



**Onyango v Republic (Criminal Appeal E191 of 2023)  
[2024] KEHC 4355 (KLR) (Appeals) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4355 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
APPEALS  
CRIMINAL APPEAL E191 OF 2023  
LN MUTENDE, J  
APRIL 22, 2024**

**BETWEEN**

**ISAAC OTIENO ONYANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal arising from the original conviction and sentence  
in Sexual Offences Case No. 10 of 2019 at the Chief Magistrates'  
Court Makadara, by Hon. A. Mwangi (PM) on 26th August 2022)*

**JUDGMENT**

1. Isaac Otieno Omollo, the appellant, was jointly charged with another and found guilty of committing the offence of Gang Rape contrary to Section 10 of the *Sexual Offences Act*. particulars of the offence were that : on 24/11/2018 at Dandora phase 1 estate in Njiru District within Nairobi while in association with another, he intentionally and unlawfully caused his penis to penetrate the vagina of L W W a child aged 13 years.
2. He also faced an alternative charge of committing an Indecent Act with a child., the allegations being that he intentionally and unlawfully touched the vagina of the minor without her consent.
3. Upon being taken through full trial, the appellant was found guilty convicted and sentenced to serve 10 years imprisonment for the main charge. In the meantime his co-accused was committed to a mental institution mid trial as he was found not fit to stand trial.
4. Aggrieved, the appellant herein proffered this appeal against sentence on grounds that: the court failed to consider the time spent in custody; and, that the court failed to consider the appellant mitigation as prescribed under the judiciary sentencing guidelines.



5. Briefly, the undisputed facts of the case were that on the 24<sup>th</sup> November 2018, the victim aged 13 years had taken her shoes to her friend and was in the company of the said friend. She went to the toilet and Suleiman was behind her while the appellant was in front. Her friend ran away and she fell down. The appellant covered her mouth and eyes and Suleiman carried her to his bed. They removed her inner wear and Suleiman proceeded to penetrate into her vagina and anus, while the appellant had blocked her mouth.
6. She bit his hand then screamed and some ladies, including PW4 Maureen Magiri who responded to her call of distress opened the door only to find Solomon on top of her while the appellant hid. However, both of them managed to escape but being neighbours she knew them very. The ladies called an ambulance and she was taken to hospital for examination and treatment.  
The anal opening had abrasion on the anal ring and reduced sphincter tone.
7. The police upon receiving the report arrested the appellant and co-accused.
8. Considering what is contended on appeal, the appellant was a first offender such that a maximum sentence should not have been imposed, an argument that is countered by the respondent who urge the sentence imposed of ten (10) years was lenient as the prescribed sentence is fifteen (15) years imprisonment.
9. This appeal is limited to the trial court's sentence. The court can only alter the sentence where the sentence was harsh and excessive or where the court acted on the wrong principles.
10. In the case of *David Njuguna Wairimu vs Republic* [2010] eKLR where the Court of Appeal emphatically stated that:  
  

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
11. Section 10 of the *Sexual Offences Act* provides that:  
  

Any person who commits the offence of rape or defilement under this *Act* in association with another or others or any person who, with common intention, is in the company of another or others who commit the offence of rape, or defilement is guilty of an offence termed as gang rape and is liable upon conviction for a term of not less than fifteen years but which may be enhanced to imprisonment for life.
12. Whether the sentence was lawful and reasonable in the circumstances of the case.
13. The statutory sentence is a minimum of 15 years jail terms but the court has the discretion to enhance it to life imprisonment .



14. In the case of *Shadrack Kipchoge Kogo vs Republic*, Eldoret Criminal Appeal No. 253 of 2003 the court stated that:

“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

15. The presentence report was filed at the trial court , the appellant also gave mitigating factors during sentence hearing stating that he was a first offender and he prayed for leniency.

16. The [Sentencing Policy Guidelines](#) makes it essential for the court to call for and consider a presentence report where the case involves a felony. The accused right to fair trial also extends to elaborate consideration and a balance of mitigation and aggravating circumstances .

17. The trial court noted mitigating factors where the appellant stated that he had no family and was an orphan. But, the court did not consider the period served in remand custody pursuant to Section 333(2) of the [Criminal Procedure Code](#).

18. Considering circumstances of the offence committed, the ten (10) year sentence is not harsh or excessive. Prior to the appellant being sentenced he was in remand custody since 1/1/2019. This period is hereby taken into consideration. To that end, the sentence shall be effective from the date of arrest, the 1<sup>st</sup> day of January, 2019.

19. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 22<sup>ND</sup> DAY OF APRIL, 2024.**

**L. N. MUTENDE**

**JUDGE**

