



**Wangila v Republic (Criminal Appeal E062 of 2022)  
[2023] KEHC 3640 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E062 OF 2022  
JRA WANANDA, J  
APRIL 28, 2023**

**BETWEEN**

**ANTHONY WEKESA WANGILA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This Appeal only seeks reduction of sentence. The accused was charged with the offence of rape contrary to Section 3(1)(a) of the *Sexual Offences Act*.
2. The particulars were that on the night of October 7, 2017, at [Particulars Withheld] Market in Kimilili District within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of the complainant without her consent.
3. The Appellant pleaded not guilty to the charge and the matter proceeded to trial. The prosecution called 5 witnesses. On his part, the Appellant did not call any witness but gave sworn evidence. He admitted that indeed he had sex with the complainant in his house on the night alleged but insisted that the action was by mutual consent and that there was no force or threat involved.
4. At the end of the trial, the Appellant was found guilty, convicted and on June 10, 2022, was sentenced to six (6) years imprisonment.
5. The grounds relied on in the Petition of Appeal filed on June 27, 2022 are that the Appellant is remorseful, that he is a person living with disability after a road accident which left him with a dislocation on the back, that he is the sole breadwinner of an extended family who entirely depend on him for substance, that he prays for a non-custodial sentence and that such non-custodial sentence will help him to repair the sore relationship that was created by the offence committed.
6. The Appeal has been opposed by the State.



## Submissions

7. The Appeal was canvassed by way of written Submissions. The Appellant filed his on November 30, 2022 while the Respondent, through the Learned State Counsel Ms Grace Mukangu, filed its Submissions on November 1, 2023.
8. In his Submissions, the Appellant basically reiterated his remorsefulness and his family obligations as the sole bread-winner. He also added that he was a first offender.
9. The Respondent, on its part, argues that the Appeal does not meet the threshold that would permit this Court to interfere with the sentence. On this point, Counsel has quoted several decisions. The first decision is the one from the Constitutional Court of South Africa delivered in *S v Malgas* 2001 (1) SACR 469 (SCA), in which the Court stated as follows:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court ..... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate.”

10. Other decisions quoted by Counsel and which reiterate the limitations on the powers of an appellate Court to interfere with a sentence imposed by the trial Court were the Supreme Court of South Africa’s decision in *Mokela v The State* (135/11) [2011] ZASCA 166, the decision in *Ogolla s/o Owuor v Republic* [1954] EACA 270 and the decisions of the Kenyan Court of Appeal in *Shadrack Kipkoech Kogo v R*, Eldoret Criminal Appeal No. 253 of 2003 and *Bernard Kimani Gacheru v Republic* [2002] eKLR.
11. The Respondent also submits that since the Appellant was convicted under Section 3(1) of the *Sexual Offences Act* which provides for a mandatory minimum prison sentence of ten years, the sentence of 6 years imprisonment imposed was reasonable and legal, that it cannot be said to be manifestly excessive or given on account of some immaterial consideration and that the trial Court cannot also be said to have overlooked some material factor or acted on a wrong principle while granting the sentence.

## Determination\*

12. The one issue that arises for determination in this Appeal is whether the sentence of 6 years imprisonment imposed against the Appellant was harsh or manifestly excessive.
13. The role of the first appellate Court was set out in the case of *Okeno v Republic* [1972] EA 32 as follows;

“It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses...”



14. As already observed above, in this case the Appellant is not challenging the conviction but only seeks reduction of the sentence.
15. In determining whether to interfere with the sentence imposed by the trial Court, I stand guided by the Court of Appeal decision in *Shadrack Kipkoech Kogo v R* Eldoret Criminal Appeal No. 253 of 2003, where the Court stated as follows:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court take into account an irrelevant factor that the wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle and must be interfered with (See also *Sayaka v R* [1989] KLR 306).”
16. Section 3 of the *Sexual Offences Act* defines the offence of rape and provides for the sentence in the following terms:

“(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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this *Act*.

(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.”
17. It is clear therefore that the offence of rape attracts a sentence of between 10 years imprisonment and life sentence. The Appellant only got 6 years imprisonment.
18. I have considered the submissions by both sides. The appellant was convicted after a full trial having pleaded not guilty. A pre-sentencing Probation Report was submitted. The report confirms that the appellant was a first offender and was remorseful. On its part, the Court recorded that it had taken the Report into consideration.
19. It is my finding that given that the Appellant was a first offender and that he was remorseful, the sentence imposed was reasonable. It was also just, given the circumstances of the offence. Rape is a serious offence. The effects of the offence on the complainant are long lasting and the psychological effect is even worse. I see nothing on the record that would warrant me to interfere with the sentence. The proceedings and the judgment of the court does not reveal any irregularity, impropriety or mistake to warrant revision by this court.
20. The grounds relied on by the applicant are mitigating factors normally given after conviction but before the court passes sentence. The applicant in this case was accorded a chance to mitigate before passing sentence.



21. For the foregoing reasons, I find no merit in this Appeal. In the premises, the appeal fails and is dismissed in its entirety.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28<sup>TH</sup> DAY OF APRIL 2023**

.....

**JOHN R. ANURO WANANDA**

**JUDGE**

