



REPUBLIC OF KENYA



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**Oyosi v Republic (Criminal Appeal E058 of 2022)
[2023] KEHC 18980 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E058 OF 2022
RE ABURILI, J
JUNE 21, 2023**

BETWEEN

CALEB ORUKO OYOSI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the sentence passed by the Hon FN Rashid on the November 10, 2022
in the Principal Magistrate's Court at Winam in Sexual Offences Case No E055 of 2022)*

JUDGMENT

Introduction

1. This appeal is against the sentence of 10 years' imprisonment for the offence of rape contrary to section 3 (1) (a) (b) of the *Sexual Offences Act* No 3 of 2006. The appellant herein, Caleb Oruko Oyosi on the August 25, 2022 in Kisumu East Sub-County, within Kisumu County, he intentionally and unlawfully caused his penis to penetrate the anus of FA without the latter's consent.
2. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.
3. After a full trial, the appellant was found guilty of the main charge of rape and was subsequently sentenced to serve 10 years' imprisonment. Aggrieved with the said conviction and sentence, the appellant preferred an appeal as set out in petition of appeal dated November 16, 2022 and filed on the November 22, 2022.
4. Ultimately, the appellant withdrew his appeal against conviction and prayed that this appeal on sentence be allowed and the sentencing orders of the learned trial magistrate be set aside and substituted with an appropriate sentence.



5. The appellant filed submissions to canvass his appeal. The respondent's counsel intimated to court that they had filed submissions but the same were not found on the court record.

The Appellant's Submissions

6. The appellant submitted that the sentence meted out by the trial court was a mandatory minimum and thus the trial magistrate was bound by legislative enactment and never exercised discretion thus being denied a chance to make an independent decision.
7. Reliance was placed on the case of *Jared Koita Injiri v R Criminal Appeal No 93 of 2014* where it was held inter alia that the mandatory minimum sentences under the *Sexual Offences Act* are unconstitutional. Further reliance was placed on Petition E017 of 2021 at Machakos.
8. The appellant further submitted that the trial court was bound to consider the mitigating circumstances prior to sentencing as was held in the case of *Simon Kipkirui v R [2019] eKLR*.
9. The appellant reiterated his mitigation before the trial court and urged this court to consider that he had a wife and children, was a first offender who was remorseful and sought leniency from this court.

Analysis and Determination

10. I have considered the grounds of appeal against sentence and the submissions by the appellant alongside the circumstances under which the offence was committed and the mitigations put forth by the appellant. I find the issue for determination to be whether this court should interfere with the trial court's decision and discretion on sentencing.
11. 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.
12. In his mitigation, the appellant pleaded for leniency on the grounds that he had a wife and children, was a first offender who was remorseful and thus sought for leniency. In considering the said mitigations, the trial magistrate further considered the fact that the appellant was a first offender and sentenced him to 10 years' imprisonment which he stated would start running from the day he was arraigned in court.
13. Sentencing is in the discretion of the trial court and such discretion must be exercised judiciously and not capriciously. This Court on appeal is guided by the principles set out by the Court of Appeal in the case of *Bernard Kimani Gacheru v Republic [2002] eKLR* where it was stated as follows:

' 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.'

14. From the above principles, a trial court must take into consideration all the facts of a case as well as the mitigations put forth by the accused person.



15. In the present case, the appellant lured the victim, a homeless and jobless person to his home where the appellant pretended that he was going to give the victim work but turned out to be a sex pest and raped his fellow man under the threat of harming the victim as the appellant carried a panga and threatened to cut the victim if the victim did not surrender to the sexual escapades of the appellant to satiate the appellant's homosexual thirst. The appellant herein took advantage of a vulnerable member of the society. Employment in this country is scares and many youths both men and women fall prey to prospective employers even in big offices. This is no secret at all. It is an issue that I take judicial notice of. Sexual harassment at workplaces is common despite the presence of sexual harassment policies in place. Sexual violence dehumanizes and undignifies the victim of the offence. The victims are left with scars which are not only physical but also psychological and counselling services for these victims are not available free of charge.
16. The Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR* clarified inter alia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the *Penal Code*, which was the case before the Supreme Court.
17. In *WOR v Republic (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR)* a (26 April 2022) (Judgment) FA Ochieng J (as he then was) stated inter alia that:

'If the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act* and that he was unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement and that in his view that renders the sentence unconstitutional as the fact that the prescribed sentence completely precluded the Court from exercising any discretion, regardless of whether or not the circumstances so require.'
18. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 3 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory, although, just like in the Muruatetu 2017 decision, the trial court may, having regard to the circumstances of each case, impose a term.
19. Taking into consideration the circumstances of this case, the manner in which the appellant committed the crime, as well as the appellant's mitigation, I find that the trial court already exercised its discretion very in sentencing the appellant to a 10 year imprisonment. I find no reason to interfere with that discretion and sentence.
20. The trial magistrate also directed that the sentence runs from the date when the appellant was arraigned in court in line with the provisions of Section 332 of the *Criminal Procedure Code*.
21. Accordingly, I find that this appeal against sentence has no merit and the same is dismissed.
22. This file is closed. I so order.

Dated, Signed and Delivered at Kisumu this 21st Day of June, 2023

R.E. ABURILI

JUDGE

