



REPUBLIC OF KENYA



KENYA LAW
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**Yego v Republic (Criminal Appeal E065 of 2021)
[2023] KEHC 2849 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E065 OF 2021
RN NYAKUNDI, J
MARCH 31, 2023**

BETWEEN

COSMAS KIPNG'ETICH YEGO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Mr. Mugun for the State

Cosmas Kingetich Yego & Co. Advocates

- 1 The Appellant was convicted with the offence of rape contrary to section 10 of the [Sexual Offences Act, 2006](#) and sentenced to 10 years imprisonment on September 17, 2021.
- 2 The particulars of the charge were that on the 15th September at [particulars withheld] Location Moiben Sub County within Uasin Gishu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of CD a female adult without her consent.
- 3 The trial court found the Appellant guilty as charged and convicted him and sentenced him to 10 years imprisonment.
- 4 The Appellant has now appealed to this court on the following grounds of appeal;
 - i. That the court may consider the Judiciary sentencing policy guidelines 2016 and establish the mitigating circumstances that would lessen the custodial sentence.
 - ii. That the appellant pleaded guilty to the offence.
 - iii. That the appellant is a young man and prays to be re-in constituted in the society to serve as a role model



ANALYSIS AND DETERMINATION

5 I have considered the Appellant’s submissions as well as those of the learned counsel for the Respondent.

6 In the present case, the appellant was charged with the offence of rape, the statutory definition of rape is in section 3 (1) of the *Sexual Offences Act*

(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 genital organs;
- (b) The other person does not consent to the penetration; or
- (c) The consent is obtained by force or by means of threats or intimidation of any kind.'

7 The main ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent in the case of *Republic vs Oyier [1985] KLR 353* the Court of Appeal held that

1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.'

8 I agree with the submission of the learned counsel for the respondent. The starting point would be Section 348 of the Criminal Procedure Code which states:

'No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.'

9 The appellant was presented to court for plea taking on September 17, 2021 and when the charge was read to him in Kiswahili, he responded that it was true. He admitted to the facts when they were read to him later. He was thus convicted on his own plea of guilty and sentenced to imprisonment for a term of 10 years.

10 The case of *Nilsson v Republic* set out the principles upon which the court can interfere sentence of the trial court. It was stated as follows:

'Before an appeal against the sentence can succeed, this court must be satisfied that there exist to a sufficient extent circumstances entitling it to vary the order of the court below. These are stated in *Ogalo s/o Owuora V R (1954) 21 EACA 270* a decision upon which I understood both counsels to rely, in the following words:'



- 11 The principle as upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if members of the court had had been trying the appellant they might have passed somewhat different sentence and will not ordinarily interfere with the discretion exercised by the trial judge unless, as was said in *James v R (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 add a third criterion, namely that the sentence is manifestly excessive in a view of the circumstances of the case'
- 12 The High court in the case of *Johnson Kobia M'Impwi v Director of Public Prosecution [2020] eKLR* Stated as follows:
- 13 Review of earlier decision by the court in a criminal revision should be weighed against the reasons advanced and the law. In the criminal jurisdiction, discovery of new and important matter or evidence is a basis for review. I should also think that review on account of some mistake or error apparent on the face of the record is also potent ground. Any other sufficient reason should warrant a review. For instance, the gravity of the matters complained of, say, infringement of fundamental rights and freedom should form sufficient reason to review the earlier order of the court.
- 14 Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.
- 15 In the case of *Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003* (Eldoret), the Court of Appeal stated as follows; '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 short of those the sentence was so harsh and excessive that an error in principle must be inferred'
- 16 Similarly, in the case *Wanjema vs. Republic (1971) E.A. 493* the court stated as follows 'An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.'
- 17 The reading of the record recognizes clearly the reasons for the verdict imposed by the trial court with regard to the individual sentence against the appellant. The judicial discretion to just retribution was observed by Professor Nicholas Cowday on aspect of sentencing (Speech delivered at legal studies Association 2007 conference 23 March 2007 Sydney Page 17' The modern historical objective system is to make the punishment fit the crime and the criminal is not possible for the relevant sentencing consideration to be to be identified accurately and comprehensively in advance of the offending (as parliament would have to do in order to be able to fix just sentences in legislation). There must be left scope for discretion to be exercised in a judicial fashion (and not arbitrary or capriciously). The alternative is not justice. This is the conceptualization of the principles in *R -vs- Raddich (19 54) NZLR 86* at page 87 a New Zealand case that has influenced Australian sentencing jurisprudence deterrence was described as: 'one of the main purposes of punishment is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield to them. They will meet with severe punishment in all civilized countries all ages. That has been the main purpose of punishment and it still continues so'
- 18 This case law is in line with fundamental purpose of sentencing is to contribute along with crime prevention initiatives, to respect for the law and the maintenance of a just, peace, and safe society by imposing just sanctions that have one or more of the following objectives



- a. To denounce unlawful conduct
 - b. To deter the offender and other persons from committing offences
 - c. To separate offenders from society : where necessary
 - d. To assist in rehabilitating offenders
 - e. To provide reparation for harm done to victims or to the community: and
 - f. To promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community
- 19 The impugned sentence weighed against the above principles is apparently within the law and there are no reasonable or compelling circumstances to interfere with the decision of the trial court. Consequently, the Appeal on conviction and sentence fails rendering the dismissal of the entire Appeal.

DATED AND SIGNED AT ELDORET THIS 31ST DAY OF MARCH, 2023

.....
R. NYAKUNDI

JUDGE

In the Presence of

Mr. Mugun for the State

Appellant Present

