



**Ng'ang'a v Republic (Criminal Appeal E108 of 2023)  
[2024] KEHC 5818 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5818 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL E108 OF 2023  
CW GITHUA, J  
MAY 22, 2024**

**BETWEEN**

**JOSEPH NGIGE NG'ANG'A ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the sentence of Hon.S. K Nyaga (S.R.M) delivered on the 5th October, 2023 at the Senior Resident Magistrate's Court at Kenol in S.O. Case No. E023 of 2023)*

**JUDGMENT**

1. The Appellant, Joseph Ngige Ng'ang'a was convicted on his own plea of guilty with the offence of rape contrary to Section 3 (1) as read with Section 3(3) of the Sexual Offences Act, No.3 of 2006.
2. The particulars supporting the charge were that on 2<sup>nd</sup> June 2023 at Murang'a south sub-county within Murang'a County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of S.M.K without her consent.
3. Upon conviction, the appellant was sentenced to 10 years imprisonment. He was aggrieved by both his conviction and sentence. He proffered an appeal to this court through a petition of Appeal dated 11<sup>th</sup> of October 2023.
4. In his grounds of appeal styled as a " Memorandum of Appeal", the appellant complained that the learned trial magistrate erred in law and in fact by; sentencing him on an equivocal plea; sentencing him to the minimum mandatory sentence prescribed by the law without considering his mitigation and, failing to consider the time he had spent in lawful custody prior to the date he was sentenced thus violating the provisions of Section 333 (2) of the Criminal Procedure Code.
5. I heard the appeal virtually on 12<sup>th</sup> March 2024 and the appellant, who was present at the Nyeri Prison and was unrepresented, chose to prosecute the appeal by way of oral submissions. In the course of



- his submissions, the appellant admitted having committed the offence as charged and consequently abandoned his appeal on conviction. He thus confined his submissions to his appeal against sentence.
6. In his submissions, he pleaded with the court to revise his sentence on grounds that he had suffered in prison and was now reformed and would never commit an offence in future. He submitted that he was the breadwinner for his family and younger siblings and promised to be of good character if his appeal was successful.
  7. The appeal was opposed by the state through learned prosecution counsel, Ms. Muriu who supported the sentence passed by the trial court. She submitted that the sentence was proper and ought not to be disturbed considering the nature of the offence, the fact that the appellant raped the victim several times and inflicted on her scars that may never heal. She invited me to dismiss the appeal for want of merit.
  8. In response, the appellant submitted that he was a first offender and that he should be given another chance to rebuild his life.
  9. Having considered the appellant's submissions, I find that although he did not expressly say so, he appeared to be arguing that the sentence imposed on him by the trial court was harsh and excessive given that he was a first offender and considering his personal circumstances; that this court should revise the sentence by either reducing it or substituting it with a non- custodial sentence.
  10. It is settled law that sentencing rests with the discretion of the trial court and an appellate court would only interfere with this discretion if it was satisfied that the sentence was illegal in the sense that it was not in accordance with the law or that when sentencing, the trial court acted on wrong legal principles or overlooked some material factors or considered irrelevant ones. An appellate court can also interfere with the sentence if it was convinced that it was harsh and manifestly excessive given the facts and circumstances of the case. See : *Mulwa v Republic (Criminal Appeal 109 of 2022)* [2023] KECA 693 (KLR); *Bernard Kimani Gacheru v Republic [2002]* eKLR;
  11. In this case, the appellant was convicted of the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act*. The penalty prescribed by the law for the offence is a minimum of ten years imprisonment which can be enhanced to life imprisonment.
  12. The trial court's record show that when sentencing the appellant, the trial court only indicated that it had considered the presentence report which inter alia gave elaborate details regarding the circumstances in which the offence was committed, the views of the victim and the character of the appellant. Although the appellant impugned his sentence on grounds that the learned trial magistrate imposed the sentence without considering his mitigation, the court record shows that in mitigation, he only sought for forgiveness claiming that he knew the appellant previously.
  13. It is noteworthy that the appellant did not claim that he was the sole breadwinner for his family as he claimed in support of his appeal and he did not offer any other mitigating circumstance. There was therefore no substantive plea in mitigation before the trial court which it could have considered. The record also shows that contrary to the appellant's allegations, the learned trial magistrate complied with the requirement of the proviso to Section 333 (2) of the *Criminal Procedure Code* by ordering that the time he had spent in lawful custody be computed as part of his sentence. In making this order, the learned trial magistrate stated as follows:

“This court considers the time spent in custody by the accused prior to sentencing since 5<sup>th</sup> June, 2023. The accused to serve the remainder of his sentence.”



14. In my view, there is nothing on the court record to support the appellant's claim that the learned trial magistrate erred when passing sentence against him. The record does not show that when meting out the sentence, the trial court considered wrong legal principles or considered irrelevant facts. And although the prosecution confirmed that the appellant was a first offender, the sentence was in my view very lenient considering the nature of the offence and the manner in which it was committed as well as the age of the victim who according to the presentence report which I have no reason to doubt was an elderly lady, a widow aged 70 years.
15. The facts of the case also disclose that the elderly victim earned her livelihood through undertaking casual jobs and that the appellant took advantage of her vulnerability and lured her to his house on the false promise of offering her casual work of weeding his farm only to turn around and rape her for the entire day. The victim's ordeal must have left her with not only physical injuries but also emotional and psychological scars which may traumatise her for the rest of his life.
16. Despite the above facts, the learned trial magistrate in the exercise of her discretion sentenced the appellant to the minimum sentence prescribed by the law. In my view, he deserved a stiffer sentence considering that the maximum penalty for the offence is life imprisonment. However, as stated earlier, sentencing is at the discretion of the trial court and an appellate court cannot substitute its own discretion with that of the trial court even if it was of the view that given the circumstances of the case, it could have imposed a different sentence.
17. Flowing from the foregoing, I see no reason to interfere with the sentence passed by the trial court. It is therefore my finding that this appeal lacks merit and it is hereby dismissed.

It is so ordered.

**C. W GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 22ND DAY OF MAY 2024.**

**In the presence of :**

**The Appellant present**

**Ms. Muriu for the Respondent**

**Ms. Susan Waiganjo – Court Assistant**

