Ogutu v Republic (Criminal Appeal E020 of 2024)
[2024] KEHC 13133 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13133 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E020 OF 2024

KW KIARIE, J

OCTOBER 30, 2024

BETWEEN

EVANS OMONDI OGUTU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case NO.018 of 2023 of the Chief Magistrate's Court at Homa Bay by Hon. J.S. Wesonga-Principal Magistrate)

JUDGMENT

1. Evans Omondi Ogutu, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No. 3 0f 2006.

2. The particulars of the offence are that on the 9th day of May 2023 at Homa Bay sub-county within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of R.M., a child aged sixteen years.

3. The appellant was sentenced to fifteen years' imprisonment. He was aggrieved and filed this appeal against the sentence in person. He appealed against the sentence and contended that 15 years imprisonment is a minimum mandatory sentence, described as a legislative fiat.

4. The state opposed the appeal. It was argued that the sentence was legal and reasonable.

5. This is a first appellate court. As expected, I analyzed and evaluated all the evidence adduced before the lower court afresh and made conclusions, bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.

6. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of Nillson vs. Republic [1970] E.A. 599, as follows:

> The principles upon which an appellate court will act, in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James Vs. Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. Shershewsity (1912) C.CA 28 T.LR 364.

7. Section 8 (4) of the *Sexual Offences Act* provides:

> A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

8. This court can interfere with the trial magistrate's sentence where the circumstances of the case justify it. The circumstances of this case do not call for this court to intervene in the sentence. The appellant had sex with the victim by force and used deception to lure her to his house. Secondly, he was sentenced to the minimum sentence prescribed by the law.

9. I find that the appeal lacks merit. Consequently, it is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE