



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. E 003 OF 2021**

**TOO.....APPELLANT**

**VERSUS**

**REPUPLIC..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case NO.E002 of 2021 of the Senior Resident Magistrate's Court at Mbita by Hon. Nicodemus N. Moseti–Senior Resident Magistrate)*

**JUDGMENT**

1. TOO, the appellant herein, was convicted after pleading guilty to the offence of rape contrary to section 3 (1)( a ) ( b ) (3) [sic] of the Sexual Offences Act No. 3 Of 2006 and the offence deliberate transmission of HIV contrary to section 26(A) ] of the Sexual Offences Act No. 3 Of 2006.

2. The particulars of the offence are that on 20<sup>th</sup> January within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of RA, without her consent. On the same day time and place he infected the said RA with HIV.

3. The appellant was sentenced to ten years' imprisonment in count one and fifteen years' imprisonment in count two. He was aggrieved and filed this appeal against both conviction and sentence.

4. The appellant raised grounds of appeal as follows:

a) That the plea of guilty entered by the trial magistrate was equivocal for the appellant was lured and intimidated/tricked by the arresting officer to plead guilty for forgiveness.

b) That the prosecution took advantage of his naivety in law and court procedures hence the whole trial and decision of the trial magistrate was null and void.

c) That the prosecution failed in disclosing to the appellant the relevant evidence at their hand which could have enabled him to change the plea if he had gone through thus he was not accorded fair trial as envisaged under article 50(2) (j) of the constitution.

d) That the trial magistrate erred in law and facts by basing his conviction on the appellant's plea of guilt without taking into consideration that there was no sufficient evidence to support the charges.

e) That the said sentence is harsh and excessive as far as the provision of article 50(2) (p) of the constitution is concerned.

5. The appeal was opposed by the state through Mr. Ochengo, learned counsel.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

7. The charge was erroneously drafted. It ought to have read:

**...contrary to section 3(3) of the Sexual Offences Act.**

From my perusal of the record, I find that the appellant was not prejudiced in any way. He fully participated in the proceedings. The error is therefore curable under section 382 of the Criminal Procedure Code.

8. Article 50 (2) (j) of the Constitution provides as follows:

**Every accused person has the right to a fair trial, which includes the right—**

9. Since the appellant pleaded guilty to the offence, then this provision did not apply in his case.

10. The appellant contends that he was misdirected by the arresting officer to plead guilty. He did not complain to the court. There is no way therefore the trial court could have known of the allegation. Even if we assume the same to be true, the facts were read four days later when he had no link with the arresting officer. This ground has no basis.

11. The facts that were read did support the charge in count two. The appellant ought not to have been convicted of the offence therein. I accordingly quash the conviction in count two and set aside the sentence.

12. Section 348 of the Criminal Procedure Code provides as follows:

**No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.**

I will therefore endeavour to establish the legality of sentence bearing in mind that an appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of **Nilson vs. Republic [1970] E.A. 599**, as follows:

**The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES Vs. REX (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. SHERSHEWSITY (1912) C.CA 28 T.LR 364.**

13. Section 3 (3) of the Sexual Offences Act provides as follows:

**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.**

14. The appellant was sentenced to serve the minimum sentenced prescribed. I therefore have no basis to interfere with the sentence. The appeal in respect of count one is therefore dismissed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**