



**Wanongo v Republic (Criminal Appeal 278 of 2018)
[2023] KECA 1538 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1538 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 278 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
DECEMBER 19, 2023**

BETWEEN

KEFA FURAHE WANONGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Kisii,
(Lagat-Korir, J.) dated 23rd May, 2012 in HCCRA No. 195 of 2011)*

JUDGMENT

1. In what would seem to be a script of a gory and horror movie, the appellant herein, Kefa Furahe Wanongo, was charged, pleaded guilty and convicted of defilement of nine young girls all between three and eight years old. The trial took place at the Senior Resident Magistrate's Court in Kilgoris. He was sentenced to life imprisonment for each of the offences as the [Sexual Offences Act](#) prescribes. The sentences were to run concurrently.
2. The appellant was dissatisfied with the conviction and sentence and appealed to the High Court. His chief complaint against conviction was that his plea of guilty was equivocal. As against sentence, he thought it was "overly harsh and excessive."
3. The appeal came up before the High Court sitting in Kisii and, by a judgment dated 23/05/2012, the learned Judge (Lagat-Korir, J.) affirmed both the conviction and sentence. The present appeal challenges that judgment by the High Court.
4. In his memorandum of appeal, the appellant vacillated between challenging both the conviction and sentence. However, before us, he was categorical that his appeal was only against sentence. Hence, we considered his challenge against conviction as withdrawn.



5. The appellant made two arguments in support of his appeal against sentence. First, he finds the argument unconstitutional and discriminatory because the sentencing court was not permitted, by virtue of the mandatory minimum sentence, to take into consideration his mitigation. Second, the appellant argues that he is remorseful and has reformed while in prison and that he should be given an opportunity to go back to the society as a rehabilitated individual, since that is the goal of sentencing.
6. Mr Okango, learned prosecution counsel, who appeared for the State, conceded to the appeal against sentence. In doing so, he referred to our emerging jurisprudence on mandatory sentences in the *Sexual Offences Act* as well as the recent decision in Malindi Criminal Appeal No 12 of 2021, *Julius Kitsao Manyeso v Republic* (Judgement 7/7/2023) (unreported) in which this court (differently constituted), while determining an appeal under similar legal provisions like this one, held that the life sentence was unconstitutional.
7. We begin by noting our limited 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. See *Samuel Warui Karimi v Republic* [2016] eKLR. Severity of sentence, on its own, is regarded as a matter of fact by dint of that statutory provision. We, therefore, cannot revisit the sentence merely because it is severe, unless we are persuaded that in its severity or manner of imposition it violated *the Constitution* or the law.
8. In the present case, the appellant was convicted of defiling nine young girls in a period of six months between January and June, 2010. The girls were between 3 years and 8 years old. The appellant was a guard at the Maranatha Compassion Center. In four of the instances, the survivors were playing at the center and he lured them to his house where he forced them, using menaces, to sexual intercourses. In the other five instances, the defilement occurred in a nearby bush: he found the girls either playing or running errands, and he forcibly held them by the hand to a bush where, with the use of menaces, he defiled them. In all instances, the appellant ignored the survivors' pleas that they were in much pain. In all cases, he also warned them not to report his nefarious act lest he kills them.
9. In the face of these severe, brutally savage and barbaric attacks, in his mitigation, the appellant said:

“There was a force put in me by a witchdoctor. I seek to be prayed for to get deliverance. I pray to be forgiven.”
10. In sentencing the appellant to concurrent life imprisonment sentences, the learned magistrate remarked that “the law provides for only one sentence, and I will sentence the accused person to suffer life imprisonment for each of the nine offences.”
11. It is obvious that the learned magistrate considered herself constrained by the mandatory minimum sentence prescribed in section 8(2) of the *Sexual Offences Act* in imposing concurrent life sentences. As such, it is equally obvious that both the learned trial magistrate and the learned Judge did not consider the mitigation of the appellant since they considered themselves straitjacketed by the *Sexual Offences Act*. It is also obvious that when the two courts below determined the case, our jurisprudence had not assumed the trajectory it has in the recent past where the minimum sentences in the *Sexual Offences Act* are no longer considered iron-clad instructions to the sentencing court.
12. As pointed out above, it is true that our emerging jurisprudence on mandatory minimum sentences and indeterminate life sentences has fundamentally shifted. The trend is attributable, if only indirectly, to the Supreme Court's decision in *Karioko Muruatetu & another v Republic*, Petition No. 15 of 2015 (Muruatetu 1). This jurisprudence has found expression in High Court decisions impugning the



constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in cases such as *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). Secondly, this court, differently constituted, in *Julius Kitsao Manyeso v Republic* Malindi Criminal Appeal No 12 of 2021 (Nyamweya, Lesiit & Odunga, JJAs) held that mandatory life imprisonment is unconstitutional due to its indeterminate nature which renders it inhumane and violative of the right to dignity of the person.

13. In *Evans Nyamari Ayako v R* (Crim Appeal No 22 of 2018) which this bench decided on December 8, 2023, we held that:

25. This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness.

26. On our part, considering this comparative jurisprudence and the prevailing socio- economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.

14. Taking this trend into consideration, we hereby set aside the sentence of life imprisonment imposed on the appellant in this case. Instead, we take into consideration the circumstances surrounding the offence; the offender and the victim. In doing so, we agree with the trial court that the offences were indeed heinous and were perpetrated in predatory and depraved manner on nine innocent little children aged of between 3 and 8 year old all of whom have been left with psychological scars

15. Considering all these aggravating factors and noting that the only truly extenuating factor is that the appellant pleaded guilty to the offences and was treated as a first offender, we think that the life sentence was well deserved. In accordance with our recent decision in *Evans Nyamari Ayako v R* (supra) we translate the life sentence to 30 years imprisonment for each of the 9 counts.

16. The upshot is that the appeal against sentences marginally succeeds to the limited extent that the sentences of life imprisonment imposed on the appellant on each count is hereby translated to a sentence of 30 years imprisonment. The sentences shall run concurrently from July 9, 2010 which was the date the appellant was presented in court and convicted of the offences.

17. Orders accordingly.

DATED AND DELIVERED AT KISUMU ON THIS 19TH DAY OF DECEMBER, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL



JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

