



REPUBLIC OF KENYA



**Masanja v Republic (Criminal Appeal E013 of 2023)  
[2024] KEHC 2321 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E013 OF 2023  
RPV WENDOH, J  
MARCH 1, 2024**

**BETWEEN**

**IBRAHIM MASANJA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. L. N. Mesa – Principal Magistrate in Senior Principal Magistrate’s Court at Kehancha S O No. 67 of 2020 delivered on 26/1/2021)*

**JUDGMENT**

1. Ibrahim Masanja pleaded guilty and was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the [Sexual Offences Act](#).
2. He is alleged to have intentionally caused his penis to penetrate the vagina of E. B. M, a child aged 17 years.
3. In the alternative, he faced a charge of committing an indecent act with a child, in that he touched the complainants’ genitalia with his penis.
4. Upon conviction the appellant was sentenced to serve 15 years imprisonment.
5. Although the appellant had appealed against the whole judgment, in his submissions filed in court on 2/11/2023, he clarified that he was only appealing against sentence but not conviction.
6. In his submissions, the appellant argued that though he committed the offence, because he had been in a relationship with the complainant for five months, yet she was about 18 years old; that the court should invoke Section 333(2) of the [Criminal Procedure Code](#), and 329 of the [Criminal Procedure Code](#) in sentencing; that due to the mandatory nature of the sentence, his rights under Article 50 (2) (j) were violated. Section 211 and 321 of the [Criminal Procedure Code](#) because his mitigation was not considered. He urged that he has four children who wholly depend on him as his wife is deceased, that



he is a first offender. He prayed that the sentence be set aside and he be set at liberty or that the sentences be reduced or that because the defilement was by consent, the conviction be quashed.

7. The prosecution counsel, Mr. Kaino, filed submissions and submitted on the appeal against both conviction and sentence. He urged that Section 333 (2) of the *Criminal Procedure Code* was not invoked and that the sentence of 15 years imprisonment was lawful. He urged the court to order a retrial if it found that the plea was not unequivocal.
8. As observed above, the appeal is against sentence only. The appellant pleaded guilty to an offence of defilement of a child aged 17 years and the sentence falls under Section 8 (4) of the *Sexual Offences Act*. The minimum sentence under the said provision is 15 years imprisonment.
9. The appellant continues to admit the offence save that it was by consent. The complainant being a minor under 18 years old had no capacity to consent to an act of defilement and therefore the plea remains one of guilty.
10. On perusal of the court record, I do note that when sentencing, the court did not indicate that the court had taken into account the period that the appellant had stayed in custody. The appellant was arraigned before the court on 10/9/2020. He was sentenced on 26/1/2021 a period of about 6 months. The said period should have been taken into account when sentencing. See the case of *Ahamad Abolfathi v Republic*.

" The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."

11. It is true that the courts are tending to move away from the mandatory minimum sentences due to the fact that the discretion of the court is taken away by such provisions. The sentence herein is lawful but the appellant pleaded guilty to the offence and did not waste the court's time. The circumstances of the offence were not aggravated and considering the appellant's mitigation, I think the sentence was on the higher side. In the circumstances, I set aside the sentence of 15 years. I take into account the six (6) months spent in custody and hereby sentence the appellant to nine (9) years imprisonment and the sentence will take effect on the date he was arraigned in court on 10/9/2020. The appeal succeeds to that extent.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 1<sup>ST</sup> DAY OF MARCH, 2024.**



**R. WENDOHO**

**JUDGE**

In presence of; -

Ms. Wainaina for the state

Appellant Present

Emma / Phelix –Court Assistant

