



REPUBLIC OF KENYA



KENYA LAW
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**Nyabanda v Republic (Criminal Appeal E011 of 2022)
[2023] KEHC 3587 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E011 OF 2022
RPV WENDOH, J
APRIL 20, 2023**

BETWEEN

JOSEPH AYUBU NYABANDA APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence by Hon. D. O. Onyango – Senior Chief Magistrate
in Migori Chief Magistrate’s Criminal Case no. E290 OF 2020 delivered on 25/8/2022))*

JUDGMENT

1. Joseph Ayubu Nyabanda, the appellant was convicted of two offences by the Chief Magistrate Court Migori on 4/11/2020.

He faced the following charges.

Count I: Gangrape contrary to Section 10 of the [Sexual Offences Act](#).

2. The particulars of the charge are that on 6/6/2018 in Migori County, in association with another person not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of JAO without her consent.
3. He faced an alternative charge of committing an indecent Act on which the court did not make a finding.
4. Count II: Assault causing actual bodily harm contrary to Section 251 of the Penal Code. The appellant is alleged to have assaulted and caused harm to the complainant on the same day.

Upon conviction, he was sentenced as follows:-

Count 1 four years imprisonment



Count II six months imprisonment

5. The appellant preferred this appeal on sentence only. It is his contention that the sentence is manifestly harsh in view of his poor health because he is sickly, he is asthmatic and requests the court to consider the time he spent in remand during the trial and sentence him to the period already served.
6. Though the prosecution were given about twenty-one (21) days within which to file submissions, by the time I am writing this judgment four weeks later, no submissions have been filed.
7. I have considered the said grounds of appeal. It is trite law that sentencing is a discretion of the court and an appellate court will interfere sparingly where the sentence is manifestly excessive in the circumstances of the case or where the court applied the wrong principles in making the sentence. This is what the court said in *Bernard Kimani Gacheru v Republic* (2020) eKLR

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

8. The appellant raises two grounds of appeal, that, he is sickly and that the sentence is too harsh. The appellant was charged with a very serious offence of gang rape which attracts a sentence of life imprisonment upon conviction.
9. In my view a sentence of four years imprisonment was a slap on the wrist and very disproportionate to the offence of gang rape considering the violence meted on a person in such offence. This is a matter where the prosecution should have asked for enhancement of the sentence but for unknown reasons, they kept quiet.
10. The appellant also wants the court to consider the time he was in remand. The appellant was arraigned before the court on 29/7/2019 and the case was concluded by 4/11/2020, a period of just over a year. In his mitigation, the appellant told the court to consider that he had been in remand from 10/7/2019 and was asthmatic. Before sentence, the court clearly considered the said factors when it said:-

“I have considered the mitigation of the accused, including that he has been in remand for over one year. I have also considered the plea that he is asthmatic. I have noted that the offence is serious and a deterrent sentence is called for.”

11. The court already took into account the factors the appellant has raised as grounds of appeal. He has not shown any evidence of being asthmatic. Though the court said a deterrent sentence should be given, four years were not a deterrent.
12. I find that the appellant has gotten away with a slap on the wrist for a heinous offence. As pointed out earlier, it should have been enhanced had the prosecution moved the court to do so. The appeal lacks merit and is hereby dismissed.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF APRIL, 2023.



R. WENDOHO

JUDGE

In presence of:-

Ms. Kosgei for State

Appellant present in person

Ms. Nyauke –Court Assistant

