



**Mwinyi v Republic (Criminal Appeal E018 of 2023)  
[2023] KEHC 24290 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E018 OF 2023  
KW KIARIE, J  
OCTOBER 24, 2023**

**BETWEEN**

**OMAR KAISHA MWINYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. case NO. E019 of 2021 of the Senior Resident Magistrate's Court at Kaloleni by Hon. R. Amwayi– Senior Resident Magistrate)*

**JUDGMENT**

1. Omar Kaisha Mwinyi, the appellant herein, was convicted of the offence of defilement contrary to section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between the 14<sup>th</sup> and 20<sup>th</sup> day of April 2021 at [particulars withheld], [particulars withheld] location in Kaloleni Sub County within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of AKT, a child aged 17 years.
3. The appellant was sentenced to ten (10) years' imprisonment. He was aggrieved and filed this appeal against the sentence.
4. The appellant raised grounds of appeal as follows:
  - a. That the Hon. Court erred in law and facts by sentencing the appellant without considering the circumstances revolving around the offence.
  - b. That the learned trial magistrate erred in law and facts by sentencing the appellant without considering that he was a first offender.
5. The appeal was opposed by the state through m/s Ngina Mutua, learned counsel. She contended that the sentence was the one prescribed.



6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v. Republic* [1972] EA 32.
7. The appellant is essentially appealing against the sentence. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. Those circumstances were well illustrated in the case of *Nelson v. Republic* [1970] EA 599, following *Ogalo Son of Owuora v. Republic* (1954) 21 EACA 270 as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* (1912) C.CA 28 T.LR 364.
8. Section 8 (4) of the [Sexual Offences Act](#) provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
9. This is a case that is disturbing. The appellant at the time of the offence was aged 20 years and can be described as an age mate of the complainant. The complainant went to stay with him on her own volition after she had disagreed with her mother. The [Sexual Offences Act](#) ought to be relooked to accommodate instances of this nature. I find that it was not fair to punish the appellant in the circumstances of this case. He, like the complainant, required counseling.
10. I am therefore persuaded to set aside the sentence and substitute it with three (3) years' probation.

**DELIVERED AND SIGNED AT HOMA BAY THIS 24<sup>TH</sup> DAY OF OCTOBER 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

