



REPUBLIC OF KENYA



**Mbandu v Republic (Criminal Appeal 190 of 2017)
[2023] KECA 1460 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1460 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 190 OF 2017
PO KIAGE, M NGUGI & JM NGUGI, JJA
NOVEMBER 24, 2023**

BETWEEN

STEPHEN AMBABU MBANDU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Kakamega
(Sitati J.) dated 13th October, 2016 in HCCRA No. 50 of 2015)*

JUDGMENT

1. The appellant places a single ground of appeal before this Court: that both the trial and first appellate court failed to observe that the sentence imposed was unconstitutional due to its mandatory nature.
2. The appellant was tried and convicted of the offence of defilement contrary to section 8(1) and 8(3) of the *Sexual Offences Act*. The particulars of the offence are that on the 19th day of August 2014 within Kakamega North District within Kakamega County intentionally caused his penis to penetrate the vagina of PW, a child aged 14 years. He was tried before the Senior Resident Magistrate's Court in Butali, found guilty as charged, and sentenced to 20 years' imprisonment. His appeal to the High Court was dismissed.
3. In his submissions, the appellant relies on the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu 1) to submit that mandatory minimum sentences are unconstitutional. He also cites the case of *Christopher Ochieng v R* (2018) eKLR to submit that this Court held mandatory minimum sentences to be unconstitutional. He pleads with this court to consider that "I pleaded guilty to this offence since I indeed committed the offence ignorantly. I am a first offender and remorseful for the offence committed."
4. In submissions in response, the State, represented at the hearing of the appeal by learned Senior Principal Prosecution Counsel, Mr. Okongo concedes the appeal on sentence. It is the respondent's



submission that while the decision in *Muruatetu 1* does not apply to sexual offences cases, the exercise of judicial discretion in sentencing in sexual offences has been accepted since the decision of Odunga J (as he then was) in *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) and the decision of this Court in *Joshua Gichuki Mwangi v R Nyeri Criminal Appeal No. 84 of 2015*. Mr. Okango proposed at the hearing hereof that the appellant's sentence be reduced to fifteen (15) years, taking into account the age of the appellant and that of his victim, which was fourteen (14) at the time of the offence.

5. We have considered the appellant's appeal and his submissions in support. We have also considered the submissions of the State and its concession that in light of the emerging jurisprudence on the constitutionality of mandatory minimum sentences, this Court should reduce the appellant's sentence to fifteen (15) years.
6. It is correct that there has been a change in jurisprudence with regard to mandatory sentencing. While the *Muruatetu 1* decision does not apply to sexual offences cases in light of the directions of the Supreme Court issued in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), jurisprudence from this Court and the High Court now leans towards the exercise of judicial discretion in sentencing in cases where a mandatory minimum sentence is prescribed by statute. The Supreme Court is yet to pronounce itself on the issue.
7. In his decision in *Edwin Wachira & Others v Republic*- Petition No. 97 of 2021, Mativo J (as he then was) emphasized the need to consider the circumstances of each case in sentencing. The jurisprudence that has emerged is that while the minimum sentences under the *Sexual Offences Act* are not per se unconstitutional, courts have the discretion to impose an appropriate sentence, taking into account the circumstances of each case and the mitigation offered by the convicted person. As Mativo J expressed it in his decision in *Edwin Wachira* (supra):
 - " 26. The core value is to ensure that courts impose a 'just and appropriate' sentence. This requires a judge sentencing an offender to ensure that the 'aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.' The "just and appropriate sentence" arrived at considering the peculiar circumstances of the case can [not] be arrived [at] if the sentence is fixed and pre- determined regardless of the peculiar circumstances."
8. In this case, we note that in his mitigation, the appellant stated that he was twenty years old, and a first offender. It would therefore appear that he may have been nineteen years old at the time of the offence. The survivor of his offence was a fourteen-year-old girl. This was not, however, a case of the so-called 'Romeo and Juliet' situation that has been the main concern and given impetus to reconsideration of the constitutionality of mandatory minimum sentences in offences under the *Sexual Offences Act*- see *P O O (A Minor) v Director of Public Prosecutions & another* [2017] eKLR and *Evans Wanjala Siibi v Republic* (2019) eKLR.
9. The evidence before the trial court in this case shows that the appellant was a young man who, though he claimed ignorance in mitigation, followed a young girl and her younger siblings, grabbed her from behind, pulled her into a sugar plantation and defiled her, his violent acts underscored by the screams of her younger siblings. While he was a young man and a first offender, and though he claimed in mitigation that he acted 'ignorantly', he was past the age of majority, and it is difficult to excuse his conduct on the basis of ignorance: we would be doing very badly as a society if our young men are



ignorant of the fact that it is not lawful and one would be severely punished if one stalks and violently forces oneself sexually on another.

10. In the circumstances, and taking into account the concession by the State, we hereby allow the appellant's appeal only to the extent of reducing his sentence to fifteen years' imprisonment, the sentence to run from the date of sentencing by the trial 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

