



**Ibrahim alias Furaha v Republic (Criminal Appeal E034 of 2022)  
[2023] KEHC 19655 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19655 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E034 OF 2022  
GMA DULU, J  
JULY 4, 2023**

**BETWEEN**

**JUMA IBRAHIM ALIAS FURAHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(from the conviction and sentence in Sexual Offence Case No. E023 of 2022 at  
Taveta Law Courts delivered by Hon. C. L. Adisa (RM) on 26th May, 2022)*

**JUDGMENT**

1. The appellant was charged in the Magistrate's court with sexual assault contrary to section 5(1)(a)(ii) as read with section 5(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on November 16, 2021 at unknown time of the day in Taveta Sub County within Taita Taveta County unlawfully penetrated the vagina of NY (name withheld) with a metal manipulated by him.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same day at the same unknown time and at the same place unlawfully and intentionally touched the vagina of NY a child aged 5 years with a piece of metal.
3. He pleaded not guilty to both counts. After a full trial, he was convicted of the main count of sexual assault and sentenced to ten (10) years in custody.
4. Dissatisfied with the sentence, the appellant has come to this court on appeal on the following grounds:-
  1. That the trial Magistrate when convicting did not consider inclusivity of the period already spent in custody during the trial of the case to be part of the sentence served in line with section 333(2) of the *CPC*.



2. That he was a first offender and no records were tendered to show that he had ever engaged in any criminal activity.
  3. That the maximum and minimum mandatory (sentences were declared illegal) by the High Court of Kenya at Machakos vide Petition No. E017 of 2021.
  4. That he wishes to tell and swear in this court that it was his first time to talk to a girl, and to speak more of it that he had never met a lady before. Therefore it was a mere juice to him and never meant to harm to the girl but nobody understood him during his arrest.
  5. That it is within the rules of law to be considered under article 50(2)(q) which provides that if convicted to appeal or apply for review by the High Court as prescribed by law.
  6. That he prays before this court to consider his age in relation to the prison life. He is currently mixed up with hard core criminals. He humbly begs this court to allow his mitigation.
  7. That pursuant to the High Court orders vide Petition E017 of 2021 this court be pleased to grant him and determine sentence to be served as prayed herein. Though it is his prayer to be acquitted or placed on probation (non-custodial sentence).
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
  6. The appeal by the appellant herein is on sentence. I am aware of the legal principle that sentencing is an exercise of discretionary power by a trial court. However, an appellate court has statutory powers to vary the sentence imposed by a trial court depending on any relevant mitigating circumstances, in order to do justice.
  7. I note that the Director of Public Prosecution has opposed this appeal on sentence and maintained that the sentence imposed was lawful and appropriate in the circumstances of the case.
  8. On his part, the appellant has strongly urged review of sentence to a more lenient sentence relying on article 50 of the *Constitution*, recently decided cases on mandatory and minimum sentences, as well as section 333(2) of the *Criminal Procedure Code* (cap.75), regarding the period he was in custody during trial, which he contends was violated as it was not taken into account in determining the prison term of 10 years. He also says that he was only 20 years old at the time of trial.
  9. Having considered the grounds of appeal and submissions, I note however, that the victim was a young girl aged five (5) years. The appellant used a bottle to sexually assault her resulting in her sustaining visible injuries in the vagina and the anus. The complainant or victim must have been greatly traumatised by the painful act caused by the appellant, and the trauma will last for a lifetime.
  10. In addition to the above, the appellant was not a first offence, as the pre-sentence report dated June 8, 2022 filed in the trial court by Johnstone Kisyang'a clearly brought out the fact that the appellant in an earlier case, Criminal Case SO No. 05 of 2008 was convicted of committing unnatural offence and sentenced to 3 years at Shimo la Tewa Borstal Institution. Thus he was not a first offender in regard to sexual offences.
  11. Of significance also, is that when he was asked by the trial court to say something in mitigation, the appellant just said – “I do not have any” thus he was not remorseful.



12. In my view therefore, the appellant cannot say that there was any legal parameter on sentencing that was not considered by the trial Magistrate during sentencing, in this serious offence case committed by the appellant, who was not remorseful.
13. I find no merits in the appeal against sentence. I dismiss the appeal and uphold the sentence of the trial court. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED THIS 4<sup>TH</sup> DAY OF JULY 2023 IN OPEN COURT AT VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

The appellant

Mr. Sirima for the State

Mr. Otolu court assistant

