



**Ashimos alias Tom v Republic (Criminal Appeal E012 of 2023)  
[2024] KEHC 6695 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6695 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E012 OF 2023**

**KW KIARIE, J**

**JUNE 5, 2024**

**BETWEEN**

**PIMCH ASHIMOS ALIAS TOM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. case NO.4 of 2021 of the Senior Principal Magistrate's Court at Oyugis by Hon. Celesa A. Okore-Principal Magistrate)*

**JUDGMENT**

1. Pimch Ashimos alias Tom, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between December 2020 and March 2021 at Rachuonyo South sub-county within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of BAO, a child aged fifteen years.
3. The appellant was sentenced to twenty years' imprisonment. He was aggrieved and filed this appeal against the sentence. He was in person. He raised grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and facts by failing to observe Article 28 of the [Constitution](#) but instead sentenced the appellant to the mandatory minimum sentence of 20 years in prison.
  - b. That the learned trial magistrate erred in law and facts by failing to consider the appellant's mitigation as it is a part of a fair trial for sentence leniency.
  - c. That the learned trial magistrate erred in law and facts by failing to observe the provisions of section 333(2) of CPC to consider the appellant's extended stay in remand custody during sentencing.



- d. That the learned trial magistrate erred in law and facts by failing to consider that the harsh sentence does not conform to the theme of the correctional institution, which is to rehabilitate the offender but not to punish.
4. The state opposed the appeal and contended that the sentence was appropriate.
5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
6. The appellant contended that the sentence meted out was very harsh and did not conform to the theme of correctional institution, which is to rehabilitate the offender but not to punish. 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 v Republic* [1970] E.A. 599, as follows:
- The principles upon which an appellate court will exercise 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 v. 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 v. Shersbewsity* (1912) C.CA 28 T.LR 364).
7. Article 28 of the [Constitution](#) of Kenya provides:
- Every person has inherent dignity and the right to have that dignity respected and protected.
8. The argument by the appellant that the sentence meted out was a derogation of his dignity is not supported by the law. Section 8 (3) of the [Sexual Offences Act](#) provides:
- A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
9. The learned trial magistrate applied the law as it is. The appellant wrongly invoked Article 28 of the [Constitution](#) of Kenya.
10. Section 333 (2) of the [Criminal Procedure Code](#) provides as follows:
- Subject to the provisions of section 38 of the [Penal Code](#) (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this [Code](#).
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
11. The appellant was arrested on April 9, 2021, and remained in custody during the trial. I, therefore, make an order that his sentence commences from that date. To that extent, his appeal succeeds.

**DELIVERED AND SIGNED AT HOMA BAY THIS 5<sup>TH</sup> DAY OF JUNE 2024**

**KIARIE WAWERU KIARIE**



**JUDGE**

