



**Mkala v Republic (Criminal Appeal E053 of 2022)  
[2023] KEHC 22720 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22720 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E053 OF 2022  
GMA DULU, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**MWANDAWA MKALA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the decision in Sexual Offence Case No. 36 of 2019 at Wundanyi  
delivered on 23rd October 2020 by Hon. E.M.Nyakundi (RM))*

**JUDGMENT**

1. The appellant was convicted on his own plea of guilty to rape contrary to Section 3(1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006, the particulars of which being that on 19<sup>th</sup> October 2019 at 0200hours in Taita Taveta County intentionally and unlawfully caused his penis to penetrate the vagina of EM a Taita adult aged 70 years without her consent.
2. Consequent upon the conviction, the appellant was sentenced to thirty (30) years imprisonment.
3. The appellant has now come to this court on appeal on sentence only stating that he is remorseful and pleaded guilty to the charge.
4. The appeal was canvassed through written submissions, and I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
5. I note that in the written submissions, the Director of Public Prosecutions has contended that the plea of guilty of the appellant was not unequivocal and relied on a number of court cases. The Director of Public Prosecutions has asked for quashing of the conviction and for a retrial.



6. With all due respect, I have perused the proceedings. The appellant pleaded guilty after the complainant PW1 had tendered all her evidence and was cross-examined by the appellant. That is when the appellant changed his plea of guilty.
7. The prosecutor then stated that the evidence to support the charge was what PW1 had already stated. In my view, that evidence was not something new as the appellant had already heard the evidence of PW1 before changing his plea to guilty. Thus in my view, though the trial court did not ask the appellant to confirm the facts, that did not make the plea of the appellant equivocal.
8. Again, the fact that the appellant stated that the complainant was his friend or even lover, could not change the plea to not guilty, as each sexual advance has to be grounded on its own consent, even if it is between lovers.
9. I thus respectfully differ with the Director of Public Prosecution, and I uphold the conviction of the appellant.
10. With regard to sentence, I note that under Section 3 of the *Sexual Offences Act* the minimum sentence is a minimum of ten (10) years imprisonment but which can be enhanced to life imprisonment.
11. In my view, since the appellant pleaded guilty, he should have been given an opportunity to mitigate before he was sentenced. In the present case, the record does not show that the accused person was given an opportunity to mitigate. Thus in my view, the sentence imposed ended up being harsh and excessive. I will thus reduce it to twelve (12) years imprisonment.
12. Consequently and for the above reasons, I allow the appeal on sentence. I set aside the sentence of 30 years imprisonment. Instead, I order that the appellant will serve twelve (12) years imprisonment from the date he was sentenced by the trial court. Right of appeal explained.

**DATED, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023 IN OPEN COURT AT VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Nusura – Court Assistant

Appellant

Mr. Sirima for State

