



REPUBLIC OF KENYA



**Wali v Republic (Criminal Appeal E048 of 2021)
[2024] KEHC 1650 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E048 OF 2021
GMA DULU, J
FEBRUARY 22, 2024**

BETWEEN

PETRO JUMA WALI APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 24 of 2019 at Wundanyi Law Courts delivered on 2nd February 2021 by Hon. E. M. Nyakundi (RM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with attempted defilement contrary to Section 9(1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on 30th July 2020 around 12:00hours at Mwatate Sub County of Taita Taveta County intentionally attempted to cause his penis to penetrate the vagina of R.M.M a child aged 10 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date, time and place, intentionally touched the breast of RMM a child aged 10 years with his penis.
3. He denied both the charges. After a full trial, he was convicted of the alternative charge of committing an indecent act with a child and imprisoned for ten (10) years.
4. Dissatisfied with the sentence, the appellant has come to this court on appeal, and relied on the following grounds:-
 1. That the learned trial Magistrate erred when she sentenced him to serve ten (10) years imprisonment without proper finding that he was a first offender.



2. The learned trial Magistrate erred when she sentenced him to serve ten (10) years imprisonment without considering that he is old besides that he is a family man with a spouse and sibling whom he provides with food, shelter, clothing, education and medical attention among others.
3. That being a major source of care, discipline and parental love to his siblings makes the situation terrible with him being behind bars.
4. That he is quite remorseful for the foolish action since he did the act under drugs and alcoholic influence since he was out of mind and sense.
5. That this court be pleased to reduce the sentence which was imposed on him.
5. 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.
6. This is a first appellate court, and ordinarily, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32. The appeal herein is however, on sentence only.
7. Having said so, from all the evidence on record, the offence occurred on 30th June 2020, but the charge reads 30th July 2020. I however find no prejudice caused to the appellant, due to the mere variance of dates.
8. On sentence, he has relied on Section 329 of the *Criminal Procedure Code* (Cap.75) and Section 333(2) of the same Act, and the case of *Geoffrey Ngotbo Mutiso v Republic* Criminal Appeal No. 17 of 2008, as well as the case of *Ahmed Abolgathi Mohamed & Another v Republic* [2018] eKLR, on the duty of a sentencing court to consider all the mitigating factors, and take into account the period spent in remand custody in sentencing.
9. From the record, I note that the appellant was treated as a first offender. He also stated in his mitigation before the trial court that he had three (3) grand children and is the one who supports (them) to attend school, and that he was the breadwinner.
10. When sentencing him, the trial court stated as follows:-

“The accused in his mitigation said that he is the bread winner. The said accused is a first offender and has not been involved in any past conduct. The said accused is hereby sentenced to serve (10) years in prison. He has a right of appeal.”
11. It cannot thus be said that the trial court was not due to the mitigation of the appellant. In my view, taking into account the statutory definition of the offence of committing an indecent act on a child, and the statutory sentence provided thereto, the trial Magistrate was correct in sentencing the appellant to 10 years imprisonment. However, in view of the provisions of Section 333(2) of the *Criminal Procedure Code* (Cap.75), the prison sentence should have run from 10th July 2020 when the appellant was arrested, as he was in custody throughout trial.
12. I thus uphold the prison sentence of ten (10) years, but order that the prison sentence will run from 10th July 2020 when the appellant was arrested.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF FEBRUARY 2024 IN OPEN COURT AT VOI.

GEORGE DULU



JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State

