



**Republic v NKK (Criminal Revision E350 of 2024)
[2024] KEHC 12615 (KLR) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E350 OF 2024
RN NYAKUNDI, J
OCTOBER 14, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

NKK ACCUSED

RULING

1. This revision file has been brought to my attention by the Chief Magistrate Eldoret Law Courts under Article 165 (6)(7) of the constitution led with sec 362 with the Criminal Procedure Code for purposes of perusing the record with a view to establish the legality, propriety, correctness, regularity and justness of the order on sentence passed by the learned trial magistrate in Criminal case no E184 of 2021. On the face of the record, the respondent was tried, convicted and sentenced to 3 years non custodian probation period for the offence of Incest Contrary to Sec 20(1) of the Sexual Offences Act No 3 of 2006.
2. In light of this the revision directed against the impugned order of the trial Court has been admitted for hearing on 30.9.2024. During the pendency of the proceedings before this Court has suspended the sentence of probation by keeping it in abeyance until the determination of this matter. From the foregone appreciation of the record the effect of which is to commit the Respondent NKK to Eldoret Correctional facility in the interim period to have the issues arising out of this revision be canvassed at the inter parties forum on the 30 .9.2024. The parameters of this basis of which temporary stay sentence has been granted justifies this order to be served upon the Respondent to prepare his submissions under article 47&50 of the constitution surrounding the issues on sentence.
3. This is the main bone of contention whether the trial court exercised judicial discretion to pass such a sentence. First and foremost the Applicant was charged with incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. Brief particulars are that on the 18th day of July 2021 at [Particulars Withheld] village in [Particulars Withheld] sub-count within Uasin Gishu county intentionally and



unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of BJK whom to your knowledge is your niece.

4. From the above particulars the Applicant was convicted having been found guilty of the offence placing the nature of penalty to be imposed by the trial court to follow within Section 20 of the [Sexual Offences Act](#) which provides as follows:

(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 and proved 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.

(2) If any male person attempts to commit the offence specified in subsection (1) he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

5. I have considered the application under Section 362 and 364 of the [CPC](#) as read with Article 165 (6)&(7) of the [constitution](#) and I am satisfied that this is a suitable case for the court to exercise jurisdiction on the issues to do with sentencing.

6. First and foremost some of the key parameters to guide this court are found in 2023 Judiciary of Kenya [sentencing Policy Guidelines](#) which provide as follows:

Sentences are imposed to meet the following objectives.

- i. Retribution: To punish the offender for his/her criminal conduct in a just manner
- ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences
- iii. Rehabilitation: To enable the offender reform from his criminal deposition and become a law abiding person.
- iv. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities and offenders needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs
- v. Community protection: To protect the community by incapacitating the offender
- vi. Denunciation: To communicate the community's condemnation of the criminal conduct

7. For this court to exercise discretion it must be guided by the principles laid down by the court of Appeal in [Benard Kimani Gacheru v Republic](#) (2002) eKLR restated that: "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not



sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist.”

8. Sentencing is a complex process. It inevitably involves the application of a variety of factors sometimes seemingly in contradiction to each other. It has therefore often been said that the process of arriving at the appropriate sentence is an art and not an exact science. Such a sentence cannot be determined by any strict mathematical formula, but involves the fine balancing of a myriad of consideration.
9. In every case, it is the duty of the sentencing judge to strive to arrive at a just sentence. This will usually involve the application of the generally accepted principle of sentencing against the background of the nature and seriousness of the offence, the circumstances surrounding its commission and the personal circumstances of the offender.
10. It will readily be seen the common factors and principles to sentencing were not taken into account by the trial court and no reasons have been advanced which were of exceptional nature to warrant a non-custodial sentence for the offence as defined in Section 20 of the Sexual Offences Act. The results of the sentence is manifestly unsatisfactory from the view point of the Sexual offence Act and the principles together with objectives of sentencing. Given the various guidelines in the case of Benard Kimani Gacheru v Republic (2002) eKLR the sentence so imposed is hereby reviewed and substituted with a custodial sentence of 10 years imprisonment. 14 days Right of Appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF OCTOBER 2024.

R. NYAKUNDI

JUDGE

