the appellant, on May 27, 2012 at [Particulars Withheld] village, [Particulars Withheld] Sub-location in Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of MK a girl aged 14 years
2. The first appeal was unsuccessful when Sitati, J on September 7, 2016 dismissed his challenge to both conviction and sentence. He is now before us on a second appeal.
3. Although the appeal raises four grounds, the only substantive ground is against sentence. It is contended that the sentence imposed is unconstitutional due to its mandatory nature and a plea is made for reduction of the sentence. We are implored to be lenient.
4. The appellant cites the Supreme Court decision in *Francis Karioko Murutetu & Another vs Republic* [2017] eKLR for the proposition that the mandatory nature of the sentence imposed on him deprives courts of their legitimate jurisdiction to exercise discretion to hand an appropriate sentence “relevant to aspect of character and record of each accused person.”



5. Responding on behalf of the respondent, Miss Proscovia Vitsengwa, prosecution counsel, opposes the appeal. Counsel argues that the sentence was neither harsh nor excessive and that when, invited at trial to offer mitigation, the appellant did not show any remorse. We were asked to consider that the offence was committed on an orphan child under the care of the appellant whom the victim considered to be like a father to her.
6. Our limited role on a second appeal against sentence is on issues of law and a sentence can only be an issue of law if it is an illegal or so manifestly high or low that no reasonable court could possibly impose it (see *Kenneth Kimani Kamunyu v Republic* [2006] eKLR)
7. Following recent jurisprudence, the rationale in Muruatetu has been extended to sentencing under the *Sexual Offences Act* and so if persuaded that the appellant would be deserving of a sentence lesser than the minimum sentence, then we should interfere with it. The victim, aged 14 years at the time of the offence, did not live with her biological parents. Her father had died and her mother left her in the custody of her sister who was the wife of the appellant. The appellant was literally a father to the victim and there would be an obvious power imbalance between the two. The appellant took advantage of his overly dominant position to sexually assault her. She was vulnerable. In addition, in defiling her, he used an amount of force. The circumstances do not invite any leniency from us. We think that the minimum sentence is deserved and we uphold it. The appeal is dismissed.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.

P.O. KIAGE

JUDGE OF APPEAL

.....

MUMBI NGUGI

JUDGE OF APPEAL

.....

F. TUIYOTT

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

