



REPUBLIC OF KENYA



KENYA LAW
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**Madara v Republic (Criminal Revision E255 of 2022)
[2023] KEHC 390 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL REVISION E255 OF 2022
JN ONYIEGO, J
JANUARY 25, 2023**

BETWEEN

PETER KEA MADARA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was on March 2, 2021 arraigned before the Taveta PMS court charged with two counts. Count one he was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *sexual offences Act* No.3 of 2006. Particulars were that on the 24th day of February 2021 at about 1600hrs at [Particulars Withheld] village within Taita Taveta sub-county in Taita Taveta County unlawfully and intentionally attempted to cause his penis to penetrate the anus of JN a boy child aged 6years.
2. He was further charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *sexual offences Act* No.3 of 2006. Particulars were that on the 24th day of February 2021 at about 1630 hrs at [particulars withheld] village within Taveta sub-county in Taita Taveta County unlawfully and intentionally touched the anus of JN a boy aged 6years with his penis.
3. After returning a plea of not guilty, the matter proceeded to full trial. He was convicted of the main count on September 15, 2021. Consequently, he was sentenced to serve 10 years' imprisonment on 15th September.
4. Dissatisfied with the sentence, the applicant moved to this court vide a chamber summons filed on July 19, 2022 seeking revision of the sentence on grounds that; he was remorseful; he was a first offender and that the period spent in remand custody was not considered. In response, counsel for the state did not oppose the application. Learned counsel conceded that the about seven months spent in remand custody ought to have been taken into account.



- 5. I have considered the application herein and the response thereof.
- 6. It is trite law that this court is empowered to exercise its supervisory powers under Article 165(6) and (7) of the Constitution to call for a subordinate court’s record so as to make any directions or order to ensure fair administration of justice. Besides, under Section 362 and 364 of the criminal procedure code, the High Court is empowered to call upon and examine the record of any criminal proceedings from a subordinate court so as to satisfy itself as to the correctness, legality, propriety on sentence passed or order made and on the regularity of the proceedings.
- 7. I am alive to the fact that sentencing is at the discretion of the trial court. However, this court in its appellate capacity is empowered to intervene where the sentence meted out is illegal or excessive. See Shadrack Kipkoech Kogo v Republic Criminal Appeal Number 25 of 2003 where the Court of appeal held that sentencing is at the discretion of the trial court and that an appellate court can only interfere or intervene if it is shown that the trial court took into consideration irrelevant factors, applied wrong principles of the law or that the sentence was excessive and therefore an error.
- 8. The applicant has not challenged conviction. He is challenging only sentence. I have considered the age of the six year old boy who was subjected to the heinous act by the applicant. The offence committed was serious in the circumstances. In my view, the trial count did properly exercise its discretion in passing the impugned sentence.
- 9. However, the trial court did not take into account the six months the applicant had spent in remand custody Pursuant to Section 333(2) of the CPC. Accordingly, am inclined to allow the application to the extent that the six months and thirteen days spent in remand custody be taken into account when computing sentence.

Right of appeal 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JANUARY 2023

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J.N.ONYIEGO
JUDGE

