



REPUBLIC OF KENYA



**Mwaluma v Republic (Criminal Appeal E054 of 2022)
[2023] KEHC 22807 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E054 OF 2022
GMA DULU, J
SEPTEMBER 28, 2023**

BETWEEN

JIMMY MWACHANYA MWALUMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 33 of 2019 at Wundanyi delivered on 14th January 2020 by Hon. E.M.Nyakundi (RM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006, the particulars of which being that on September 28, 2019 at 11a.m in Mbale Sub-Location of Taita Taveta County intentionally touched the buttocks of Beatrice Wawuda a child aged 6 years with his fingers.
2. He denied the charge, and after a full trial he was convicted of the offence and sentenced to ten (10) years in prison.
3. He has now come to this court on appeal on sentence only and relied on the following amended grounds of appeal:-
 1. The sentence imposed was harsh and excessive since it was applied without considering the appellant's mitigation or unique facts and circumstances of the case.
 2. The appellant was a first offender at the time of conviction and sentence.
 3. The court has discretion on sentencing following the decision of the Court of Appeal in *Mwangi v Republic* (Criminal Appeal 84 of 2015) 0221 KECA 1106 (KLR) (7th October 2022).



4. The court be pleased to find that he had never been married prior to his conviction and sentence and as such would wish to get a chance to have a family of his own thus enabling him to enjoy right to human dignity as per Article 28 of our Constitution.
5. The court acknowledge that while in prison he had taken full advantage of the rehabilitative programmes offered in the correctional facility as is evident in the attached documents together with a prison report.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
5. This is an appeal on sentence only. The appellant being a layman however, I have taken the liberty to also consider the evidence on which he was convicted.
6. Having perused and considered the evidence on record wherein the prosecution called four (4) witnesses, and the appellant elected to keep quiet in his defence, I find that the prosecution proved all the elements of the offence beyond reasonable doubt.
7. With regard to sentence, it is an exercise of discretionary power by the trial court, provided the sentence is within the parameters allowed by law.
8. With regard to determination of the sentence of 10 years imprisonment herein, indeed the prosecution stated that the appellant had no previous conviction. When the appellant was asked to say something in mitigation he said “I have nothing to mitigate about”.
9. The trial Magistrate took into account the above factors and also that the minimum sentence was 10 years imprisonment. The Magistrate also stated that the appellant was not remorseful.
10. The appellant has now come to this court on appeal stating that the Magistrate did not take into account his mitigation, which is not true. He also say that he has reformed in prison and wants to start a family, which information was not before the Magistrate for consideration.
11. In my view, the trial court did not err in sentencing the appellant to 10 years imprisonment. The reasons given by him on appeal herein in asking for a review of sentence are also not sufficient for reduction of sentence.
12. I thus dismiss the appeal of the appellant on sentence. Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2023 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Nusura – Court Assistant

Appellant

Mr. Sirima for State

