



REPUBLIC OF KENYA



KENYA LAW
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**Chirchir v Republic (Criminal Revision E001 of 2023)
[2023] KEHC 17998 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL REVISION E001 OF 2023
RB NGETICH, J
MAY 31, 2023**

BETWEEN

JOHN CHIRCHIR APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant was charged with two main counts of offences and alternative charge to count 1. Count 1 is the offence of defilement y to section 11(1) of the *Sexual offences Act* No 3 of 2006 The particulars are that on the diverse dates between May 6, 2014 and October 3, 2014 in Mogotio sub-county within Baringo county, committed an act which caused the penetration of his penis into the vagina of AJR a child aged 14 years.
2. Alternative charge to count 1 is of indecent Act with a child contrary with alternative charge to count 1. Particulars are that on diverse dates between May 6, 2014 and October 3, 2014 in Mogotio sub-county within Baringo county committed an act which caused his penis to come in contact with the vagina of AJR a child aged 14 years old.
3. Count 2 is the offence of supplying drugs to procure abortion contrary to section 160 of the *Penal Code*, the particulars of the offence being that the accused on the 3rd day of October, 2014 in Mogotio sub-county within Baringo County, unlawfully supplied to AJR some tablets knowing that it was intended to be unlawfully used to procure the miscarriage of a child namely AJR.
4. The accused denied all the charges and the matter was set down for full trial with the prosecution calling 10 witnesses in support of the charges and the accused in his defence gave sworn/unsworn statement and called one witness in support of his case.



5. By judgment delivered on the July 11, 2019, the trial court found the accused guilty in count 1 and count 2 and sentenced him to 10 years imprisonment in Count 1- and 2-years imprisonment in count 2; the sentences were to run concurrently.
6. Dissatisfied with the conviction and the sentence of the trial court, the Appellant filed a petition of appeal vide Kabarnet High court criminal Appeal No 47 of 2019 on the following grounds: -
 - i. That the Learned trial magistrate erred in law and facts by finding that there was evidence to support the charge of defilement contrary to section 8(1) as read with (2) of the [Sexual offences Act](#) and supplying drugs to procure abortion contrary to section 60 of the [Penal Code](#).
 - ii. That the learned trial magistrate erred in law and in fact by failing to appreciate that the medical officer Health who examined the complainant is not the one who produced it in court thus limited cross-examination.
 - iii. That the trial magistrate erred in law and facts by failing to appreciate that the complainant did not produce any Hospital treatment card to show that she has been treated at the Hospital.
 - iv. That the trial magistrate erred in law and facts by failing to consider that the purported drugs were medical prescriptions and not abortion as exhibited by Pw 9.
 - v. That the trial magistrate erred in law and facts by admitting evidence of the prosecution yet the purported lodging at Marigat and a building in Nakuru were not identified by the complainant on her visit to the towns by her and the investigating officer.
 - vi. That the trial magistrate erred in law and facts by ignoring the legal principle governing the circumstantial evidence and when to convict on the basis of such evidence.
 - vii. The trial magistrate erred in law and facts by admitting evidence of the prosecution yet the purported small vehicle was never identified as to the vehicle registration Number nor the ownership and the same was not produced in court.
 - viii. That the trial magistrate erred in law and facts by failing to consider the alibi of the Appellant and the evidence adduced by Dw 2.
 - ix. That the trial magistrate erred in law and facts by failing to appreciate that the appellant was not examined by a doctor to link him with the alleged offence.
 - x. That the trial magistrate failed in law and facts by failing to consider the evidence of the accused.
7. The Appellant prayed that his appeal be allowed, the sentenced quashed and conviction set aside and he be set at liberty.
8. On the 21st of December 2022 when the appeal came up for hearing before Hon Justice HK Chemitei, the Appellant notified the court that he would wish to withdraw the appeal and seek review of the sentence.
9. On the March 30, 2023 Ms Ratemo counsel for the prosecution notified this Honourable court that on the December 21, 2022 the Appellant withdrew the Appeal to pursue review of sentence and the court marked the appeal as withdrawn and directed that the file to be for review.

