



**DAW v Republic (Criminal Appeal 110 of 2018)
[2024] KECA 452 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 452 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 110 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
APRIL 12, 2024**

BETWEEN

DAW APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Kisumu,
(Majanja, J.) dated 30th January, 2018 in HCCRA No. 49 of 2017)*

JUDGMENT

1. DAW , the appellant herein, was tried and convicted by the SRM’s court at Tamu for the offence of Rape contrary to Section 3(1)(a)(b) and (3) of the *Sexual Offences Act* and deliberate transmission of HIV contrary to Section 26(1)(b) of the *Sexual Offences Act*. He was sentenced to serve 10 years imprisonment on the rape charge and 15 years imprisonment on the second charge.
2. He appealed against his conviction and sentence to the High Court and the High Court dismissed his appeal against the rape charge but allowed the appeal against conviction on the charge of deliberate transmission of HIV and set aside the sentence of 10 years imprisonment.
3. He is now before us on a second appeal in which he has appealed against sentence only. He seeks reduction of sentence urging the Court to bear in mind his young age at the time of arrest, and the time that he has spent in custody. He pleads that his experience in custody has given him an opportunity to transform and he should be given an opportunity to go and take care of his young children as his wife is deceased. He also urges the Court to consider the unconstitutionality of the mandatory sentence.
4. The application was opposed by the respondent who was represented by Mr. Okango, Senior Principal Prosecution Counsel from the Office of the Director of Public Prosecutions, who maintained that the sentence of 10 years was not excessive.



5. This being a second appeal, our jurisdiction is limited by Section 361(1) of the *Criminal Procedure Code* to matters of law only. That section expressly states that severity of sentence is a matter of fact and this therefore excludes severity of sentence from our jurisdiction, unless the appellant can show that the sentence imposed raises an issue of law. In this regard the appellant has decried the mandatory nature of the offence that was imposed upon him.
6. The penal section under which the appellant was convicted is Section 3 (3) of the *Sexual Offences Act* which states as follows:
 - (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.
7. A plain reading of Section 3(3) of the *Sexual Offences Act*, shows that it gives the court the power to sentence an offender to a minimum term of 10 years' imprisonment and a maximum term of life imprisonment. This means that the appellant was sentenced to a term of 10 years' imprisonment on the rape Charge, which is the minimum sentence that could be imposed. The sentence was not a mandatory sentence to the extent that the court had discretion to impose a higher sentence, though the court's discretion was limited on the lower side. In sentencing the appellant, the trial magistrate stated that he had taken into account the fact that the appellant was a first offender.
8. The circumstances leading to the appellant's conviction were that on 24th October, 2016, the appellant, who was a camera man, went to the house of Susan Ochieng. He found the complainant, who is mentally challenged, and asked her for water. When she went to get the water, the appellant got hold of her, led her to the bedroom, removed her pants and had sexual intercourse with her. He then gave the complainant Kshs 50/-. The complainant went and informed a neighbour what had happened. Later, when her sister whom she stays with came back the matter was reported to her and she in turn reported to the police. Both the complainant and the appellant were taken for medical examination, it was confirmed that the appellant was HIV positive.
9. Although the medical evidence was not conclusive on whether penetration had taken place, the court believed the complainant's testimony and that of the neighbour that sexual intercourse had taken place and therefore there was penetration. The court found that the appellant knew that he was HIV positive and that there was a possibility of him infecting the complainant.
10. We note that the appellant took advantage of the appellant who was vulnerable because of her condition. The trial magistrate took into account his mitigation and exercised his discretion in sentencing the appellant to 10 years' imprisonment. We are satisfied that given the circumstances before the trial court, the sentence imposed on the appellant was neither excessive nor illegal as to meet the threshold for our intervention.
11. Accordingly we affirm the conviction and dismiss the appeal against sentence.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF APRIL, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

