



REPUBLIC OF KENYA



KENYA LAW
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**Atonya v Republic (Criminal Appeal E034 of 2022)
[2024] KEHC 1627 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E034 OF 2022
RN NYAKUNDI, J
FEBRUARY 23, 2024**

BETWEEN

JETHRO ATONYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal on re-sentencing in Cr. Case. No. 34 of 2015 in
a judgment delivered Hon. N. Wairimu (SPM) on 18.8.2021)*

JUDGMENT

1. This appeal arises from the judgment and decree in Eldoret Chief Magistrates' Criminal Case No. 34 of 2015 delivered on 18th August 2021. The appellant was charged with the offence of Defilement contrary to section 8(1) of the *Sexual Offences Act*. The particulars of the offence were that on 21st December 2014 at Mwangi in Eldoret West District within Uasin Gishu County he intentionally and wilfully caused his genital organ (penis) to penetrate the genital organ of LN a girl aged 9 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. The appellant pleaded not guilty and the matter proceeded to full trial. As the appeal is against sentence only, the court shall not reproduce the proceedings of the trial court. Upon considering the evidence and the testimonies of the witnesses, the trial court found the appellant guilty of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was sentence to 10 years' imprisonment.
3. Being aggrieved with the sentence, the appellant instituted the present appeal *vide* a petition of appeal dated 14th April 2022 premised on the grounds that he is remorseful and repentant and urged the court to reduce his sentence in consideration of the time spent in custody.



Appellants' Submissions

4. The appellant filed submissions on 17th July 2023, urging that he was arrested on 28th December 2014 and convicted on 18th August 2021. He cited the provisions of section 333(2) of the *Criminal Procedure Code* and Article 19 of *the Constitution* urging the court to consider the time spent in prison in resentencing.

Analysis & Determination

5. The only issue that arises for determination is;
Whether the court should interfere with the sentence?

The *locus classicus* on interfering with sentence is the celebrated case of *Wanjama v Republic*, Criminal Appeal No. 204 of 1970 (1971) EA 493, 494, where Trevelyan J held as follows: -

“An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

6. This court has supervisory jurisdiction granted by Article 165(6) of *the Constitution* it is stated as follows:-

“

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

Further, section 333(2) of the *Criminal Procedure Code* provides as follows;

Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

7. As the appellant has not contended that the sentence was excessive, the court shall determine his petition on the basis of the provisions of section 333(3)(2) of the *Criminal Procedure Code*. The appellant was in custody from 29th December 2014 when he was arrested. He was sentenced on 28th July 2021. It is not in dispute that he spent time in custody during the trial period. A reading of the judgment of the trial court reveals that the learned trial magistrate did not expressly state that she took the time spent in custody into consideration. The appeal therefore succeeds only to the extent that the sentence meted out by the trial court shall be calculated to commence from the date of 28th December 2014.
8. I hereby order that;
The appellants' sentence shall be calculated to have commenced from the date of 28th December 2014.
9. It is so ordered.



DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 23RD DAY OF FEBRUARY, 2024

In the presence of:

Appellant in person

Mr. Mugun for State

.....

R. NYAKUNDI

JUDGE