Application for Review of Sentence

10. The Applicant has now petitioned this court *vide* an undated application for review of sentence. In the application, the applicant avers that having been sentenced on the July 11, 2019, he has now served



- 3 years in prison and in line with the sentencing policy of retribution and rehabilitation, he has since reformed. He stated that the complainant in the case is married and has since settled in her matrimonial home.
11. The Applicant states that he was in remand custody for one year and urged this court to consider the time spent in prison as part of the sentence pursuant to section 333(2) of the *Criminal procedure code*. He sought leniency from the court.
 12. In response, the state filed a replying affidavit sworn by one Vivian Ratemo, the state counsel herein. She disposes that the *sexual offences act* provides a mandatory minimum sentence of 20 years imprisonment for the offence of defilement of a child aged 14 years and notwithstanding that, the Applicant was then sentenced to serve a term of 10 years for defilement. She states that the Applicant was lucky that he had the mandatory sentence reduced before the Supreme court clarified its decision in the Muruatetu case which the trial court had relied on in sentencing him otherwise 20 years imprisonment would have been imposed for offence of defilement.
 13. That the supreme court later clarified the court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences the *sexual offences Act*.
 14. She avers that the offence committed was gravious and violent against a child which necessitated a deterrent sentence and in the circumstances the sentence was more lenient since it gives the Applicant the opportunity to be re-integrated back into the society and be a productive citizen.
 15. She further avers that the Applicant does not deserve a review of the sentence as reduction of the sentence will occasion prejudice and injustices to the who suffered harm which she will not forget soon.

Applicant's Submission

16. On the March 30, 2023 when the matter came up for hearing of the application for review, the Applicant submitted that he was charged with the offence of defilement contrary to section 11 (1) of *Sexual Offences Act* and supply of drugs to procure abortion contrary to section 160 of the *Penal Code*; and was sentenced to 10 years and 2 years respectively to run concurrently. He states that he was arrested on October 21, 2014 and sentenced on July 11, 2019 and was in remand for 1 year and 2 months; on the July 11, 2023 he will have served four years in prison hence remaining with 2 years.
17. The Applicant stated that he has trained in carpentry and Joinery grade III, diploma in biblical correspondence, certificate in biblical studies, certificate in discipleship and certificate in prison journey and that he recently graduated with diploma in theology. He states that he has recommendation letters from Nakuru Main prison and in charge industry.
18. The applicant stated that he has 11 children and two wives who have suffered while in remand; four of his children are in secondary school and the complainant was his neighbour. He pleaded for leniency and sought revision in respect remainder of about 2 years 8 months. He requested to have the period reduced and he be allowed to serve the remaining sentence at home. He stated that he will be resourceful to the community and his children; that he has learned that it is wrong to commit an offence and seeks forgiveness from the family of the complainant and he regrets committing the offence.

Respondents Submissions

19. The Respondent filed written submissions dated October 26, 2022 and submits that they conceded to the application being allowed to the extent that this Honourable court considers the time the Applicant spent in custody in line with section 333(2) of the *Criminal Procedure code* which makes it mandatory



for the sentencing court to take into account the period spent in custody by the accused prior to the sentence.

20. That indeed the computation of time should factor in the time spent in custody during the trial being the period from the date of arrest being October 17, 2014 to September 14, 2015 and cited the case of *Samuel Njeru & 2 others vs Republic* (2020) eKLR.
21. The state counsel submitted that the power of the High court to revise sentence is set out under Article 165(6) and (7) of the *constitution* and section 362 of the *criminal procedure Code* which gives the court the power to examine the record of any criminal proceedings before any subordinate for the purpose of satisfying itself as to the correctness, legality and propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court.
22. The state counsel submitted that the state is objecting reduction of sentence as they are of the view that the concept of sentence should reflect the offence committed. She submitted a minor was defiled and as a result of the defilement she got pregnant and to add injury, the Applicant assisted the minor to carry out abortion hence the Applicant intentionally endangered the life of the minor to cover the offence.
23. She further submitted that the Applicant benefitted from the case of *Muruatetu* before the Supreme Court clarified its applicability; that the minimum sentence should have been 20 years as the minor was 14 years but the trial court imposed 10 years imprisonment for the charge of defilement relying in *Muruatetu 1* and the sentence was therefore lenient in the circumstances and a further review of the sentence will not reflect the offence committed.
24. She further submitted that although the Applicant has said the complainant is now married, marriage will not take away the trauma she suffered; further the trial court noted that the complainant did not know about the drugs she was given and ended up losing a child at a young age and marriage will not take away the trauma she suffered. She urged this court to uphold the sentence by the trial court because other than rehabilitation, the sentence was also meant to be deterrent and reducing the sentence will not meet the intention of sentence. She urged this court to dismiss the application for review of the sentence downwards.
25. On March 30, 2023 the court ordered that a social inquiry report to be filed by the probation officer to assist the court in making the determination on whether to review/revise the sentence.

