



REPUBLIC OF KENYA



**KENYA LAW**  
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**Adero v Republic (Criminal Appeal 63 of 2017)  
[2019] KEHC 12496 (KLR) (18 June 2019) (Judgment)**

Neutral citation: [2019] KEHC 12496 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL 63 OF 2017  
HPG WAWERU, J  
JUNE 18, 2019**

**BETWEEN**

**RASHID ADERO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant Rashid Adero was convicted after trial of the alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. It was alleged in the particulars of the charge that on 13/04/2016 in Samburu County in the Republic of Kenya, he intentionally and unlawfully committed an indecent act with a child called SL by touching her buttocks, breasts and vagina. He was acquitted of the main charge of defilement contrary to section 8(1) & (2) of the Act. The reason for his acquittal was that the age of the complainant was not proved to the required standard. On 14/02/2017 the Appellant was sentenced to ten (10) years imprisonment.
2. The Appellant was also convicted in count 2 of resisting lawful arrest contrary to section 253(b) of the *Penal Code*. For this offence he was sentenced to serve one year imprisonment, concurrently with the other sentence.
3. The Appellant has appealed only against the sentence for the alternative charge. He said he was satisfied with the conviction. In his “plea of mitigation” the Appellant has, in effect, submitted that the sentence was manifestly harsh and excessive in the circumstances of the case. The learned prosecution counsel for the Respondent has opposed the appeal. He pointed out that the sentence was not only lawful, but also the minimum prescribed by law.



4. Section 11(1) of the *Sexual Offences Act* states as follows -

“ Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

The use of the term “is liable to” and not “shall be sentenced to” is of course an indication that the trial court had the discretion to consider a non-custodial sentence. But once it decided that the offender deserved a custodial sentence, then it must sentence him to a term of imprisonment of not less than ten years. There is nothing in the record of the trial court showing that the learned trial magistrate was aware of this discretion.

5. Secondly, the Supreme Court of Kenya in the case of Francis Karioko Muruatetu & Another -vs- Republic, Petition No 16 of 2015 has since held that the mandatory sentence of death prescribed for the offence of murder in section 204 of the *Penal Code* was unconstitutional because, inter alia, that mandatory nature of the legislation deprived the courts of their legitimate discretion in sentencing.
6. By parity of reasoning, the Court of Appeal at Eldoret very recently extended that holding of the Supreme Court to the mandatory sentences prescribed in the *Sexual Offences Act*. This was in the case of Evans Wanjala Wanyonyi -vs- Republic, Criminal Appeal No 312 of 2018.
7. That being the state of the law now, and this court having the same powers as the trial court in matters of sentencing, as the first appellate court, I must decide what sentence would have served the ends of justice in this case.
8. I have considered the circumstances in which the offence was committed, and I have no doubt in my mind that he deserved a custodial sentence. He was an uncle to the complainant whose trust he betrayed, and took her out into the night to defile her. He escaped the main charge of defilement only because the age of the complainant (who was about 9 years old at the time of the offence) could not be proved beyond reasonable doubt. Had her age been proved, the Appellant would have been convicted of defilement of a child aged below 11 years, and would have appealed against a sentence of life imprisonment!
9. That notwithstanding, I have considered that the Appellant was a first offender who sought leniency. He has not appealed against the conviction, and I consider that to be a sign of remorse. However, in the particular circumstances of this case I consider that the sentence of 10 years imprisonment was richly deserved, and I decline to interfere with it.
10. The appeal has no merit and is hereby dismissed. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 18<sup>th</sup> DAY OF JUNE 2019**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 20<sup>th</sup> DAY OF JUNE 2019**

