



**Lumbasi v Republic (Criminal Appeal 135 of 2016)
[2022] KECA 1097 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1097 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 135 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
OCTOBER 7, 2022**

BETWEEN

GEORGE MUCHIKA LUMBASI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from a conviction & sentence of the High Court of Kenya at Kakamega (E. C. Mwita, J) dated 18th August, 2016 in HCCRA NO. 17 OF 2016)

JUDGMENT

1. George Muchika Lumbasi, the appellant, is serving a life sentence after a conviction for the offence of defilement of a child contrary to section 8(1) as read with section 8 (2) of the [Sexual Offences Act](#).
2. This second appeal is on sentence only. The appellant states that he is remorseful and seeks leniency. He also submits that this Court in [Christopher Ochieng -vs- Republic](#) [2018] eKLR following the Supreme Court decision in [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR held that the mandatory prescription of a sentence cannot take away the discretion of a sentencing Court.
3. Miss. Lubanga Caroline Prosecution Counsel appearing for the State, citing Muruatetu (supra) urged this Court to exercise its discretion but asked us to consider some aggravating factors. The tender age of seven years of the victim; that the appellant defiled the minor three times and that the appellant threatened to kill the victim.
4. A second appeal is an appeal on issues of law only ([Njoroge -vs- Republic](#) [1982] KLR 388) and a sentence can only be an issue of law if it is an illegal sentence. Severity of a sentence would be a question of fact and one that cannot be properly taken up in a second appeal (see [Kenneth Kimani Kamunyu v Republic](#) [2006] eKLR).



5. We think that following the successful constitutional challenge in Petition No. E017 of 2021: Philip Mueke Maingi & 5 others v Director of Public Prosecutions and another on the restrictions that the minimum sentences in the Sexual Offences Act places on sentencing discretion, which is not inconsistent with Muruatetu, this court would have the latitude, as a matter of law, to review the sentence imposed by the trial court in this matter and upheld by the first appellate court. We consider that decision, although of the High Court, to be persuasive as it is also consistent with a long line of jurisprudence by this Court (see for example Dismas Wafula Kilwake v Republic [2019] eKLR, Jared Koita Injiri v Republic [2019] eKLR, Christopher Ochieng v Republic [2018] eKLR and Daniel Kipkosgei Letting v Republic [2021] eKLR.)
6. Whilst the appellant says that he is remorseful and prays for leniency, we have no doubt in our minds that this is one instance when the minimum sentence is deserved. The victim was a girl of seven (7) years. The sexual assault left her with serious injuries including a torn hymen. She suffered an infection to her urinary tract. The appellant defiled the child on no less than three occasions. On one occasion, he forced a handkerchief into her mouth so as to muffle any noises of distress from her. In addition, he threatened her. This was a really heinous crime, callous in the extreme, and traumatic to the victim.
7. The sentence imposed was neither unlawful nor manifestly excessive. It is in fact deserved and we shall not interfere with it. We dismiss the appeal.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR

