



REPUBLIC OF KENYA



KENYA LAW
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**Akello v Republic (Criminal Appeal E048 of 2022)
[2023] KEHC 19200 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E048 OF 2022
RE ABURILI, J
JUNE 27, 2023**

BETWEEN

PHILIP OMONDI AKELLO APPLICANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Winam Senior Principal Magistrate's Court Sexual Offences Case No.36 of 2020 delivered on 5th October 2022 by Hon. F. Rashid (PM))

JUDGMENT

1. The appellant is Phillip Omondi Akello. He was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) and sentenced to serve ten (10) years imprisonment.
2. Aggrieved by the conviction and sentence delivered on October 5, 2022, he filed this appeal on October 18, 2022. The appeal was admitted to hearing on December 21, 2022 and on March 29, 2023, the parties agreed to have this appeal canvassed by way of written submissions and on May 17, 2023, this court set the date for delivery of judgment.
3. I have perused the court record and seen the Respondent's submissions filed on May 4, 2023. On the part of the Appellant represented by Mr Ayayo Advocate, what is headed as Appellant's submissions filed on January 12, 2023 is nothing but a reproduction of the Grounds of Appeal. Grounds of Appeal cannot be and have never been submissions. Grounds of appeal are pleadings and on appeal, an appellant must argue out his or her case to demonstrate, based on the grounds of appeal, why the judgment, conviction and sentence imposed cannot stand. There are absolutely no arguments in support of the grounds of appeal as reproduced in the so-called written submissions of the appellant.



4. Grounds of Appeal are pleadings on appeal. To prosecute an appeal, an appellant has to either argue the appeal orally or file written submissions and not to leave it to court to figure out how to determine the merits of the grounds of appeal, or for the Respondent to prosecute the appeal for him.
5. Unlike at the trial stage where the burden of proof lies on the prosecution to prove its case against the accused person beyond reasonable doubt, once the trial court finds that the prosecution had discharged that burden and proceeds to find the accused guilty of the offence charged and sentences him/her as was the case herein, the prosecution no longer bears the burden of proving anything on appeal.
6. At the trial stage, submissions whether oral or written are not a must. Parties can elect not to file any submissions and simply rely on the evidence adduced before the trial court.
7. On appeal, unless the respondent has filed a cross appeal, they have no case to prosecute and or prove on appeal.
8. On appeal, therefore, the burden lies on the Appellant to demonstrate that his conviction was erroneous and that the sentence imposed was unlawful, or harsh and excessive.
9. In this case, the Appellant who is represented by an advocate has not attempted to prosecute any of the grounds of appeal contained in his petition of appeal filed on October 18, 2022.
10. In my view, the Appellant's counsel had nothing at all to present before this court to support the petition containing grounds of appeal, not even on sentence as the Appellant was not given mandatory minimum sentence as contemplated in Section 8(3) of *Sexual Offences Act* which is twenty years imprisonment.
11. For the above reasons, I find this appeal both against conviction and sentence fatally incompetent and devoid of any substance. The same is hereby dismissed in its entirety.
12. However, on sentence, I would consider the application of section 333(2) of the *Criminal Procedure Code* on the period that he spent in custody during the trial prior to being sentenced. The Appellant was arrested on April 25, 2020 and apprehended to court on April 27, 2020 and on May 11, 2020 he was released on bond pending trial. I shall therefore invoke the provisions of Section 333(2) of the Criminal Procedure Code and order that the ten (10) years imprisonment imposed on the Appellant shall take into account the number of days that the Appellant spent in custody from April 25, 2020 date of arrest to May 11, 2020 when he was released on bond.
13. This file is closed.
14. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE, 2023

R. E. ABURILI

JUDGE

