



**Ayoyi v Republic (Criminal Appeal 30 of 2018)  
[2022] KEHC 12019 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12019 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 30 OF 2018  
PJO OTIENO, J  
JUNE 24, 2022**

**BETWEEN**

**VINCENT AYOYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Even though the Appellant had preferred ten grounds of appeal, when the matter came up before court on the May 23, 2022, he abandoned his appeal against conviction and asked the court to consider looking at the propriety and correctness of the sentence and relied wholly on its submissions filed.
2. For the Respondent/ODPP no submissions were filed with the Prosecutor choosing to rely wholly on the Probation Officer's Report.
3. I consider the request by the Appellant for the court to only look at the aspect of sentence to sit in consonance with the Courts mandate on first appeal to proceed by way of a retrial with the obligation to consider the entire record, with a view to coming to own conclusions without feeling unduly constrained to agree with the findings of the trial court. In *Okeno v Republic* [1972] EA 32, the Court of Appeal laid the mandate and obligation of a first appellate court in the following words:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v Republic* [1975] EA 57. It is not the duty of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make own findings and draw own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.”



4. In coming to its decision in the sentence against the Appellant, the trial court said:-

“The accused mitigations is considered. The [sexual offences Act](#) provides minimum sentences that the court must met upon conviction. In this case the minimum sentence is ten (10) years. The accused is therefore sentenced to serve prison term for a period of 10 years.”

5. It is clear to this court that the trial court felt that its judicial discretion in sentencing had been taken away by the stipulations of the Act. That the court finds to be an error for the discretion of the court is never taken away by legislation because it judicial and not legislative to impose a judicial sentence.

6. In [AOO and 6 Others v Attorney General & Another](#) [2017] eKLR the court rendered itself on the discretion reserved and rested in a court in imposition of sentences on criminal trial in the following words:-

“The [constitution](#) being the supreme law of the land separates the powers of the legislature, the executive and the judiciary. Judicial power is reserved to the judiciary. The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power. In so far as section 25 (2) & (3) of the [Penal Code](#)[38] allows a person aged below 18 years to be detained at the presidents pleasure, thereby granting the president powers to determine sentence or when to release the person and requires a judicial officer to forward notes to the president, in my view it offends the principle of separation of powers and Article 160 (1) of the [constitution](#) of Kenya 2010.

The [Constitution](#) of Kenya 2010 provides that “The Constitution is the supreme law of the Republic and any law which is inconsistent with the constitution is to the extent of the inconsistency void.[39] The [Penal Code](#)[40] was one of the ‘existing laws’ that continue to be in force. Subject to Rule 7 (1) of the sixth schedule to the [constitution](#), section 25 (2) & (3) of the [Penal Code](#)[41] must be construed with such modifications, adaptations, qualifications and exceptions necessary to bring its provisions into conformity with the Constitution. The courts are accordingly empowered to construe the provisions of the [Penal Code](#)[42] to bring them into conformity with the Constitution.

Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. Review of sentences imposed by sentencing courts is a judicial function to be performed by appellate courts.

7. I do find that it remains the duty of a sentencing court to retain its discretion in sentencing and not to abdicate it on account of a mandatory sentence in the statute. Whenever that surrender occurs, it is not only the sentence in that particular case that is surrendered but the pillar of the judicial authority being its independence. Consequently, the court finds that on account of the error by the trial court, no doubt, it had discretion to impose any sentence, but there is no reason advanced why only the minimum sentence was imposed.

8. Here by order of the court dated 25/2/2021, the Probation Officer has filed a report called Bail Information Report in which the family background of the accused, his attitude/conduct and character as well as the attitude of the victim and community where the offence took place have been outlined with a conclusion and recommendation that he be considered for a release having served part of the term of ten (10) years from the February 28, 2018. Prior to the conviction and sentence the Appellant was on bond whose terms he duly kept.



9. On the basis of Probation Officer's Report, the age of the Appellant and his circumstances revealed in the said report and the period served since conviction, now a period of about 4 ½ years, the court deems it just to reduce the term of imprisonment from ten (10) to six (6) years. This is done so that the accused is given a chance to be reintegrated into society and unite with the family to become a useful and better citizen.
10. The computation of the same will take effect from the date of conviction since he was actively on bond pending trial.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24<sup>TH</sup> DAY OF JUNE 2022.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Appellant in person

Ms. Chala for the Respondent/ODPP

Court Assistant: Kulubi

