



REPUBLIC OF KENYA



KENYA LAW
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**Juma v Republic (Criminal Appeal E055 of 2022)
[2023] KEHC 20531 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E055 OF 2022**

DK KEMEL, J

JULY 21, 2023

BETWEEN

EDWIN JUMA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal arising from the conviction and sentence by Hon P.Y Kulecho
(S.R.M) in original Webuye SPMC S.O No. 27/2019 delivered on 30/05/2022)*

JUDGMENT

1. Edwin Juma was arraigned on charges of committing an offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, 2006. It was alleged that on 8/8/2019 in Webuye Sub-County within Bungoma county intentionally and unlawfully caused his penis to penetrate into the vagina of SN, a child aged 15 years. He also faced an alternative count of committing an indecent act contrary to section 11(1) of the *Sexual Offences Act* with the particulars being that on the 8th day of August, 2019 in Webuye West within Bungoma County intentionally and unlawfully rubbed his penis against the vagina of SN a child aged 15 years.
2. After hearing the matter in which four witnesses testified for the prosecution, the learned trial magistrate convicted the appellant and sentenced him to 15 years' imprisonment. The appellant being aggrieved moved this court challenging both the conviction and sentence. The petition of appeal was lodged on June 7, 2022 wherein the appellant raised the following grounds of appeal:
 - i. That the trial magistrate grossly erred in law and fact in convicting the appellant on contradictory, inconsistent and uncorroborated evidence.
 - ii. That the learned trial magistrate erred in law and fact in failing to comply with section 200 of the *Criminal Procedure Code*.



iii. That the learned trial magistrate erred in law and fact in failing to comply with article 50(2) of the Constitution.

iv. That the learned trial magistrate erred in law and fact when she failed to ensure that the witnesses statements were availed to the appellant contrary to article 50 on fair trial.

The appellant prayed that the appeal be allowed and that the conviction be quashed and he be set at liberty unless otherwise lawfully held.

3. When the matter came up for directions on the disposal of the appeal on 13/4/2023, the appellant informed the court that he wished to abandon his challenge on conviction and sought a review of the sentence. Parties agreed to canvass the appeal by way of oral submissions.

4. In his oral submissions, the appellant stated that he had learnt a lot in prison as had enrolled in several course so that if released, he will serve God as His servant. That he has children who have suffered during his incarceration and that his father was involved in an accident in May, 2022 while his wife deserted him prior to the criminal charges.

5. The Respondent through Miss Mukangu learned state counsel opposed the plea by submitting that the act was committed on an innocent child who had never engaged in sexual intercourse before. That the appellant tendered his mitigation in the trial court and that court imposed the minimum sentence as provided for under section 8(4) of the Act. That the appellant has not shown that the trial court misdirected itself while sentencing or overlooked a material fact or acted on wrong principles. That the appellant has not shown that the sentence is manifestly excessive. Counsel relied on the case of Joseph Mureithi Kanyita v Republic (2017) eKLR.

6. She submitted that the Act was passed to specifically deal with offenders of this nature. That the victim deserves protection since the appellant is a father of six children and that he is therefore expected to respect children. That the appellant has changed the victim's life through psychological torment and does not deserve to rejoin the society. That the trial court ordered the sentence to begin from 2019 which has not been fully served.

7. I have considered the appeal as well as the submissions tendered herein., I find the issue for determination at this juncture is whether the appeal on revision has merit. It is not in doubt that the appellant was sentenced to 15 years' imprisonment.

8. The appellant having been charged with an offence under section 8(4) of the Act, the same provides for a sentence, upon conviction, for a prison term of not less than 15 years.

9. Having taken into account the appellant's oral submissions and the opposition by the respondent, I am alive to the fact that sentencing is a prerogative of the trial court. This is a principle running through several decisions of this court and the Court of appeal.

10. The principles as stated in *Shadrack Kipkoech Kogo v R*. Eldoret Criminal Appeal No 253 of 2003 where the Court of Appeal stated thus:-

“ sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R* (1989 KLR 306)”



11. In *Bernard Kimani Gacheru v Republic* (2002) eKLR it was held:

.....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 states is shown to exist.

12. In this case, the appellant tendered in his mitigation which was to the effect that he was a road traffic accident survivor and sole bread winner for his family. From the above authorities, an applicant who wished to have his sentence reviewed ought to establish one or more of the grounds established by those authorities.
13. Having gone through the record, I am alive to the sentencing policy guidelines which mandates the courts to consider inter alia the objectives therein for instance the need to punish the perpetrator of the offence and the need to rehabilitate the offender.
14. The appellant in this case has not established that the trial court failed to take into account a relevant factor and or failed to take into account a factor which it ought to have taken into consideration. The prison term handed down herein is legal and falls within the limits provided for by the Act. There is need to balance between the victim's expectation to have the perpetrator punished for his wrongs and the appellant's right to benefit from the least severe sentence permissible in law. It transpired from the record of the lower court that the appellant took advantage of the victim who had gone to take shelter from rain in his house. The incident has clearly scared the victim psychologically for the rest of her life. The sentence imposed is the minimum possible in law. I see no reason to interfere with it. For the reason that I do not find any misdirection and consideration of non-material fact on the part of the trial magistrate while passing the sentence, I decline the invitation to interfere with the sentence passed by the trial court.
15. In the result, it is my finding that the application for revision lacks merit. The same is dismissed. The sentence by the trial court is upheld and which is to commence from the date of arrest namely 16/8/2019.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT BUNGOMA THIS 21ST DAY OF
JULY , 2023.**

D.KEMEI

JUDGE

In the presence of :

Edwin Juma Appellant

Mukangu for Respondent

Kizito Court Assistant

