



REPUBLIC OF KENYA



KENYA LAW
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**Mbago v Republic (Criminal Appeal 10 of 2019)
[2023] KEHC 18975 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL 10 OF 2019
RE ABURILI, J
JUNE 21, 2023**

BETWEEN

LEAKEY OTIENO MBAGO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the sentence by the Hon. B.M. Kimtai on the 26.6.15 in the Senior Principal Magistrate's Court at Nyando in Sexual Offences Case No. 1113 of 2014)

JUDGMENT

Introduction

1. Leakey Otieno Mbago, the appellant herein, appeals to this court against the sentence for rape contrary to section 3 (1) as read with section 3 (3) of the *Sexual Offences Act* of 2006. It was alleged that on the September 9, 2014 in Muhoroni District within Kisumu County he intentionally and unlawfully caused his penis to penetrate the vagina of NAO without her consent.
2. The appellant also faced a second count of assault causing actual bodily harm contrary to section 251 of the *Penal Code*, the particulars being that on the September 9, 2014 in Muhoroni District within Kisumu County he unlawfully assaulted the complainant NAO thereby causing her actual bodily harm.
3. The appellant pleaded not guilty to both counts and after a full trial, he was found guilty on both counts and sentenced to 15 years' imprisonment on count one and 3 years imprisonment on count two, sentences that were to run consecutively.
4. In this appeal which is only against sentence, the appellant pleaded for leniency and submitted that he had a young family and was their sole bread winner. He acknowledged the seriousness of the offence



as well as the consequences of committing the said offence stating that he had reformed having been taken through the prison reformation programme.

5. The appellant submitted that his mitigation must be given a priority and he be treated as an equal before the law enjoying all the benefits and protection of the law. Reliance was placed on the case of *Simon Kipkirui v R* (2019) eKLR.
6. The appellant further submitted that he had reformed as evidenced from the Certificate of Industrial Grade Test (Grade I) in tailoring, an indication that he would be a nation builder. The appellant urged this court to take into account section 333 (2) of the *Criminal Procedure Code* so that his sentence can run from the date of his arrest.
7. In response, Mr Okoth Senior Principal prosecution Counsel for the respondent submitted that he left the matter to court as the issue of sentencing was within the discretion of the court.

Analysis and Determination

8. The issue for determination herein is whether this court should interfere with the trial court's decision on sentencing.
9. The punishment prescribed for the offence of rape in 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 pleaded for leniency on the grounds that he had a young family with his first born being a candidate. It also emerged that the appellant was serving a 15-year imprisonment for a different charge of rape. In considering the same, the trial magistrate sentenced the appellant to 15 years' imprisonment which he stated would start running after the lapse of the previous sentence that he was serving.
11. Sentencing is in the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.
12. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No 253 of 2003 (Eldoret), the Court of Appeal stated that:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.”
13. Similarly, in the case of *Wanjema v Republic* (1971) E.A. 493 the court stated as follows:

“An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”
14. In this instant appeal, the appellant who it emerged was a repeat offender wrecked the life of the lady he raped. The effect of the offence on the victim are long lasting and the psychological effect is even worse.
15. That being said, in meting out 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.



16. In the Appellant's case no reasons were stated as to why he was sentenced to fifteen years' imprisonment instead of the minimum sentence of ten years. Further, there was no reason advanced by the trial court as to why the appellant's sentence would commence after his previous sentence had ended.
17. I find the sentence of fifteen years' imprisonment that was meted herein as excessive. I set it aside and substitute it with one of 10 years imprisonment to be calculated from the date of conviction and sentence on the June 26, 2015
18. The appellant further submitted and urged this court to have his sentence comply with section 333 (2) of the Criminal Procedure Code. Section 333(2) of the Criminal Procedure Code provides that:

“Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence.... shall take account of the period spent in custody.”
19. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. In this case, however, it is not in doubt that the appellant was in custody during the entirety of his trial as he was serving a lawful sentence.
20. Section 333 (2) does not apply where the accused is serving time in prison for a separate offence. In the circumstance, this ground is without merit and is dismissed.
21. Accordingly, this appeal against sentence is partially allowed to the extent that the sentence of fifteen years imprisonment is set aside and substituted with ten years imprisonment to run from the date of conviction and sentencing on 26/6/2015. The sentence of three years imprisonment on count two is sustained and upheld. The two sentences in count one and count two shall be served concurrently but after completion of the 15 years earlier on imposed.
22. This file is closed. I so order.

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

R.E. ABURILI

JUDGE

