



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mweke v Republic (Criminal Appeal 100 of 2022)  
[2023] KECA 1527 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1527 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL 100 OF 2022  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**SUDI MNALO MWEKE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgement of the High Court of Kenya at Mombasa delivered on 3rd September 2018 by Hon Justice D.S. Majanja in High Court Criminal Appeal No 103 of 2017 Original Mariakani SPM Criminal Case SO 668 of 2014)*

**JUDGMENT**

1. This second appeal was lodged by the appellant against the judgement delivered on 3<sup>rd</sup> September 2018 by Hon Justice D.S. Majanja in Mombasa High Court Criminal Appeal No 103 of 2017. The Appellant had been charged before the Senior Principal Magistrates Court at Mariakani with one count of the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*. He faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on the 27<sup>th</sup> October, 2014, at about 12.15pm at Kaloleni District of Kilifi County within Coast region, the appellant intentionally caused his penis to penetrate the vagina of WM, a child aged 10 years.
2. When the charges were read to the appellant, he pleaded not guilty and was taken through trial in which 5 witnesses testified for the prosecution and the appellant testified in his defence. The evidence before the trial court was to the effect that that PW1, WM, went to the appellant's house to deliver groundnuts packaging papers that the appellant had sent her to buy for him and on her way out the appellant grabbed her, threw her on the bed, pulled off her clothes, removed his clothes, separated her legs and "did bad things" to her by inserting his penis into her vagina, despite the Complainant complaining that she was feeling pain.



3. When one of the Complainant's siblings was heard calling her, the appellant gave her the clothes while telling the sibling to wait at the door. Similar incidents occurred for three days, on Saturday, Sunday and Monday.
4. PW1 informed her mother PW3 about the incident who took PW1 to Mariakani District Hospital where she was examined by PW2, Mwangolo Chigulu. The examination revealed that PW1 had a cut on the labia minora and bruises on the labia and a broken hymen and was suffering from a sexually transmitted disease. PW3, CM, the Complainant's mother recalled how PW1 recounted the occurrence to her and stated that PW1 was born in July 2004. PW5, Dr Ishar Mwamji, testified of the age assessment conducted on PW1 revealed that PW1 was between either 9 and 11 years. The offence was investigated by PW5, Cpl Nicholas Mburugu, who established that the appellant used groundnuts to lure PW1 and after which he defiled her. At the completion of the investigations, the appellant was arrested and charged.
5. Upon the close of the defence case, the appellant was put on his defence in which he denied the commission of the offence and lamented that the prosecution evidence was contradictory; that no exhibits of the PW1's torn skirt were produced in court; that on the material day he worked overnight and slept during the day and that at 12.15pm when the offence was alleged to have been committed, he was asleep. He, however, admitted sending the PW1 to buy papers for groundnut packaging and that he is a neighbour to PW1.
6. The learned trial magistrate, L.K. Gatheru, vide judgement delivered on 28<sup>th</sup> June 2017 found that PW1 was proven to be a minor of 10 years vide the age assessment report; that penetration was proven vide the evidence of PW1 as corroborated by the medical evidence of PW2; that PW1 recognized the appellant who was her neighbour; that the appellant's defence did not shake the independent prosecution evidence against him; that the appellant was admittedly at home on the material day; and that the inconsistencies in the time of the incident were immaterial. Accordingly, the appellant was found guilty of the offence of defilement and convicted accordingly. After considering mitigation, the appellant was sentenced to serve life imprisonment.
7. The appellant was dissatisfied with the decision of the learned trial magistrate and appealed to the High Court at Mombasa on the grounds that the prosecution did not prove its case; that the prosecution evidence was contradictory; that the court relied on uncorroborated evidence without independent evidence; that the appellant's defence was not considered; that there was breach of the appellant's right to fair hearing and right to be represented by an advocate; and that the maximum sentence meted was contrary to the principles of sentencing.
8. Majanja, J, vide judgement rendered on 3<sup>rd</sup> September 2018 was not satisfied that there was any violation of the appellant's fundamental rights and freedoms; that the appellant was represented by counsel during his defence therefore there was no prejudice in the direction by court declining to recall the prosecution witnesses for cross- examination; that penetration was proven vide PW1's testimony as corroborated by the medical evidence of PW2 and the account of PW3; and that PW1's age was proven vide the age assessment report; that the appellant was well known to PW1 as he used to send her on errands and that the mandatory sentence was within the law. The court upheld the conviction and sentence and dismissed the appeal.
9. The appellant is still not satisfied with that decision and has moved this court based on the grounds of bias of the trial magistrate who handled another case in respect of the appellant; violation of the appellant's right to fair trial; failure to give the appellant an opportunity to recall witness; and that the medical evidence did not corroborate the charge. It was sought that the appellant be set at liberty after the conviction is quashed and sentence set aside.



