



**Wainaina v Republic (Criminal Appeal 96 of 2023)  
[2025] KEHC 4817 (KLR) (Crim) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4817 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL 96 OF 2023**

**KW KIARIE, J**

**APRIL 24, 2025**

**BETWEEN**

**SAMUEL GTHINJI WAINAINA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Case No. E064 of 2022 of the Senior Principal Magistrate's Court at Engineer by Hon. H.O. Barasa–Senior Principal Magistrate)*

**JUDGMENT**

1. Samuel Githinji Wainaina, the appellant in this case, was convicted in count one of the offences of sexual assault contrary to section 5(1) read with section 5(2) of the *Sexual Offences Act* No. 3 of 2006. In the second count, he was convicted of the offence of sexual assault contrary to section 5 (1) as read with section 5 (2) of the *Sexual Offences Act*.
2. The particulars of the offence in count one were that on diverse dates in June 2022, in Nyandarua Central Sub-County within Nyandarua County, he unlawfully used his fingers to penetrate the vagina of JWM.
3. In count two, the particulars of the offence in count one were that on diverse dates between May and June 2022, in Nyandarua Central Sub-County within Nyandarua County, he unlawfully used his fingers to penetrate the vagina of JWM.
4. The appellant was sentenced to serve ten years' imprisonment in each count. The sentences were ordered to run consecutively. He was aggrieved and has appealed against the sentence. He was in person and raised grounds of appeal as follows:



- a. The learned trial magistrate erred in law and fact by ordering the 10 years imprisonment sentences in each count to run concurrently, thus violating Article 25 (a) (c) 27 and Article 50(2) (p) section 37 of the Penal Code, New Judiciary sentencing Guidelines under paragraph 2.3.34 2023.
  - b. The learned trial magistrate erred in law and fact by awarding a sentence that was excessive and harsh in the circumstances of the offence.
5. The state opposed the appeal through M/S. Odero Vena learned counsel because it lacked merit.
  6. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs the Republic [1972] EA 32.
  7. The prosecution' splitting of the two counts as they did was erroneous. They ought to have charged him with one count. This was prejudicial to the appellant. I quash the conviction and set aside the sentence in count two.
  8. The appellant has contended that the sentence was excessive and harsh in the circumstances of the offence. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of Nillson 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 Shershewity (1912) C.CA 28 T.LR 364.

9. Section 5 (2) of the Sexual Offences Act provides:

A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years, but which may be enhanced to imprisonment for life.
10. The sentence is the prescribed one, and I have no compelling reasons to interfere with it.
11. The upshot of the foregoing analysis is that the appeal is successful to the extent I have indicated hereinabove.

**DELIVERED AND SIGNED AT NYANDARUA THIS 24<sup>TH</sup> DAY OF APRIL 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

