



**Ali v Republic (Criminal Appeal E065 of 2022)
[2023] KEHC 19220 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E065 OF 2022
JN ONYIEGO, J
JUNE 26, 2023**

BETWEEN

ABDULLAHI ADAN ALI APPELLANT

AND

REPUBLIC RESPONDENT

*(From Original Conviction and Sentence of P. W. Wasike in Criminal
Case No. E031 of 2022 of The Principal Magistrate's Court at Mandera)*

JUDGMENT

1. The appellant was arraigned before Mandera Senior Resident's Magistrate's Court on the August 27, 2021 charged with the offence of attempted defilement Contrary to Section 9 (1) (2) of the [Sexual Offences Act](#) No 3 of 2006. Particulars were that on the August 26, 2021 in Mandera East Sub-county within Mandera County, he intentionally and willfully attempted to cause his penis to penetrate the vagina of AZH a child aged 5 years.
2. After returning a plea of not guilty, the matter proceeded to full trial. He was finally convicted on August 2, 2022 and sentenced to 10 years' imprisonment on August 2, 2022.
3. Dissatisfied with both the conviction and sentence, he filed a memorandum of appeal on December 1, 2022.
4. However, the appellant filed what is referred to as mitigation on May 31, 2023 in which he abandoned the appeal challenging conviction. He therefore proceeded to argue his appeal on sentence alone. He relied on two grounds as follows; the court did not consider his mitigation; the court did not take into account the period he spent in remand custody and that the sentence was excessive.
5. In response, Mr Kihara for the state submitted that considering the age of the victim, the sentence of 10 years being the minimum sentence for such an offence was lenient and not excessive.



6. I have considered the grounds of appeal mainly challenging the sentence imposed on grounds that it is excessive and that the period spent in remand custody was not taken into account. I have also considered submissions by both counsel.
7. It is trite that sentence is a matter of discretion by the trial court and that an appellate court can only interfere if the same is excessive; the trial court applied wrong legal principles or that it considered irrelevant factors - see *Shadrack Kipkoach Kogo –vs- Republic Eldoret Criminal Appeal No 253 of 2003* Court of Appeal.
8. In the circumstances of this case, the penalty provided for the offence of this nature is not less than 10 years. Although the court had the discretion to mete out even a lesser penalty, the circumstances of the offence where the victim was 5 years will dictate upholding of the 10 years’ imprisonment. See *Chigongo Dzuye -vs- Republic Cr Appeal No 31 of 2022* Court of Appeal Malindi where the court held that trial courts are at liberty to impose minimum sentences depending on the circumstances of each case. In this case the Court of Appeal reduced life sentence to 30 years.
9. In view of the holding in this case, I do not find the sentence of 10 years to be excessive as the circumstances are such that sufficient punishment was necessary.
10. As regards the issue of computation of the period spent in custody, Section 333(2) of the *Criminal Procedure Code* is clear. Accused was charged on August 27, 2021, and then released on bail on January 21, 2022. He then absconded until April 7, 2022 when he was re-arrested and kept in remand custody till August 2, 2022 when he was sentenced. That translates to 4 months and 6 days plus 3 months and 25 days making a total of 8 months to be taken into account when computing sentence. To that extent the appeal on sentence, partly succeeds and partly fails. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 26TH DAY OF JUNE, 2023.

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J.N. ONYIEGO

JUDGE

