



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT LODWAR**

**CRIMINAL APPEAL CASE NO. 1 OF 2018**

**ROBERT LOKWAWI EMULON.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. The appellant was charged with the offence of Rape contrary to section 3 (1)(a)(c) (3) of the Sexual Offences Act no. 3 of 2006, the particulars of which were that on the night of 17<sup>th</sup> October, 2016 at around 3.00 am at [particulars withheld] market, Lodwar town in Turkana Central sub-county in Turkana County, intentionally and unlawfully caused his penis to penetrate the vagina of RAL by force and threats.

2. He faced on alternative charge of assault causing actual bodily harm contrary to section 251 of the penal code, the particulars of which were that on the night of 17<sup>th</sup> October, 2016 at around 3.00am at [particulars withheld] market Lodwar town in Turkana central Sub county of the Turkana county jointly with others not before the court willfully and unlawfully assaulted RAL. thereby occasioning her actual bodily her.

3. He pleaded not guilty of both counts and was tried and convicted on the main charge of rape and sentenced to serve fifteen (15) years imprisonment on the 19/12/2017.

4. By a letter dated 20/12/2017 the trial court approached the court under sections 362 and 363 (1)(2) for Revision on the grounds that upon mitigation the same was of the view that a minimum sentence would have sufficed considering that the accused was a first time offender but instead of meting out the minimum of Ten (10) years she meted out a period of Fifteen (15) years imprisonment and therefore on her motion requested for the file to be placed before the Judge for revision of sentence from Fifteen (15) years to the minimum Ten (10) years.

5. While this application for revision was still pending the convict subsequently filed this appeal on both conviction and sentence.

6. When this matter was placed before me for hearing Mr. Mongare for the Director of Public Prosecution informed the court that the appellant (convict) had filed a substantive appeal but conceded that the same being a first offender should have been given the minimum sentence and therefore conceded to the application of review of sentence. The appellant on his part stated that he had no objection to review of the sentence.

7. The powers of the High Court in revision is provided for in section 362 to 366 of the criminal procedure code with the power of the court stated in section 364 as follows:

**Section 364(1)** In the case of proceeding in a subordinate court the record of which has been called or which has been reported for orders or which has otherwise come to its knowledge the High court may;

a) In the case of conviction exercise any of the powers conferred on it as a court of appeal by section, 354, 357 and 358 and may enhance sentence.

b) In any other that an order of acquittal alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or through an advocate in his own defense provided that this subsection should not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence.

3. Where the sentence dealt with under this section has been passed by a subordinate court, the High court shall not

inflict a greater punishment for the offence which in the opinion of the High court the accused has committed that might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High court to convert a finding of acquittal into one of conviction.

5. When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of a party who could have appealed.

8. I have perused the lower court file and whereas the convict has filed an appeal against both conviction and sentence, this revision is applied for by the trial court and as was stated in the case of Fatuma Hassan Salo versus Republic (2006) eKLR.

“Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised jurisdictionally. The trial court must be governed by evidence and sound legal principles. It must take into account all relevant factors and exclude extraneous factors.”

9. The supreme court of India in ALISTER ANTHONY PAREIRAN VERSUS STATE OF MAHARASHTRA (2012) 2SCC648 had this to say on sentencing “Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime..., **“What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, the motive for the crime, nature of the offence and all other attendant circumstances”** (Emphasis added)

10. Having come to the conclusion that sentence is a judicial function of the trial court who has a wide discretion in passing an appropriate lawful sentence and in exercising both revising power under section 362 and supervisory jurisdiction under article 165 of the Constitution of Kenya 2010 and having noted that the appellant shall suffer no prejudice, I hereby Revise the sentence meted out to the convict, quash the same and substitute it with an imprisonment of Ten (10) years and it so ordered.

Dated at Lodwar this 4<sup>th</sup> day of October, 2018

**J WAKIAGA**

**JUDGE.**