



REPUBLIC OF KENYA



KENYA LAW
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**Parmau v Republic (Criminal Appeal 6 of 2016)
[2024] KEHC 10010 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 10010 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL 6 OF 2016
SN MUTUKU, J
JUNE 25, 2024**

BETWEEN

JAMES LAIZA PARMAU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant has filed this Appeal against conviction and sentence of the lower court in Criminal Case No. 466 of 2014. The Appellant was charged with defilement of a boy aged 14 years contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the diverse dates between 20th March 2014 and 8th April 2014 in Kajiado Central of Kajiado County, intentionally caused his penis to penetrate the anus of VM a child aged 14 years.
2. The Appellant faced an alternative count of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars are similar to the main count save for stating that he committed an indecent act with a child namely VM by touching his genitals organ namely anus.
3. The Appellant pleaded not guilty and the trial proceeded. At the end of the trial the Appellant was found guilty of the main charge and was sentenced to 20 years imprisonment. He has appealed against that conviction and sentence in the Memorandum of Appeal filed on 3rd March 2016 and has raised the following grounds:
 - i. That the learned trial magistrate erred in law and in fact in failing to appreciate the fact that the charges as laid out were incurably defective contrary to section 214 of the *Criminal Procedure Code* and *Sexual Offences Act* No. 3 of 2006 occasioning prejudice.
 - ii. That the learned trial magistrate erred in law and in fact by failing to find that articles 49 and 50 of the *Constitution* pertaining to fair trial were grossly violated occasioning a serious dereliction of justice fatal to the proceedings enough to secure acquittal.



- iii. That the learned trial magistrate erred in law and in fact in failing to find that there were pertinent and material contradictions and inconsistencies in this trial which rendered the same doubtful contrary to requirements of the law.
 - iv. That the learned trial magistrate erred in both law and fact in failing to appreciate that the standard of proof was far below the required standard under the law.
 4. The Respondent raised four (4) grounds of opposition to the appeal, namely:
 - i. That the Appeal lacks merit, is misconceived and unsubstantiated.
 - ii. That the Appeal is an abuse of the Court process since the Appellant was properly convicted before the court and the prosecution discharged its burden of proof beyond reasonable doubt.
 - iii. That the Appellant has not demonstrated any special or unusual circumstances to warrant his appeal to be upheld.
 - iv. That the Appeal lacks merits and the same should be dismissed in its entirety.
 5. The Appeal was canvassed through written submissions. The Appellant filed his submissions on 9th December 2023. I have read the submissions. The Appellant seems to have changed his mind. He has not submitted on the grounds he has raised in his Memorandum of Appeal in which he questioned the trial magistrate for making errors of law and fact. Instead, the Appellant is asking this court to consider the time he spent in custody and reduce the sentence.
 6. The intention of the Appellant is clear from his submissions where he states that:

“.....the Petitioner has petitioned this court under section 333 (2) of the [Criminal Procedure Code](#), it is my humble request that this court to take into consideration the time I spent in custody prior to conviction while undergoing trial.”
 7. Section 333 (2) of the [Criminal Procedure Code](#) provides that:

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.
 8. The Appellant also referred this court to the Sentencing Guidelines to the effect that the time spent in custody while the trial was proceeding should be taken into consideration in sentencing. The Appellant also submitted that he is remorseful and that he has been rehabilitated while in prison.
 9. I have noted that the submissions of the Respondent were filed in June 2022 before the Appellant filed his submissions. The Respondent submitted on the grounds of appeal. It would have been better to wait for the Appellant to file and serve his submissions before the Respondent filed because procedure requires a respondent to respond to what the appellant or applicant has submitted on.
 10. I have considered the matter. To my mind, the Appellant seems to have changed his mind about the appeal and decided to change his pleadings to seek revision of the sentence by taking into consideration the time he spent in custody before the trial was concluded. In this judgment therefore, I will not be determining the Appeal filed herein and for which the Appellant has not argued.



11. I have noted that the Appellant was presented in court on 11th April 2014. He took the plea that day. The matter went to trial and was not concluded until 20th January 2016 when he was sentenced to serve 20 years imprisonment. I have noted from the judgment of the lower court that the Appellant, though released on bond, was not able to raise bond and remained in custody throughout the trial. My calculation gives me a period of 22 months from April 2014 to January 2016.
12. I have noted that while the trial court considered the mitigation of the Appellant in sentencing him, it did not take into account the time he spent in custody while the trial was ongoing. For this reason, I will and do hereby consider that the Appellant spent 22 months in custody awaiting the conclusion of his trial. I will give him the benefit of those 22 months and reduce the sentence of 20 years with 22 months. For the avoidance of doubt, the Appellant shall serve the remainder of the sentence less 22 months.
13. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 25TH JUNE 2024.

S. N. MUTUKU

JUDGE

In the presence of:

1. James Laiza Parmau, the Appellant
2. Ms Akunja for the Respondent

