



**Makau v Republic (Criminal Appeal E060 of 2021)
[2023] KEHC 1972 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E060 OF 2021
A. ONG'INJO, J
FEBRUARY 28, 2023**

BETWEEN

DAVID KILONZO MAKAU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision by Hon. Khapoya S. Benson (PM) on 30th July 2021 in Taveta Sexual Offence Case No. 7 of 2019, Republic v Daudi Kilonzo Makau)

JUDGMENT

1. The Appellant David Kilonzo Makau was charged in Taveta Principal Magistrates Court Sexual Offences Case No 7 of 2019 with the offence of rape contrary to Section 3(1)(a) & (b) as read with Section 3(3) of the Sexual Offences Act No 3 of 2006.
2. Particulars were that on February 23, 2019 at around 1800hrs in Taveta Township within Taita Taveta County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MW without her consent.
3. The trial Magistrate Hon Khapoya S Benson (Mr) PM weighed the evidence of 4 prosecution witnesses against the unsworn statement of the appellant and found him guilty and he was convicted and sentenced to serve 10 years jail term. The appellant allegedly rode the motorbike in which he was carrying the Complainant to a deserted school compound where he was a guard and he raped her while threatening to cut her with a panga if she screamed.
4. The Appellant was aggrieved by the conviction and sentence and he filed appeal herein on the grounds that 10 years imprisonment was imposed on him without being given the benefit that he was a 1st offender. That the trial Magistrate failed to consider that he was the only bread winner of his family and old parents. That the trial Magistrate denied him the benefit of the lesser severe punishment. That 10 years is harsh & excessive. That the sentence should be reduced.



5. The Appeal was canvassed by means of written submissions. The Appellants appeal filed on May 30, 2022 have argued what is beyond the grounds of appeal. The Respondent has also filed submissions that has gone beyond the grounds of appeal.
6. This court has considered the appeal & grounds thereto, the Right of Appeal which have been re-evaluated as well as the respective submissions.
7. The Complainant knew the appellant and that is why she requested for a ride home as it was threatening to rain and it was also getting late – 1700hrs. It was not yet dark. It was in the evening at 5.00pm. There could not have been mistake in the identify of the appellant.
8. PW 2 the Complainant's aunt saw complainant arrive while crying and she informed her she had been raped by the accused. She advised her to go and report to police. The complainant was examined by PW 4 found to have been raped.
9. PW 1 said she didn't consent to the appellant to have sexual intercourse with her. This court finds that the prosecution proved all ingredients of the offence of rape against the appellant and he was properly convicted.
10. On Sentence Section 3(3) of the *Sexual Offences Act* No 3 of 2006 provides that a person guilty of an offence under this Section is liable upon conviction to imprisonment for a term which shall not be less than 10 years but which may be enhanced to imprisonment for life.
11. When sentencing the appellant, the trial Magistrate noted his mitigation that he had children who depended on him but the trial Magistrate found that the sentence provided is 10 years. The sentence is lawful save that the trial Magistrate needed to indicate whether the granty & circumstances of the offence made him impose the sentence on that it was a mandatory sentence.
12. Having not said that, this court finds that he didn't exercise discretion to enhance or decreased/reduce the minimum provided sentence and that is unconstitutional as the appellant needed his mitigation to be factored in his sentence.
13. This court therefore substitutes sentence of 10 years to 7 years from date sentenced i.e. July 30, 2021.
14. Right of Appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 28TH DAY OF FEBRUARY 2023.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Otolo - Court Assistant

Mr. Okemwa for Respondent

Appellant - Present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

