**Munyua v Republic (Criminal Revision E144 of 2022)**
**[2023] KEHC 4151 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 4151 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**CRIMINAL REVISION E144 OF 2022**

**GL NZIOKA, J**

**JANUARY 26, 2023**

**BETWEEN**

**PETER MWAURA MUNYUA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged *vide* Criminal Case No E027 of 2021, with the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* No 3 of 2006, and an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars of each charge are as per the charge sheet.

2. He pleaded not guilty and the case proceeded to full hearing. At the end of the trial, the learned Trial Magistrate found the applicant guilty and sentenced him to serve fifteen (15) years imprisonment.

3. The applicant now seeks for review of sentence based on the memorandum of sentence review filed on September 15, 2022 in which he states in the mitigating grounds as herebelow reproduced that;-

    a. That, I am a first offender.

    b. I have no pending appeal.

    c. That I am remorseful of the offence and have learnt to be a law abiding citizen and rehabilitated well enough.

    d. That, I am from a poor but humble family background.

    e. That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.

f. That, I am not appealing against the sentence and conviction but applying for a review of sentence.

4. The respondent filed submissions in response to the application and urged that the sentence imposed was sufficient for the offence. That, the applicant did not deserve a lenient sentence in light of the circumstances of the case as this was a sexual and gender based violence targeting a child. Further, that the Supreme Court in Petition No 15 of 2015 *Francis Karioko Muruatetu and Another vs Republic* (2017)eKLR recognized the objectives of sentencing to include deterrence, which is appropriate in this case.

5. The Probation Department filed a pre-sentence report dated; December 2, 2022, which indicates that the applicant is 62 years old, married with three children. That, he was working as security guard manning a house and assorted machineries before his arrest. Further he suffers from arthritis and stomach ulcers. That, he is remorseful and pleads for a kind revision in light of his age and health concerns.

6. The report further indicates that his family members prays for a favorable revision. That the wife stated that, he is a man of good character. However, the victim and her mother were opposed to the revision stating that they could not forgive the applicant and he should serve his full sentence. The local administration stated that he does not have any records of crime. However, some community members stated that there were unreported cases in his working place though there was no formal proof of the allegations.

7. The Prison authority indicated that he has been in custody for one (1) year and works in the kitchen department. That, while in prison he has acquired several certificates in bible school correspondence, prison journey and focus on the family.

8. In considering the revision application, I note that the law that guides the revisionary power of the High Court is sections 362 of the *Criminal Procedure Code* which states as follows:

> " The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

9. However, this provisions should be read together with section 364 of the *Criminal Procedure Code* which provision states as follow: -

> " In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (b) in the case of any other order other than 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 by an advocate in his own defence: Provided that this subsection shall 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 concerned.

(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 than 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 lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

10. It is clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. This objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

11. It therefore follows that, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major SS Khanna vs Brig FJ Dillon* 1964 AIR 497, 1964 SCR (4) 409).

12. It is noteworthy therefore that, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another vs Republic* [2017] eKLR, *Republic vs Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors vs Muhavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, DPP vs Samuel Kimuche.

13. Having considered the application, I find that, the offence with which, the applicant was convicted of and sentenced is provided for under section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*, which states as follows: -

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

14. It is clear from the aforesaid that, the sentence provided for the offence is a mandatory minimum of twenty (20) years imprisonment. The sentence meted in the present case was imprisonment of fifteen (15) years and therefore the sentence was below what is provided for under the law.

15. On time spent in custody, the provisions of; section 333 (2) of the *Criminal Procedure Code* are couched in mandatory terms and require that the trial court while meting out a sentence shall take into account the period the convict spent in custody. The aforesaid provisions states 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"

16. In the same vein, the Court of Appeal in the case of; *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR stated that:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*...By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced...."Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."

17. In the instant matter the applicant was arraigned on April 19, 2021 and was convicted on November 9, 2021. He was held in remand prison during the hearing of the case for a period of six (6) months. Therefore, I direct that the period of fifteen (15) years takes effect from April 19, 2021, when the applicant was arraigned in court.

18. It is so ordered

**DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF JANUARY 2023**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:**

Applicant in person virtually

Mr. Michuki for the Respondent

**Ms Ogutu: Court Assistant**