



**Masika v Republic (Criminal Appeal 17 of 2019)
[2023] KECA 1412 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1412 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 17 OF 2019
PO KIAGE, M NGUGI & JM NGUGI, JJA
NOVEMBER 24, 2023**

BETWEEN

JUSTUS WEKESA MASIKA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Bungoma
(Ali-Aroni, J.) dated 8th February, 2018 in HCCRA No. 221 of 2016)*

JUDGMENT

1. In this appeal, the appellant, Justus Wekesa Masika challenges the decision of the High Court at Bungoma (Ali-Aroni, J., as she then was) made on 8th February, 2018. By that decision, the court dismissed the appellant's first appeal against his conviction and the sentence to life imprisonment meted upon him by the Principal Magistrate's Court at Sirisia, for the offence of defilement.
2. Initially, the appellant had raised six grounds of appeal in his self-crafted memorandum of appeal which he titled 'supplementary grounds'. At the hearing of the appeal, however, he did not urge those grounds, which he abandoned, choosing to address us on sentence only. The appellant's complaint is that the sentence imposed is extremely harsh and excessive in the circumstances. He sought a review of the mandatory minimum sentence meted on him.
3. We address the question of sentence only as regards its legality since, in a second appeal, our jurisdiction is circumscribed by section 361(1) of the *Criminal Procedure Code* and confined to matters of law only, with severity of sentence statutorily stated to be a question of fact.
4. The appellant urged that while reviewing the mandatory sentence, we should consider his age which at the time of the hearing was over 60 years. He also submitted that he had done several courses while in custody, which would help him once released, and that he was now a changed man.



5. For the respondent, Mr. Okango, the learned Senior Principal Prosecution Counsel conceded to the appeal on sentence in view of emerging jurisprudence on the unconstitutionality of minimum mandatory sentences under the *Sexual Offences Act* (SOA). He, however, implored us to give a severe sentence noting that, there was no expression of remorse by the appellant; the victim of the offense was only 10 years old; the appellant was in a place of authority to the victim by virtue of being her teacher, and the trial court had directed that his name should be entered in the register of dangerous sexual offenders. Counsel thus proposed a term sentence of 30 years imprisonment.
6. In the often-cited Supreme Court case of *Francis Karioko Muruatetu & Anor vs. Republic* [2017] eKLR, the apex court instructed that sentencing is a judicial function which enables the courts to exercise discretion, on principle, in an individualized case- by-case basis with a view to imposing appropriate and just sentences.
7. Bearing in mind the said decision and the sequel thereto in which the Supreme Court gave certain directions, as well as subsequent decisions of both the High Court and this Court on the unconstitutionality of mandatory minimum sentences in the *Sexual Offences Act*, for instance, *Maingi & 5 Others Vs. Director Of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and *Joshua Gichuki Vs. Republic*, Criminal Appeal No. 84 of 2015 (Unreported), we are inclined to interfere with the sentence imposed by the Principal Magistrate’s Court and upheld by the High Court. We do so taking into consideration both the aggravating factors and the appellant’s mitigation and the fact that the two courts below were bereft of the discretion to consider both by the mandatory sentence prescribed by statute.
8. In the result, this appeal partly succeeds to the extent that, we set aside the sentence to life and substitute therefor a term of twenty-five (25) years imprisonment to run from 14th March, 2016, when the appellant was first arraigned in court.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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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

