



**TMK v Republic (Criminal Appeal 43 of 2019)
[2023] KEHC 18330 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 43 OF 2019
RM MWONGO, J
MAY 31, 2023**

BETWEEN

TMK PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged for the offence of incest contrary to section 20(1) of the [Sexual offences Act](#) No 3 of 2006. He faced an alternative Charge of indecent act with a child Contrary to Section 111(1) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the main charge are that the accused on diverse dates between 22nd February, 2018 and 26th February, 2018 at [Particulars Withheld] village intentionally and unlawfully caused his penis to penetrate the vagina of GWM a girl aged 12 years who was to accused's knowledge his daughter. The particulars of the alternative charge are that on the same diverse dates he committed an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#).
3. After hearing 8 prosecution witnesses and the defence, he was convicted with committing an indecent act on 13th July, 2019, and sentenced to 10 years' imprisonment on the 2nd August 2019.
4. Dissatisfied, he moved this Court by way of a Petition of Appeal dated 7th August 2019 on the grounds that:
 1. That the trial magistrate erred in law and facts by failing to appreciate that ingredients of the offence were never proven.
 2. That the trial magistrate erred in law and facts by failing to take into consideration that the evidence tendered was full of contradictions and inconsistencies.



3. That the trial magistrate erred in law and facts by failing to take into consideration that the evidence produced in court was insufficient to hold a conviction.
 4. That the trial magistrate erred in law and facts by arriving to a judgment that is legally and procedurally defeating in failing to appreciate that the prosecution did not prove the case beyond reasonable doubts.
 5. That the trial magistrate erred in law and facts by convicting me relying on the evidence that was uncorroborated and in the absence of any tangible evidence that could link me directly to the evidence.
5. In his submissions filed on 30th June, 2022, however, he abandoned the grounds of appeal and submitted on the following
- a. The period he was in remand was not considered when he was sentenced.
 - b. This Court be pleased to review the sentence imposed on him.
 - c. He is remorseful and regrets his action.
 - d. He is a first offender hence seek for forgiveness and leniency.
 - e. He was rehabilitated during his stay in Prison.
6. The parties canvassed the appeal through written submissions.

Petitioner's Submissions

7. He took plea on the 2nd day of March 2018. Therefore, he was in remand for about 11/2 Years before the conclusions of the matter. The period he was remanded was not considered in the sentence. He prayed for the consideration of the same in re-sentencing.
8. Secondly, he prays that this honourable court be pleased to review his sentence and impose a more lenient sentence. He says has now served close to four years in prison, during which period he has lived peacefully with fellow inmates and prison authorities. His character and record in prison are good and he promises before God and this honourable court to maintain the good character now and even when he will go back to the society.
9. The petitioner submits that he is remorseful over the incident that has ruined the life of his family prays for forgiveness, court's leniency and a second chance in life. He believes that this honourable court has mandate under article 165 (30) of constitution to hear and determine as well as to enforce matters of rights and fundamental freedoms enshrined in the Constitution.
10. He submitted that he is a first offender with no previous record of any crime. He pleads with this honourable court to have compassion on him considering family back at home.
11. Moreover, he said he is a carpenter, and possesses skills in welding. He will utilize the skills to earn his family's livelihood when the court set him at liberty. He urges this court to consider that he was a sole bread winner in his family. His wife who is not financially stable cannot satisfactorily cater for the needs of the children. Their grandmother is now old. She cannot cater for the same. His firstborn is now in 4th form and others are in primary school. They all need support for furtherance of their studies.
12. Due to foregoing, he urges this court to set him at liberty or award him the benefit of a non-custodial sentence so that he can get an ample opportunity to cater for needs of my family.



Respondent's Submissions

Whether the period spent in remand should be considered

13. The respondent submits that indeed Section 333(2) of the [Criminal Procedure Code](#) provides that:

“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced.”

Hence, the sentence should take account of the period he was held in custody.

Whether the sentence imposed on him should be reviewed

14. The respondent submits that the Petitioner does not challenge both the conviction and the sentence imposed on him by the trial Court on the 2nd day of August 2019, He was charged for the offence of incest Contrary to Section 20(1) of the [Sexual Offences Act](#) No 3 of 2006 that provides;

“Any male person who commits an indecent act or act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of 18 years, the accused shall be liable to serve imprisonment for life and it shall be immaterial that the act which causes penetration or indecent act was obtained with the consent of the female person.”

15. The Petitioner's defiled his own daughter then aged only 12 years.

16. The testimony of Pw- 1 the complainant was clear that the petitioner did not only defile her once but several times being on 22nd February, 2018, 23rd February 2018 and 26th February 2018.

17. The petitioner should count himself lucky as the maximum sentence is life imprisonment as the Complainant in this case was only 12 years at the time of the commission of the offence.

