



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rotich v Republic (Criminal Revision 213 of 2022)  
[2023] KEHC 2826 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2826 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL REVISION 213 OF 2022  
RN NYAKUNDI, J  
MARCH 31, 2023**

**BETWEEN**

**ELIJAH KOECH ROTICH ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before me is a Notice Motion dated November 2, 2022 expressed to be brought pursuant to Article 165 of the Constitution, Sections 362 and 364 of the Criminal Procedure Code. The applicant seeks amongst other orders: (1) Review and setting aside of the enhanced sentenced by this court before the honorable judge, Hon Olga Sewe; An order that the court considers the Applicant's mitigation; and that the court considers the 11 years that the applicant has so far served in prison.

**Brief facts**

2. The applicant herein was charged with the offence of defilement contrary to section 8 (1) as read together with section 8(2) of the Sexual Offences Act. No 3 of 2006 along with an alternative charge of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. The applicant was arraigned before the lower court for plea on May 24, 2010 where he entered a plea of not guilty.
3. The trial took place between the month of November and March 2011. During the hearing, the charge sheet was substituted and the main count was replaced with a charge of incest contrary to section 20(1) of the Sexual Offences Act. The learned trial magistrate in a judgment delivered on May 25, 2011, found he applicant guilty of the main charge and convicted him therefor. The applicant was sentenced to 7 years imprisonment.
4. The applicant was dissatisfied with his conviction and sentence instructed the firm of M/s Nyambegera & Co Advocates to lodge an appeal against the conviction and sentence. The appeal against conviction and sentence failed and was dismissed in its entirety.



5. It is the applicant's case that the sentence meted by the appellate court was excessively high in light of the minimum sentence of ten years prescribed by the law.

## **Analysis And Determination**

### **Issue**

6. The only issue I find for determination is whether the sentence meted was excessive.

### **Analysis**

7. The High court in the case of *Johnson Kobia M'Impwi v Director of Public Prosecution* [2020] eKLR Stated as follows:

Review of earlier decision by the court in a criminal revision should be weighed against the reasons advanced and the law. In the criminal jurisdiction, discovery of new and important matter or evidence is a basis for review. I should also think that review on account of some mistake or error apparent on the face of the record is also potent ground. Any other sufficient reason should warrant a review. For instance, the gravity of the matters complained of, say, infringement of fundamental rights and freedom should form sufficient reason to review the earlier order of the court.

8. In this case, I don't find substantial reasons that necessitate the present application. The offence of incest was proved by the prosecution and the law then prescribes a minimum sentence of ten years.

### **Whether The Offence Of Incest Proved.**

9. The offence of incest is defined in Section 20(1) of the *Sexual Offences Act* as:

- (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years, provided that if it is alleged in the information or charge that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

10. Thus, the ingredients for the offence of incest are:

- (i) Proof that the offender is a relative of the victim.
- (ii) Proof of penetration or indecent Act.
- (iii) Identification of the perpetrator.
- (iv) Proof of the age of the victim.

11. From the above provision, it is clear that the sentence for incest is predicated upon the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment.



12. The above interpretation was well fleshed out by the Court of Appeal decision in *M K v Republic* [2015] eKLR which clearly pronounced itself on this matter as follows:
17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?
18. The first observation to note is that the phrase “not less than” has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
19. What does “shall be liable” mean in law? The Court of Appeal for East Africa in the case of *Opoya v Uganda* (1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The Court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in *James v Young* 27 Ch D at p.655 where North J. said:
- “But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.
- We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are “shall be sentenced to death”.
20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that 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. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.
21. Guided by the decision in *Opoya v Uganda* (1967) EA 752 and the persuasive dicta of North J. in *James v Young* 27 Ch D at p 655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply



states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

13. As stated in the Opoya Case (*supra*) cited in the above decision of MK (*supra*), the Court of Appeal for East Africa interpreted and clarified and gave legal meaning to the words “shall be liable” to mean as follows: “shall be liable on conviction to suffer death” means that the court has discretion “to provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment”.
14. In conclusion therefore, the proviso to Section 20 (1) simply means that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) the Court of Appeal stated that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment
15. I find that the prosecution proved its case beyond all reasonable doubt. The conviction and sentencing of the Appellant were based on cogent evidence adduced by the prosecution and I uphold it. The learned judge was right in enhancing the sentence by imposing a twenty-year jail term. The law empowers the High Court to exercise supervisory jurisdiction over the subordinate courts. For the purposes of this clause “ The High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure a fair administration of justice”
16. The effect of the court’s decision was to undo the illegality occasioned by the learned trial magistrate imposing a sentence not provided for in the statute Therefore offending the provisions of the Act. It is within the power of the High Court to look at the illegality of the sentence or unjustness arising thereto from the court below to protect the sanctity and fidelity of the law as in enacted by the legislature. The court observes that the interpretation of that provision as of the quantum of sentence was such that if allowed to stand, it would have amounted to an illegal sentence. It is also the consideration of preventing injustice to the victim of the offence. In a nutshell pursuant to Section 382 of the Criminal Procedure Code, the application is not sustainable. The courts in exercising discretion, must not condone a breach of a statute nor must they help to frustrate any operation of a provision of a statute. I accordingly find that the sentence meted is lawful.
17. The applicant herein cannot be accorded another opportunity for review of sentence that has already been reviewed by a competent court and a court of concurrent jurisdiction.
18. In the upshot, this court is of the view that the custodial sentence that the Applicant is serving fits the crime and finds the Applicant’s application to be without merit. The same is dismissed.

It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 31<sup>ST</sup> DAY OF MARCH, 2023**

.....

**R. NYAKUNDI**

**JUDGE**



**In the presence of**

Mr. Mugun for the state

Appellant Present

**Coram:** Before Hon. R. Nyakundi

Ngigi Mbugua & Co. Advocates for the Applicant

Mr. Mugun for the State

