



REPUBLIC OF KENYA



KENYA LAW
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**Obaga v Republic (Criminal Appeal 184 of 2017)
[2023] KECA 1453 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1453 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 184 OF 2017
PO KIAGE, M NGUGI & JM NGUGI, JJA
NOVEMBER 24, 2023**

BETWEEN

EDWARD OBAGA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kakamega
(Majanja, J.) dated 29th August, 2013 in HC.CR.A No. 05 of 2017)*

JUDGMENT

1. The appellant herein was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 17th January 2014 at (particulars withheld) within Western region he intentionally and unlawfully penetrated by his genital organ namely penis, into the genital organ namely, vagina of AAO, a girl aged 8 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars as to the place, time, and identity of the victim were the same as in the main charge.
3. The appellant pleaded not guilty to the charge. The prosecution marshalled its case by calling five (5) witnesses and closed its case. The trial court found that the prosecution had established a prima facie case and placed the appellant on his defence. In his defence, the appellant gave unsworn testimony and called no witnesses.
4. In a judgment dated and delivered on 7th April, 2014, the trial court convicted the appellant of the main charge and sentenced him to life imprisonment.



5. Aggrieved by the trial court’s decision, the appellant moved to the High Court on appeal via Kakamega High Court, Criminal Appeal No. 05 of 2017. In a judgment delivered on 29th August 2017, the High Court affirmed both conviction and sentence.
6. The appellant has filed a further appeal to this Court challenging both conviction and sentence. In his Memorandum of Appeal, the appellant proffered four grounds – three attacked conviction and one challenged the sentence as manifestly excessive.
7. Although the appellant had filed submissions on all the four grounds, when the appeal came up for hearing on 23rd May, 2022, the appellant informed the Court that he wished to withdraw his appeal against conviction and only pursue his appeal against sentence. We allowed him to so withdraw his appeal against conviction and conducted a hearing on the appeal against sentence.
8. Even in allowing only his appeal against sentence to proceed, we are mindful of our remit as a second appellate court. Our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact which have been dealt with by the trial court and reevaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See [Samuel Warui Karimi vs. Republic](#) [2016] eKLR.
9. The appellant submitted that the courts have changed their views about mandatory minimum sentences like the one imposed on him. He urged this Court to utilize that emerging jurisprudence to relook at his case and impose an appropriate definite term sentence in lieu of the indefinite life imprisonment sentence imposed on him. The appellant cited [Francis Karioko Muruatetu & Another v Republic](#), Petition No. 15 of 2015 (Muruatetu 1). However, we note that subsequent to Muruatetu 1, the Supreme Court issued the guidelines in [Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others \(Amicus Curiae\)](#) [2021] eKLR (Muruatetu 2) where it was categorical that: “(t)he decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*.” This, therefore, means that Muruatetu 1 cited by the appellant is not directly applicable to this appeal.
10. However, as Mr. Okango, learned counsel for the respondent, submitted in conceding the appeal, our jurisprudence on the question of mandatory minimum sentences under the [Sexual Offences Act](#) has shifted. Mr. Okango pointed out that courts have addressed the issue of constitutionality of mandatory minimum sentences, particularly in [Maingi & 5 others v Director of Public Prosecutions & another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR) in which Odunga, J. (as he then was) first addressed the issue of the mandatory nature of sentences in the [Sexual Offences Act](#). He also cited this Court’s decision in Nyeri Criminal Appeal No. 84 of 2015 [Joshua Gichuki Mwangi V. R](#) (unreported). Mr. Okango, therefore, conceded that the appellant had a “right to have his mandatory life sentence reviewed.” He suggested that we set aside the mandatory life sentence and remand the case to the trial court for re-sentencing.
11. It is true that while Muruatetu 1 does not apply directly to cases other than murder, its reasoning has inspired the application of its reasoning to the mandatory minimum sentences in [Sexual Offences Act](#). Consequently, the High Court, in [Maingi & 5 others v Director of Public Prosecutions & another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and [Edwin Wachira & Others v Republic](#) – Mombasa Petition No. 97 of 2021, (Mativo J. as he then was), found the mandatory sentences in the [Sexual Offences Act](#) unconstitutional to the extent that they deprive the sentencing court of the opportunity to consider the aggravating and extenuating factors and the individual circumstances of each convicted person before pronouncing sentence. In both cases, the judges pegged the unconstitutionality on the statutorily-imposed inability of a judicial officer to exercise discretion



to impose an appropriate sentence after taking into account the circumstances of each case and the mitigation offered by the convicted person.

12. In the present case, the survivor of the crime was a child only 8 years old and in standard 3. She was on her way to fetch water. The appellant waylaid her, forcefully took her by the hand and led her deep into the bush. While there, he stripped her of her skirt and panties. He forced her to lie on the ground. He unzipped his trousers and forcefully penetrated her vagina. The survivor reported that she felt immense pain. She tried to scream but the appellant blocked her mouth with his hands. When he finished defiling the survivor, the appellant stood, zipped his trousers, picked up his water jerry cans and left her deep in the bush.
13. There is no question that this is an objectively serious offence committed in a heinous fashion on a girl of very tender years. There is no question that the survivor suffered not only physical pain and physical violation but psychological trauma that might last throughout her lifetime. There are absolutely no mitigating circumstances in this sordid ordeal. It must be remembered that our emerging jurisprudence on mandatory sentences does not in any way imply that courts have embraced a jurisprudence of leniency in favour of sexual predators and convicted paedophiles. It only means that each sentence must be imposed after taking into consideration the circumstances of the offence, the offender, and the victim.
14. In the present case, while the respondent has urged us to remit the case to the trial court for re-sentencing, we do not think it prudent to do so given the length of time that has passed and the need to avoid creating needless case backlog in the lower courts. There is enough on the record to impose a just and proper sentence. Consequently, taking into consideration the circumstances as briefly set out above and taking into consideration the concession by the State, we allow the appeal only to the extent of setting aside the mandatory life imprisonment sentence imposed. We substitute that sentence with twenty-five (25) years' imprisonment. The record shows that the appellant was in custody since he was arraigned in court on 21st January, 2014. By dint of Section 333(2) of the *Criminal Procedure Code*, the imprisonment term shall be computed to begin running from that date.
15. Orders accordingly.

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