Pre-sentence Report

26. In the pre-sentence report filed on the April 26, 2023, the probation officer indicates that the complainant is now 23 years old, she is married and living with her husband in Eldama Ravine; they are blessed with one daughter and on being informed of the Applicants prayer to the court, she stated that she has forgiven him for the offence and wish that the Petition is allowed by the Honourable court as she does not object to the Applicant serving the remainder of the period of his imprisonment under probation.
27. The local administration and the community are of the view that the Applicant has learnt a lesson from his deeds while in prison and do not object to the sentence review; they support that the remainder period of imprisonment be substituted with a probation or community service.
28. The prison authorities (supervisor) stated that the Applicant herein has gone through various stages of prison rehabilitation and vocational training in carpentry and joinery and the Applicant has reformed. In view of the above sentiments the probation officer recommends that subject to court's discretion, the Applicant's sentence may be substituted for a probation order for the remainder period of 2 years.



Analysis and Determination

29. I have considered grounds of the application, averments by the applicant and the state counsel. I have also considered submissions filed. The application to consider period served in remand is not opposed. The learned trial magistrate failed to apply Section 333 (2) of the Criminal Procedure Code which is stated in mandatory terms. Section 333 (2) is in the following terms:
- “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.”
30. The lower court’s record shows that the applicant was arrested on October 17, 2014. He was remanded in custody till September 14, 2015 when he was released on bond of Kshs 200, 000 plus a surety of a similar amount. The above means that the applicant was in lawful custody for a period of 1 year prior to the date he was released on bond. Period served in remand should have been reduced from sentence imposed.
31. What I consider to be in issue is whether sentence imposed by trial court should be revised by this court
32. The applicant was convicted of the offence of defiling a minor aged 14 years old. Section 8 (2) of the Sexual Offences Act which is the relevant penal provision for the offence of defilement where the victim was 14 years and below prescribes a mandatory sentence of 20 years imprisonment. In this case, the applicant was sentenced to ten (10) years imprisonment.
33. It is important to note that the sentence against the applicant was passed on July 11, 2019 a time when the high court applied decision by the Supreme Court in Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR to Sexual Offences. The understanding was mandatory minimum sentences were unconstitutional to the extent that they deprived the trial court of its discretion to mete out an appropriate sentence against an offender after considering his or her plea in mitigation and the aggravating factors surrounding commission of the offence in question.
34. The applicability of Muruatetu case was clarified by Supreme Court in directions issued on July 6, 2021 in Muruatetu 2. The court directed that Muruatetu case applied only to the mandatory death sentence for the offence of murder prescribed under section 204 of the Penal Code.
35. The above directions were issued about two years after decision of this case and that may explain why the state did not apply for enhancement of sentence as directions given by the supreme court could not apply retrospectively. In my view, the applicant benefited by imposition of lesser sentence due to high court’s interpretation of supreme court decision on minimum sentence to apply in sexual offences matters. I will not therefore review the sentence but will order that sentence served in custody awaiting trial be reduced from the 10-year sentence imposed against the applicant.
36. Final Orders: -
1. Application to review sentence imposed is hereby dismissed
 2. Period served by applicant in custody to be reduced from the sentence imposed.
37. It is so ordered.



RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 31ST DAY OF MAY 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Applicant – Present.

Ms Ratemo for state.

