



**Mutsami v Republic (Criminal Appeal 30 of 2020)
[2023] KEHC 20423 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 30 OF 2020
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

EDWARD MUTSAMI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from judgment by Hon. JN Maragia, Resident Magistrate, RM, in
Kakamega CMC Sexual Offence Case No. 16 of 2017, of 8th March 2018)*

JUDGMENT

1. The appellant, Edward Mutsami Milimo, had been convicted by the trial court, on March 8, 2018, of rape, contrary to section 3(1) of the *Sexual Offences Act*, No 3 of 2006. He was sentenced to 10 years imprisonment, on June 4, 2018.
2. He lodged an appeal against the conviction, in Kakamega HCCRA No 84 of 2018. The same was heard by Ogola J, and a judgment was delivered on the appeal, on September 13, 2019. The appeal was dismissed for lack of merit.
3. The instant appeal is another appeal by the appellant to the High Court. It appears to have been prompted by a remark made by Ogola J, in the judgment of September 13, 2019, to effect that the appellant had not appealed against his sentence. The relevant portion of that judgment reads:

“ 17. On sentencing the court notes that the appellant has not appealed against the prison term of 10 years imposed by the trial court...”
4. The appellant, however, does not appear to have reckoned with the last part of that paragraph 17, where Ogola J considered the sentence of 10 years, and declared that he would not interfere with the jurisdiction of the trial magistrate, and added that the sentence imposed by the trial court was lenient,



given the nature of the offence. That latter bit of paragraph 17, in the judgment of Ogola J, in Kakamega HCCRA No 84 of 2018, says:

“ 17. ... However, even if he had appealed against the same, this court would still not interfere with the discretion of the trial court on sentencing, which in any event, appears to have been lenient for a serious case such as is before this court.”

5. The final orders, stated in paragraph 18, of the judgment in Kakamega HCCRA No 84 of 2018, are equally relevant. Ogola J upheld the findings of the trial court, on both conviction and sentence. The exact words in paragraph 18 are:

“ 18. ... The trial court’s finding on conviction and sentencing are accordingly upheld.”

6. Ogola J is a judge of the High Court. When he determined the appeal, in Kakamega HCCRA No 84 of 2018, he exercised a jurisdiction concurrent to mine. He upheld the sentence imposed by the trial court. I cannot now turn around and purport to undo the order of another judge, of concurrent jurisdiction, on the matter of the sentence.
7. Ogola J gave the appellant 14 days to appeal, not to the High Court. He could only appeal to the Court of Appeal. 2 appeals to the High Court, from the same decision of the trial court, over the same issues, cannot be sustained nor entertained. The appeal herein is filed in abuse of court process, and it is hereby accordingly dismissed.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Edward Mutsami, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