18. The prosecution submits that the sentence of 10 years' imprisonment was lenient and reasonable as grounds exist for the enhancement of the Petitioner's sentence to a life sentence as held in [A.N.N v. Republic](#) in Criminal Appeal No 124 of 2010.

Whether the Petitioner has been rehabilitated

19. The petitioner was convicted in 2019 and has been in custody for a period of four years.

20. The prosecution submits that the petitioner should seek to benefit from Section 46 of the [Prisons Act](#) Cap 90 on remission, as the discretion of the Commissioner General of Prison provide for remission on good conduct and industry as demonstrated by the applicant.

Issues for Determination

21. The issues that arise for determination herein are as follows:

1. Whether the offence of indecent act was proved



2. Whether the period spent in remand should be considered and the petitioner's sentence reviewed.
- Analysis and Determination
- Proof of Indecent act
22. This court has powers both of appeal and of review. For general review, the court is empowered by Article 165(6) of *the Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:
- “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.”
23. For criminal review, the court's power emanates from sections 362-367 of the *Criminal Procedure Code*.
24. The power to entertain appeals from subordinate courts in criminal matters is found in Part XI of the *Criminal Procedure Code*. These are not contentious matters herein and are only mentioned because the appellant filed an appeal and then abandoned it midway for a review.
25. The prosecution in its submissions has failed to appreciate that the appellant was charged with a main count of Incest and an alternative count of committing an indecent act with a child. Indeed, the trial court found the accused guilty and convicted him only for indecent act, the court found that there was insufficient evidence of penetration but ample evidence of the accused rubbing his penis on the defendants' vagina.
26. Having carefully perused the evidence, this court agrees with the trial court that the offence of defilement was not proved, but that the offence of committing an indecent act was.
27. “Indecent act” is defined in section 2 *SOA* as
- An unlawful intentional act which causes-
- (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
- (b) exposure or display of any pornographic material to any person against his or her will “
28. The evidence of the child showed that the appellant on several occasions lay on her and rubbed his penis on her vagina and threatened to beat her up if she told anyone. The medical evidence clearly demonstrated that the child's vagina area had bruises in the labia minora, but that there was no evidence found of penetration, such as a broken hymen.
29. The sentence provided for the offence of indecent act with a child is imprisonment for a term of not less than ten (10) years under section 11 of the *Sexual Offences Act*. The trial court was therefore within the law in issuing the sentence meted.

Whether the period spent in remand should be considered and sentence be reviewed

30. The petitioner was convicted and sentenced trial court for the offence of incest contrary to section 20 (1) of *sexual offences Act*. He was sentenced to 10 years' imprisonment on the 2nd of August 2019. He was arrested and held in custody from 28th February 2018 until the time of his sentencing, which is one (1) year five (5) months and four (4) days.



31. The proviso to Section 333(2) of the CPC is as follows:

“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced.

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

32. It is clear that the period during which the appellant was remanded was not considered at the time of sentencing in this case. He prays for the consideration of the same in re-sentencing, and is entitled to it by law.

33. In Boniface Mugo Maingi v Republic [2021] eKL it was stated:

“The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

34. A similar position was held by the Court of Appeal in Abamad Abolfathi Mohammed & Another vs Republic [2018] eKLR when it stated:

“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. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “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(2) 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

35. The term served by the accused should show that he has served a term commencing on the date he was placed in custody, that is, from 28th February 2018, to date. The period spent in imprisonment should therefore be taken to be 5 years and 3 months. A proper calculation is necessary.



36. The sentence meted was for 10 years (or 120 months). The appellant has spent 63 of those months in custody or imprisonment. Under Sec 46 of the *Prisons Act* he would be entitled to remission of one-third of his sentence subject to good conduct and industry at the discretion of the Commissioner. That period of remission would be $120 / 3 = 40$ months, leaving a balance of 60 months to be spent in prison. The relevant parts of Sec 46 provide:

“46(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one third of their sentence or sentences

.....

.....

(2) For the purpose of giving effect to the provisions of subsection (1) of this section, each prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period”

Conclusion and Disposition

37. Ultimately, I conclude that the appellant was properly convicted and sentenced for committing an indecent act. The sentence shall therefore not be reviewed.

38. The appellant has to date served 63 months (5 years 3 months) out of his sentence term of 120 months (10 years) sentence. Applying the provisions of Section 46(1) and (2) of the *Prisons Act* he would be entitled to remission of one-third (40months) of his 120-month sentence being, the 80 months balance. He therefore has 17 months more to serve, subject to remission.

39. I order a Probation Officer’s Report and the Prisons Report to enable me to further consider any further options for the Applicant. The POR to be filed in 14 days and similarly the Prisons Report to be filed within 14 days.

40. Mention October 5, 2023.

41. Orders accordingly.

DATED AT KERUGOYA THIS 31ST DAY OF MAY, 2023

.....

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mamba for the state
2. TMK
3. Court Assistant, Murage