10. The appellant’s submissions in support of the appeal took issue with the trial magistrate’s handling of another criminal file involving the appellant that the learned trial magistrate interfered with his right to remain silent by advising him to rethink his decision to remain silent; that contrary to Article 50 of the Constitution and Section 150 of the Criminal Procedure Code, the appellant, a layman, was not given the right that he sought to recall witnesses who had testified; that his rights were not safeguarded.
11. It was further submitted that while the victim had a sexually transmitted disease, the appellant was not tested to confirm if he was infected too and Section 36 of the Sexual Offences Act was cited in support of this submission. To the appellant, a medical test on the appellant would have cleared any doubts as to whether the appellant committed the offence.
12. During the hearing of the appeal before us on 19<sup>th</sup> June, 2023, the appellant who appeared virtually from Manyani Prison, relied entirely on his written submissions which amplified his grounds of appeal while Learned Senior Principal Prosecution Counsel, Miss. A. Fuchaka, also relied entirely on her written submissions urging that the evidence tendered by the prosecution was cogent and established its case beyond reasonable doubt.
13. We have considered the said submissions.

### **Analysis and Determination**

14. In a second appeal such as this, our mandate under Section 361 of the Criminal Procedure Code is limited to a consideration of matters of law only. In *Karani vs. R* [2010] 1 KLR 73 the Court express that:

“By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

15. As already stated, the appellant took issue with the trial magistrate’s handling of another criminal file involving the appellant. This is an issue that was not raised before the High Court. This Court in Alfayo Gombe Okello v. Republic [2010] eKLR had this to say about the issue:

“....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

16. The predecessor to this Court in *Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi* [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

“The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a



Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.”

17. There is however a limited avenue where the decision in question is manifestly contrary to the law or the Constitution such as where the sentence imposed is manifestly illegal since a Court of law cannot close its eyes to a manifest illegality since this Court is bound by the National Values and Principles of Governance in Article 10 of the Constitution which oblige us, in interpreting any law, to inter alia, be bound by the rule of law.
18. It was contended that the learned trial magistrate interfered with the appellant’s right to remain silent the by advising him rethink his decision to remain silent. We were unable to understand the appellant’s grievance with the course adopted by the learned trial magistrate. The learned trial magistrate was just being kind to him by advising him to rethink his stand, a course which is recommended where an accused person appears in person. He ought to appreciate that kindness instead of vilifying the learned trial magistrate for doing so.
19. As regards the alleged violation of the appellant’s right to fair trial, we agree with the appellant that he ought to have been informed of his right to have legal representation before the commencement of the trial. However, it is clear that he was legally represented later in the proceedings and we do not think that in the circumstances of this case, the failure by the learned trial magistrate to explain to him his rights occasioned a failure of justice
20. It was contended that contrary to Article 50 of the Constitution and Section 150 of the Criminal Procedure Code, the appellant was not given the right to recall witnesses who had testified. We disagree with the appellant that he had a right to recall witnesses who had testified and whom he had cross-examined. While there was nothing wrong in his application for recall of those witness, the decision whether or not to allow such application was discretionary and we cannot fault the trial court for exercising the discretion in the manner it did.
21. It was further submitted that while the victim had a sexually transmitted disease, the appellant was not tested to confirm if he was infected too and Section 26 of the Sexual Offences Act was cited in support of this submission. While it may have been prudent to subject the appellant to such examination we find that the failure to do so does not justify interference with the decision of the trial court where there was sufficient material on the record to convict.
22. In the end, we find no merit on the appeal as regards the conviction of the appellant.
23. As regards sentence, the appellant was sentenced to a life sentence. A life sentence, in our view, is only meaningful where there is a prescription as to what life entails. Otherwise, such a sentence becomes indeterminate and fails to take into account the peculiarities of individual circumstances such as the age of the offender. In that case, the indeterminate nature of the sentence lends itself to indiscriminate application of the law. If such a sentence is meant to punish the offender, it means that the longer one stays alive the more punishment is inflicted on him or her since we cannot tell when the sentence will be said to have been served or executed.
24. Such sentences, whose service and execution cannot be determined may only meet the objective of sending a message to the society, an objective that may well be achieved by a little longer, but definite sentence. In our view a sentence ought to be capable of being executed by those whom the law can



compel to execute them. It was in realization of this fact that, we believe the Supreme Court in *Francis Karaoke Muruatetu & another vs. Republic* [2017] eKLR recommended:

“that Attorney General and Parliament commence an enquiry and develop legislation on the definition of ‘what constitutes a life sentence’; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing. We are of the view that such proposed legislation will enable us to comply with Articles 2(6) of the *Constitution* which states that any treaty or convention ratified by Kenya shall form part of the law of Kenya.”

25. However, as the Attorney General has not deemed it fit to act in accordance with the recommendation of the Supreme Court, we would be abetting injustice if we failed to appreciate the injustice being caused by the indefinite life sentence particularly when such injustice has been appreciated by the highest court in our jurisdiction, the Supreme Court.
26. To the extent that the life sentence meted out by the two courts below for the offence is an indeterminate sentence, we are inclined to interfere with the sentence.
27. We accordingly, dismiss the appeal on conviction but set aside the life sentence imposed on the Appellant. We substitute therefore a sentence of 30 years from the date of his conviction by the trial court.

**DATED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

**DEPUTY REGISTRAR**

