



REPUBLIC OF KENYA



KENYA LAW
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**Omondi v Republic (Criminal Appeal E013 of 2023)
[2025] KEHC 270 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E013 OF 2023
WM MUSYOKA, J
JANUARY 24, 2025**

BETWEEN

KEVIN OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. T Madowo, Senior Resident Magistrate, SRM, in Busia CMCSOC No. E129 of 2021, of 5th August 2023)

JUDGMENT

1. The appellant, Kevin Omondi, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the Sexual Offences Act, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge were that on 6th September 2021, within Busia County, he had intentionally and unlawfully caused his penis to penetrate the vagina of EN, a girl aged 7 years. The appellant denied the charges, and a trial was conducted, where 7 witnesses testified.
2. PW1, the victim, testified to have been in some bushes near a river, picking fruits, when a strange man, who was later identified as the appellant, emerged, and defiled her. A report of the incident was made to her mother, PW2, by a third party. PW2 and PW3 were the parents of PW1, to whom the third party reported. PW5 was the third party, who had allegedly chanced upon the appellant, defiling PW1 and reported the incident to PW2 and PW3. She later met the appellant, arrested him and handed him over to the authorities.
3. PW4 was the clinical officer who attended to PW1. He noted bruises on her labia majora and vagina, and her hymen was freshly torn, and he concluded that penetration had occurred. PW6 was the arresting and investigating officer. PW7 claimed that the appellant had confessed the crime to him, whereupon he escorted him to the police.



4. The appellant was put on his defence, vide a ruling that was delivered on 21st December 2022. He made an unsworn statement, on 20th February 2023.
5. In its judgment, delivered on 5th April 2023, the trial court found the appellant guilty. He was sentenced to life imprisonment, on 24th April 2023.
6. The appellant was aggrieved, and brought the instant appeal, revolving around his constitutional rights, under Article 50(2)(b)(j), being violated; the medical evidence not linking him to the offence; and the investigations being shoddy.
7. Directions were given on 15th May 2024, for canvassing of the appeal by way of written submissions. Only the appellant filed written submissions.
8. In his written submissions, the appellant submits only on the sentence. He submits on the unlawfulness of life imprisonment as a sentence, and the failure to consider the period that he spent in custody. He cites Articles 25, 27 and 28 of the Constitution; sections 216, 329 and 333(2) of the Criminal Procedure Code, Cap 75, Laws of Kenya; Julius Kitsao Manyeso vs. Republic [2023] eKLR; Vinter & others vs. United Kingdom (Application No. 6609, 130/09 and 3898/10/2016 111 ECLLR 317 (9 July 2013)); Ogolla s/o Owuor vs. Republic [1955] 5 EACA 270; Republic vs. Shereskowsky [1912] CCA 28 TRR 263; Wanyama vs. R [1971] EA 313; Evans Wanjala Wanyonyi vs. Republic; Yawa Nyale vs. Republic and Benard Barasa vs. Republic CRA No. 313 of 2018.
9. The fact that the appellant has only submitted on the sentence presupposes that he has abandoned the other grounds of appeal. I shall, in the circumstances, determine the appeal only on the ground of the sentence.
10. The appellant was charged under section 8(2) of the Sexual Offences Act, which prescribes a sentence of up to life in prison, upon a conviction for defilement of a minor of tender years, that is where the victim is under 11 years of age. The sentence is not mandatory, but permissive. Life in prison is the maximum. The provision does not state a minimum, but, no doubt, the minimums stated in sections 8(3)(4)(5) of the Sexual Offences Act, should be relevant. The penalties are graduated, depending on the ages of the victims. A perpetrator of defilement on a minor of tender years, say of age 7, should not expect to be treated the same with the defiler of a much older minor, say of 17 years, for example.
11. In Julius Kitsao Manyeso vs. Republic [2023] eKLR (Nyamweya, Lesiit & Odunga, JJA) the court declared life imprisonment, whether prescribed as a mandatory or permissive sentence, unconstitutional. In Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA), it was declared that a sentence of life imprisonment should translate to 30 years imprisonment. These 2 decisions of the Court of Appeal came in 2023, the same year the sentence herein was imposed by the trial court, perhaps before the 2 decisions were made, or, if made before the sentence was handed down, the trial court was unaware of them, or the same had not been brought to its attention.
12. The Supreme Court did not pronounce them, in its recent decision in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), where it examined sentences in sexual offences, to be bad law, hence the same remain binding on the courts below, including this court. Consequently, I do hereby apply both, to have the sentence of life imprisonment, imposed on the appellant, reduced to a definite sentence of 30 years imprisonment.
13. As the trial court was imposing a sentence of life imprisonment, there would have been no reason for it to consider the period that the appellant had spent on remand pending trial. I note that he was arrested



on 10th September 2021 and was arraigned on 13th September 2021. He was admitted to bond, but the same was never processed, hence he remained in remand throughout. Judgment was pronounced on 5th April 2023, and he was sentenced on 24th April 2023. The period that he spent in custody, between arraignment and sentencing, shall be reckoned in calculation of the period that he shall ultimately serve in prison.

14. The appeal herein is disposed of in those terms. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 24TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Kevin Omondi, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

