



**Odhiambo v Republic (Criminal Appeal E082 of 2022)
[2024] KEHC 7549 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E082 OF 2022
RN NYAKUNDI, J
JUNE 24, 2024**

BETWEEN

CHARLES OWINO ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. Wairimu
in Eldoret law court cr. SO. NO. E137 of 2019)*

JUDGMENT

Representation:

Mr. Mark Mugun for ODP

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that on diverse dates between 19th May, 2019 in Turbo Sub-County, within Uasin Gishu County, the appellant intentionally inserted his genital organ penis into the genital organ of BN a female aged 8 years.
2. The appellant was tried, convicted and sentenced to serve 30 years in prison. Being dissatisfied with the sentence imposed, he has approached this court for sentence review.
3. The grounds raised in support of the appeal as follows:
 - a. That the learned magistrate erred in law in convicting and sentencing the appellant to serve 30 years yet failed to take into consideration all the mitigating factors raised by him which was manifestly harsh and excessive in the circumstance and occasioned a failure of justice.



- b. That the learned trial magistrate erred in law in convicting and sentencing the appellant minus considering section 333(2) of the Criminal Procedure Code and Petition No. 15/2020 Machakos High Court by Justice G.V. Odunga by considering his pre-trial (remand) period.
 - c. That the court he is a remorseful, repentant person and that the court should consider the sentencing policy guidelines in coming up with an appropriate sentence.
4. The respondent did not file his submissions in opposition to the appeal. I shall however proceed to determine whether the imposed was proper considering the offence and circumstances of the case.

Analysis and determination

5. I have perused through the petition and the record together with the information available. The issue I find for determination is the legality of the sentence.
6. What is the appropriate sentence? Section 8 (2) of the Sexual Offences Act to Convict provides as follows:
- “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
7. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola S/O Owoura v Reginum* (1954) 21 270 as follows:-
- “The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly 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 R.*, (1950) 18 E.A.C.A 147:
- “It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”
8. From the foregoing authority, just because I might have come to a different conclusion will not warrant a sentence review. I have considered the sentence imposed on the Appellant by the trial court. Needless to say, the court has discretion on sentencing and there are some considerations attached to that. In sentencing an offender, the sentence meted out on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. (See *AmbanivRepublic*). The Court of Appeal *Thomas Mwambu WenyivRepublic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony PereiravState of Maharesbtra* at paragraph 70-71 where the court held the following on sentencing: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of



proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

9. The sentence prescribed for such an offence is a term not less than fifteen years. In order to decide whether such a sentence is appropriate, the Court has to consider the seriousness of the offence. The offence in question is that of defilement of a child aged 8 years and, in such cases, age is considered to be an aggravating factor. Given that the appellant was sentenced to serve 30 years imprisonment, I form the opinion that the sentence was appropriate. I see a trial court that considered the objectives of sentencing in totality. The appellant would otherwise be condemned to life imprisonment but such a sentence is now unlawful. I therefore find no fault in the sentence.
10. In the end, I have come to a conclusion that the sentence was commensurate to the offence and the circumstances of the offence. I find no merit in the appeal. The appellant shall however benefit from the provisions of section 333(2) of the *Criminal Procedure Code*. The provision mandates the court to consider the time spent in custody until conviction, so as to ensure fairness and proportionality in sentencing. The trial court therefore should actually be clear that the same has been considered.
11. In the present case, it did not come out clear whether section 333(2) was considered. The appellant's prayer to this end is granted and as such the 30 years sentence shall run from 25th May, 2019.
12. It is so ordered.

DATED AND SIGNED AND DELIVERED VIA E-MAIL THIS 24TH DAY OF JUNE, 2024

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R. NYAKUNDI

JUDGE

