**Republic v Abok (Sexual Offence 84 of 2017)**
**[2023] KEHC 18730 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18730 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT LODWAR**

**SEXUAL OFFENCE 84 OF 2017**

**RN NYAKUNDI, J**

**JUNE 12, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JACKSON EKAI ABOK ..... ACCUSED**

## JUDGMENT

### Background

1. The Appellant was charged, tried and convicted by the Senior Resident Magistrate Honourable Wekesa for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The trial court having found him guilty and on conviction sentenced him to 20 years imprisonment. The matter has been brought to the attention of the High Court vide a notice of motion filed in court on 23rd Marcy 2023 seeking review of sentence based on the following grounds:

    1. That I was arrested charged tried and convicted for the defilement sentenced to twenty (20) years imprisonment
    2. That I pleaded not guilty at the trial
    3. That The appellant is a first offender
    4. That Your honour, the applicant asks the high court to reduce twenty years imposed on the accused to a lesser prison term.
    5. That Your honour the applicant has a wife with two children
    6. That My Lordship, the applicant was the only sole bread winner who took case of his brother's children
    7. That Your honour, the applicant is remorseful and repentant

8. That You honour the applicant trusts the high court will listen to his prayers based on the facts laid down.

9. That Your honour may the high court consider the gravity of twenty years the applicant is serving behind bars as it does no good either to justice or the society.

10. That Your honour may the applicant benefit during the determination of this application.

**Determination**

2. By law under article 50(6) (a) & (b) of the *Constitution*, section 362 as well as 364 of the *Criminal Procedure Code*, this court is seized of this case for purpose of review grounded on the mitigation offered by the Appellant. In reviewing the Appellant's case this court's mandate is to examine the record of the criminal proceedings before the trial court in order to satisfy itself as to the correctness, legality, justness and propriety of the finding on sentence or order made by the learned trial magistrate.

3. Turning to the issue of sentence the appellant ought to satisfy the criteria set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para12 where it was held that:-

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court ... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate" similarly in the case of *Shadrack Kipkoech Kogo v R*. Eldoret Criminal Appeal No 253 of 2003 it was held as follows " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R*. (1989 KLR 306)"

4. From the record the magistrate took into account all the relevant facts, the circumstances of the offence inconformity with the *Sexual Offences Act*. The sentence imposed may on the face of it appear to be subjecting the appellant to cruel, inhuman, or degrading treatment of punishment in consonant with article 25 of (a) of the *Constitution* but basically it is a legal sentence in the operative Act of such offences. In sum I hold as a matter of principle that the criminal sentence is proportionate to the crime for which the Appellant was convicted of by the trial court. The circumstances in this case demanded no leniency and this court finds no error, mistake, or compelling evidence to review the sentence as urged by the appellant. The only recourse is to affirm the provisions of Section 333(2) of the *Criminal Procedure Code* as to the credit on sentence for the period spent in remand custody. The learned trial magistrate was aware of the binding provisions as captured in his judgement denoting that the 20 years in prison to run from the time he appeared in court to take plea. In essence the learned trial magistrate interpreted the provisions by giving allowance of the period spent in custody to count as part of the sentence to be served by the Appellant. It is important that this court reminds trial courts to navigate the provisions by giving allowance for the period spent in remand custody within the context of the law. It is imperative therefore for the trial court to have just subtracted the credit of 2 years spent in pre-trial detention based on the above factors in the court to warrant the appellant sentence to read 18

years imprisonment. That is indeed the position that by credit reference on the period spend in custody taking into considerations the prescripts of section 333(2) of the *code* has to be applied consistently and predictably. In substance save for this remarks the review on sentence fails.

Orders Accordingly.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 12TH DAY OF JUNE 2023**

**R. NYAKUNDI**

**JUDGE**

Coram: Before Hon. Justice R. Nyakundi

Mr. Mugun for the State