



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO OF 61 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. D.O. Onyango – (PM) delivered on 28<sup>th</sup> September 2012 in Kibera CMC. Case No.5796 of 2009)*

**DUNCAN NYAKUNDI ABUGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Duncan Nyakundi Abuga was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the night of 18<sup>th</sup> and 19<sup>th</sup> December 2009 at unknown place within Langata in Nairobi County, the Appellant intentionally and unlawfully committed a sexual act by inserting the male genital organ (penis) which caused penetration into the female genital organ (vagina) of TCD (the complainant), a girl aged 13 years. The Appellant pleaded not guilty to the charge. After full trial, the Appellant was found guilty of the charge. He was sentenced to serve twenty years imprisonment. He was aggrieved by his conviction and sentence. He filed an appeal to this court.

Although the Appellant filed appeal against conviction, it was clear from his submission that he was pleading with the court to review his sentence. He told the court that the trial court did not take into account the period of two years and nine months that he spent in remand custody before sentencing him to serve the custodial sentence. The Appellant submitted that he was his family's sole breadwinner and therefore his continued incarceration had adversely affected his family. He told the court that he had reformed in the period that he had been in prison. He annexed copies of the courses and certificates that he had obtained while in prison. In essence, the Appellant was saying that during the period of his incarceration, he had changed his ways and become a better person and therefore should be given a chance at freedom. The Appellant was of the view that if the trial court had taken into account his mitigating circumstances, it would not have sentenced him the custodial sentence that it did.

Ms. Sigei for the State opposed the appeal. She submitted that the offence that was committed by the Appellant had a life changing impact on the victim. It was a serious offence and was treated as such by the trial court. However, she conceded that the period that the Appellant was in remand custody ought to have been taken into account by the trial court. Otherwise, she was of the view that the Appellant's appeal on sentence lacked merit and should be dismissed.

When the trial magistrate sentenced the Appellant to serve the custodial sentence, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Appellant or that the sentence was illegal. In the present appeal, it was clear that the trial court sentenced the Appellant to serve a legal sentence. **Section 8(3)** of the **Sexual Offences Act** prescribes the sentence that shall be imposed should an accused be found guilty of committing the offence. However, it was apparent to this court that the trial court did not take into account the period that the Appellant was in remand custody prior to his conviction. **Section 333(2)** of the **Criminal Procedure Code** mandates the court sentencing an accused person to take into consideration the period that such accused was in remand custody prior to his conviction. In the present appeal, the Appellant was in remand custody for a period of two years and nine months prior to his conviction. This period shall be taken into account by this court.

In the premises therefore, the custodial sentence imposed by the trial court of twenty years imprisonment shall be reduced by two years and nine months. The Appellant shall therefore serve seventeen years and three months imprisonment with effect from 28<sup>th</sup> September 2012. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER 2018**

**L. KIMARU**

**JUDGE**