



REPUBLIC OF KENYA



KENYA LAW
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**Wesley v Republic (Criminal Appeal E021 of 2023)
[2025] KEHC 7116 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E021 OF 2023
WM MUSYOKA, J
MAY 29, 2025**

BETWEEN

DANCAN OWINO WESLEY APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from sentence, imposed on 15th March 2022, in Busia
CMCSOC No. E113 OF 2021, by Hon. EC Serem, Resident Magistrate, RM)*

JUDGMENT

1. The appellant, Dancan Owino Wesley, had been charged with defilement of a girl of fifteen years, contrary to Section 8 (1) (3) of the *Sexual Offences Act*, Cap 63A of the Laws of Kenya. There was an alternative count of engaging in an indecent act with the child. All that allegedly happened on diverse dates between 19th and 21st July 2021, at Nyakhobi sub-location, Namboboto Location, in Samia, Busia. He denied the charges. Seven witnesses testified. He was convicted on 1st March 2022 on the count on defilement. He was sentenced to twenty years imprisonment.
2. The appeal, going by the grounds in the petition of appeal filed sometime in October 2023, turns only on sentence. Consequently, I do not see the need to recite the testimonies of the prosecution witnesses and the defence.
3. The grounds are that the sentence is harsh and severe; the appellant did not use force or coerce the complainant to have sex with her; rules of natural justice and prerogative of mercy should be applied, for reduction of the sentence; and that the appellant was a student at a local polytechnic.
4. The complainant was a girl of fifteen years. The appellant was charged and convicted under Section 8(3) of the *Sexual Offences Act*. Under that provision, defilement of a minor of between twelve and



fifteen, both years inclusive, attracts, upon conviction a sentence of a minimum of twenty years imprisonment.

5. The appellant has not contested the age of the complainant. Neither has he contested the fact that, upon being convicted of defilement of a child of the age of the complainant, he exposed himself to a sentence of a minimum of twenty years imprisonment. The trial court awarded to him the minimum allowed by section 8 (3) of the *Sexual Offences Act*.
6. Did the trial court have discretion to consider any other sentence? No. Its hands were tied. Where a sentence is framed as a statutory minimum, no other sentence can be considered. The trial court cannot award a custodial sentence below the prescribed minimum, neither can it employ non-custodial measures.
7. Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) appeared to open a door, for exercise of discretion in such cases. That door was closed by Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), where it was clarified that the earlier decision applied only to murder cases.
8. Then came Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), where the High Court declared a similar discretion, with respect to the minimum and mandatory sentences prescribed in the *Sexual Offences Act*. That window has also been shut, 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 has firmly been declared that Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) are not good law, and that the sentences prescribed by the *Sexual Offences Act* are constitutional and lawful.
9. As it is, there is no wriggle room. Maybe section 333 (2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya? To cover the period the appellant spent in remand custody between the date of arrest and the date of sentence? No. The sentence order, made on 15th March 2022, covered that. The order was that his sentence was to run from the date of his arrest.
10. Consequently, there is no merit in the appeal herein. I shall, as I hereby do, dismiss it. The sentence imposed, on 15th March 2022, is hereby confirmed. This file shall be closed accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 29TH DAY OF MAY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Barasa Ouma, instructed by B.M. Ouma & Company, Advocates for the appellant.

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

