



REPUBLIC OF KENYA



**KENYA LAW**  
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**Winga v Republic (Criminal Appeal E021 of 2022)  
[2023] KEHC 185 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 185 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E021 OF 2022  
RE ABURILI, J  
JANUARY 25, 2023**

**BETWEEN**

**JOHN ONYANGO WINGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal against the conviction and sentence of Hon. S.W. Mathenge, Resident Magistrate in Bondo PM's Court in Sexual Offence case No. E018 of 2020 on 31/5/2022)*

**JUDGMENT**

1. The Appellant John Onyango Winga was convicted of the offence of rape. He was charged under section 3(1)(a)(b)(3) of the *Sexual offences Act* after the charge of defilement of an imbecile contrary to section 146 of the *Penal Code* was substituted with the one of rape. The offence took place on October 28, 2020 at 1.00pm at [Particulars Withheld] in Rarieda Subcounty. The victim was EA aged 27 years old and was with mental disability.
2. The Judgment is on sentence alone as the appellant, John Onyango Winga withdrew his appeal against conviction when he appeared before court on 1/11/2022.
3. The court then directed that he files his submissions on sentence reduction but he did not file. Only the respondent State filed written submissions on 2/12/2022. Our concerted efforts to get the appellant who is an inmate at Naivasha Maximum Security prison did not bear any fruit as the officers who joined the court on the online platform simply said they were looking for him but they became non-responsive.
4. The respondent submitted that the sentence of 30 years which is 20 years above the minimum provided for the offence of Rape contrary to section 3 of the *Sexual Offences Act* is lawful and warranted because there were aggravating circumstances in that the victim was deaf and dumb; she was unable to walk; she could not feed herself; and she was an imbecile.



5. It was further submitted that the appellant having taken advantage of such a person with serious disabilities, he deserved an enhanced sentence hence the respondent urged this court to retain the sentence imposed on the appellant.

### **Analysis and Determination**

6. I have considered the charge facing the appellant as substituted from defilement of an imbecile to Rape contrary to section 3(1) (a)(b)(3) of the *Sexual Offences Act*.
7. The complainant was 27 years and from the Mental Assessment Report filed in court dated 24/11/2020, the victim had delayed milestones and was unable to carry out any activities, including feeding or dressing. She has an impaired speech, movement and cognitive abilities. She has cerebral palsy. She was mentally unstable.
8. The trial court, before sentencing the appellant considered the gravity of the offence and a Presentence Report filed on 30/5/2022 by Leakey Lugalia which showed that the victim had since the offence committed against her on 28/10/2020, died in February, 2022. That the appellant was a neighbour. He was 28 years old. He was not remorseful and claimed that he was innocent and being tormented for an offence that he did not commit. The Probation Officer did not recommend non-custodial sentence.
9. From the evidence on record, the appellant raped the victim on several occasions prior to the one of 28/10/2020 forming the substance of the charge. He lived with the victim in her home though he came from the same neighbourhood. It was in broad daylight when he raped her. He denied the offence but upon conviction and filing of this appeal, he has owned up and accepted that his conviction was sound hence urging the court to consider reducing his sentence of 30 years imprisonment,
10. The minimum sentence provided for under the Act is 10 years. The relevant Section provides as follows:
  - “3(1). A person commits the offence termed rape if -
    - a. he or she intentionally and unlawfully commits an act which causes penetration with his or her genitals organs;
    - b. the other persons does not consent to the penetration; or
    - c. the consent is obtained by force or by means of threats or intimidation of any kind.
  - (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”
11. The trial court exercised discretion and sentenced the appellant to serve an enhanced sentence of 30 years imprisonment instead of life imprisonment which is the maximum.
12. Sentencing being in the discretion of the trial court, this court would not interfere unless it is shown that the discretion was exercised injudiciously and capriciously.
13. In *Shadrack Kipchoge Kogo v Republic* Criminal Application No. 253/2003, the Court of Appeal stated that:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that



a wrong principle was applied or show of those the sentence was so harsh and excessive that an error in Principle must be inferred.”

14. In *Wanjema v Republic* [1971]E.A 473, the Court of Appeal further stated that:

“An Appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evidence that it overlooked some material factors, took into consideration some material fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”
15. In her sentencing remarks, the trial magistrate observed that the Presentencing Report was against a non-custodial report and that the offence is heinous against a mentally unstable victim, a person who was in no position to defend herself in any way, a person who has trusted the accused person to the take care of her. The accused misused that duty and raped the victim. The offence deserves a deterrent sentence.
16. In mitigation, after conviction, the appellant stated that he was an orphan, stays with his grandmother, provides for her and prayed for the court’s assistance.
17. The appellant is a first offender as there is no evidence of his past criminal record.
18. I however note that indeed, the accused took advantage of a mentally sick person and of her isolation from her other family members and further, that the victim died in February 2022 after a long illness according to the Presentence Social Inquiry report, just three months to the judgment date in the trial court.
19. Although the victim’s death may not be linked to the rape ordeal that she underwent, it is saddening to learn that the appellant took advantage of an ailing mentally ill person, so vulnerable and raped her!
20. In addition, the appellant denied committing the offence and the case had to go on full trial perhaps in the hope that since the victim was not in a state of mind to talk and say what he had done to her, he would get away with it. Had PW2 not found the appellant in the act of raping the complainant, there would have been no case.
21. Furthermore, when the appellant raped the victim who was that sick both mentally and physically, from the testimony of PW6 Sammy Luzuri the Clinical Officer who examined her and confirmed penetration, he also established from the laboratory report that the victim was pregnant following the rape ordeal. Could such a very sick person with very serious mental illness bear the burden of pregnancy?!I say no more as the victim is no more and nothing else was said about her demise and the cause thereof.
22. In my humble view, this was one of those cases deserving stringent punishments in the circumstances although the appellant has not challenged his conviction which he rightly did not challenge as his conscience must have picked him to accept the truth.
23. Taking all the above circumstances into account, I find and hold that the 30 years imprisonment which was imposed on the appellant was lawful and lenient as the maximum under the law is up to life imprisonment.
24. In the end, I find this appeal against conviction which was withdrawn and against sentence, not merited. It is hereby dismissed. The conviction and sentence imposed by the trial court is hereby upheld.



25. I however order that as the appellant was in custody during his trial, the sentence as imposed and upheld by this court shall be calculated from the date of his arrest which was 6/11/2020. This is in accordance with section 333(2) of the *Criminal Procedure Code*.

26. I so order. File closed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

**R.E. ABURILI**

**JUDGE**

