



REPUBLIC OF KENYA



KENYA LAW
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**Abuto v Republic (Criminal Appeal E010 of 2022)
[2023] KEHC 19271 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E010 OF 2022
RE ABURILI, J
JUNE 21, 2023**

BETWEEN

JARED OUMA ABUTO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the sentence passed by the Hon. P. Olengo on the 20.12.2018 in the Senior Principal Magistrate's Court at Nyando in Sexual Offences Case No. 37 of 2017.)

JUDGMENT

Introduction

1. This appeal is against the sentence of 20 years' imprisonment for rape contrary to section 3 (1) (a) (b) of the *Sexual Offences Act* No 3 of 2006. The appellant, on the December 25, 2017 in Muhoroni District within Kisumu County, intentionally and unlawfully caused his penis to penetrate the vagina of MAO by use of force.
2. The appellant faced a second count of assault causing actual bodily harm contrary to section 251 of the *Penal Code* the particulars being that on the December 25, 2017 in Muhoroni District within Kisumu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MAO thereby occasioning her actual bodily harm.
3. After a full trial, the appellant was found guilty on both counts and sentenced to serve 20 years on the first count of rape and 3 years on the second count of assault with the trial magistrate directing that the sentences run consecutively.
4. Being dissatisfied with the said conviction and sentence, the appellant preferred this appeal with grounds as set out in petition of appeal dated March 8, 2022.



5. Ultimately, the appellant withdrew his appeal against conviction and prayed that this appeal be allowed; and the sentencing orders of the learned trial magistrate be set aside and substituted with an appropriate sentence.
6. The appellant submitted before court that the sentence imposed on him was too long and that sought for leniency because he was held for 2 years in remand before conviction. He stated that he was 28 years old.
7. Mr Okoth Senior Principal Prosecution Counsel for the respondent relied on the evidence on record and that the court could exercise its discretion on sentence.

Analysis and Determination

8. Having considered the appeal and submissions, the issue for determination is whether this court should interfere with the trial court's discretion on sentencing.
9. The penalty prescribed for the offence of rape under section 3 (3) of the *Sexual Offences Act* is a term which shall not be less than ten years but which may be enhanced to imprisonment for life.
10. In his mitigation, the appellant was not remorseful and stated that he had stayed in custody for long. The trial magistrate considered the appellant's mitigation and the fact that he was a first offender and also that the appellant had stayed in custody and sentenced him to 20 years' imprisonment on the first count and 3 years imprisonment on the second count, directing that the sentences run consecutively.
11. Sentencing is in the discretion of the trial court and such discretion must be exercised judiciously and not capriciously. The case of *Bernard Kimani Gacheru v Republic* [2002] eKLR the Court of Appeal set out principles that the court should consider in sentencing and stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentencing 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.”

12. From the above principles a trial court must take into consideration all the facts of a case as well as the mitigation from the accused person, before imposing an appropriate sentence
13. In this case, the appellant other than raping his friend's wife, threatened to harm her with a panga, which he ended up doing by cutting her on the right wrist, hand and the head. The effect of the offence on the victim are long lasting and the psychological effect is even worse. The victim's husband, PW2, testified that the victim was unable to speak on the day after the incidence.
14. That being said, in awarding a sentence higher than the minimum, it is important for the trial court to state the reasons. See the case of *Ndundi Mwambire Koi v Republic* [2018] eKLR.
15. In the Appellant's case, no reasons were stated as to why he was sentenced to twenty years' imprisonment instead of the minimum sentence of ten years. I find the sentence of twenty years' imprisonment that was meted to the appellant in count one of rape to be excessive. I set it aside and substitute it with ten (10) years imprisonment.



16. The sentence for assault is lawful and in accordance with Section 251 of the *Penal Code* which provides that:

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

17. The appellant was given three years imprisonment instead of five years imprisonment for assault. I find no reason why I should interfere with that lenient sentence in the second count.

18. However, as the two offences were committed in the course of the same transaction, I order that the two sentences shall be served concurrently and shall be calculated from the date of arrest on the December 26, 2017 as stipulated in Section 332 of the *Criminal Procedure Code*, the appellant having spent in custody all the time upon arrest until he was convicted and sentenced.

19. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2023.

R.E. ABURILI

JUDGE

