



REPUBLIC OF KENYA



KENYA LAW
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**Hamisi v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 4358 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E003 OF 2023**

KW KIARIE, J

APRIL 25, 2024

BETWEEN

AUSTIN HAMISI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case NO.5 of 2018 of the Senior Principal Magistrate's Court at Oyugis (Kendu Bay) by Hon. J.P. Nandi-Senior Resident Magistrate)

JUDGMENT

1. Austin Hamisi, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 26th day of March 2018 at [Particulars withheld] sub-location, Rachuonyo North sub-county within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of CA.O., a child aged eleven years.
3. The appellant was sentenced to twenty years' imprisonment. He was aggrieved and filed this appeal against the sentence. He was in person. He premised his appeal on the following grounds:
 - a. That the trial court did not consider the provisions of section 333(2) of the CPC.
 - b. This court considers that the appeal is based on the sentence.
 - c. That the appellant was a first offender.
 - d. The sentence meted was harsh and arbitrary.



- e. That the trial magistrate erred in both law and fact by failing to address the issue of a minimum mandatory sentence as discriminatory and taking away the court's discretion in setting an appropriate sentence.
 - f. That the appellant is the sole breadwinner in a nuclear family.
4. The state opposed the appeal through Mr. David Ndege, learned counsel who contended that he was sentenced to a proper sentence for the offence.
 5. This is a first appellate court. As expected, I analyzed and evaluated all the evidence adduced before the lower court afresh and made conclusions, 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.
 6. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] E.A. 599, 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.

7. Section 8 (3) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

8. The circumstances of this case do not call for this court to intervene in the sentence. Secondly, he was sentenced to the minimum sentence prescribed by the law. I know the school of thought that a minimum sentence takes away the court's discretion. That may be so, but this position will remain aspirational unless parliament amends the law.
9. I find that the appeal lacks merit. Consequently, it is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE

