



REPUBLIC OF KENYA



**Joshua v Republic (Criminal Appeal E013 of 2023)
[2023] KEHC 23290 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E013 OF 2023
A. ONG'INJO, J
OCTOBER 5, 2023**

BETWEEN

DOMINIC JOSHUA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment delivered by Hon. Christine
Kemuma Auka, Senior Resident Magistrate on 4th January 2022 in Kwale
Magistrate's Court S. O. No. 28 of 2019, Republic v Dominic Joshua)*

JUDGMENT

Background

1. Dominic Joshua was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars are that Dominic Joshua on diverse dates between February 17, 2019 and February 20, 2019 in Kinango Sub-County within Coast region intentionally and unlawfully caused his penis to penetrate the vagina of CMP a girl aged 15 years old.
3. In Count II, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.
4. The trial magistrate considered the evidence of five prosecution witnesses and the unsworn statement of the appellant and convicted the appellant on the main charge of defilement and was sentenced to serve 10 years imprisonment.
5. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds filed on June 21, 2023: -



1. That the trial court erred in law and facts by giving me a harsh and excessive sentence
 2. That the trial court erred in law and facts by failing to consider my mitigation address that I the appellant was a first offender.
 3. That the trial court erred in law and fact by failing to take into account the pretrial custody period in my sentence.
6. The appellant prayed for the court to quash the conviction and set aside the sentence.

Prosecution's Case

7. The complainant went missing from 17th to February 20, 2019 when she failed to go back from church. When the grandfather and father went to report to Kinango Police Station, they saw the complainant passing by and she was arrested. That on arrest, she was interrogated and she disclosed where she had been at the accused person's house. She led the police to where the accused person was and he was arrested and charged after the complainant was treated and PRC and P3 Form filled.

Defence Case

8. The appellant in his unsworn statement given on January 10, 2022 said that the complainant was not a school going child and was married. He also said that that the complainant had an infection which he did not have and therefore it is not true that he had sex with the complainant. The appellant also said he did not understand why the complainant had two birth certificates with different ages. He said that the complainant had intentions of getting married and the charges against him were fabrications. The appellant said that the parents of the complainant had married her off and had even been paid dowry. He said he did not have any issue with the complainant or any of her family members prior to this issue.

Appellant's Submissions

9. The appellant submitted that the trial court did not consider his mitigation to his expectation being that he was a first offender and he also told the court that he was an orphan and a sole bread winner to his siblings. He said that his mitigating factors were sufficient to inform the court that he was deserving of a non-custodial sentence as the siblings were suffering in his absence.

Analysis and Determination

10. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic [2010] eKLR* where the court of appeal held: -

' The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.'

11. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -
 - i. Whether the trial court took into account the appellant's trial period in remand custody.



- ii. Whether the trial magistrate considered the appellant's mitigation as a first offender.
 - iii. Whether the sentence was harsh and excessive in the circumstances.
12. Before tackling issues for determination, a perusal of the records in the trial magistrate's court, it has come to the attention of this court that the original birth certificate which was produced to prove the age of the complainant has a handwritten alteration to show that she was born on April 16, 2005 but a photocopy bearing the same serial number as the original that is 768xxx shows that the complainant was born on April 16, 2003. The appellant's concern was therefore valid and the trial magistrate confirmed that indeed there was an attempt to alter the complainant's age with an intention of attracting a more severe sentence.
13. When the accused was arraigned in court, the court ordered for age assessment to be conducted and the same was done at Kwale District Hospital where vide a report dated February 27, 2019, it was established that he was about 19 years. The appellant and the complainant were in the same age bracket and being that the complainant took herself to the appellant's house and stayed there for 3 days, the appellant's defence that the complainant had intentions of getting married and was not going to school ought to have been considered by the trial court in favour of the appellant.

Whether the trial court took into account the appellant's trial period in remand custody

14. The appellant was arraigned in court on February 22, 2019 and released on cash bail on February 28, 2019. He was therefore in custody for 6 days before he was released. When the appellant failed to attend court on August 11, 2020, the cash bail of Kshs 50,000 was forfeited. On October 1, 2020 when he attended court, he explained that he was in his home in Kibwezi and due to the Covid-19 pandemic lockdown, he was unable to attend court. The magistrate then granted him cash bail of Kshs 10,000 and explained that the issue of reinstatement of the forfeited cash bail would be canvassed in the trial court. The cash bail of Kshs 10,000 was paid on October 5, 2020. The appellant was therefore in custody for a total of 10 days during pre-trial.
15. What is disturbing about the forfeiture of the cash bail of Kshs 50,000 is that it was a matter of public knowledge that the entire world was under a lockdown due to the Covid-19 pandemic and the explanation by the appellant was satisfactory enough for the trial court to make an order for a refund of the cash bail. This court therefore finds that the forfeiture was uncalled for and hereby orders that the Chief Registrar of the Judiciary processes a refund of the same to the depositor who is the applicant herein.

Whether the trial magistrate considered the appellant's mitigation as a first offender

16. A perusal of the sentencing proceedings show that the trial magistrate extensively looked at the mitigation before he was sentenced to 10 years in accordance with Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) which provides for imprisonment for a term of not less than 20 years.

Whether the sentence was harsh and excessive in the circumstances.

17. Having found that the complainant and the appellant were age mates and that the complainant went and spent at the appellant's place for 2 days without telling the grandfather, her conduct and behavior cannot be blamed entirely on the appellant. In the circumstances and in consideration of the appellant's age, mitigation that he was an orphan, a first offender and that he was responsible for his siblings, the sentence was harsh and excessive.



18. In conclusion, this court finds that the appeal has merit and the conviction is quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 5TH DAY OF OCTOBER 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

