



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO. E016 OF 2021**

*(Revision from the sentence of the Principal Magistrate at Sotik,*

*S.O. No. 1 of 2016, passed on 7<sup>th</sup> November 2016)*

**HILLARY KIPKIRUI MUTAI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. This Application is brought through Chamber Summons under a Certificate of Urgency dated 11<sup>th</sup> February 2021 and filed on 16<sup>th</sup> February 2021. It is premised on Article 50(2) (q) of the Constitution and Section 137 (1), (2a), 333, 350 and 362 of the Criminal Procedure Code.

2. The background to this Application is contained in the trial file which I have perused. The Applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. An alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act was also preferred against him. He pleaded not guilty to both charges and the trial proceeded to completion. The Prosecution called six witnesses who testified against him. At the close of the Prosecution’s case, the trial court found that he had a case to answer and put him on his defence under section 211 of the Criminal Procedure Code. He elected to give unsworn testimony and called no witnesses. At the conclusion of the trial, he was convicted of the offence of defilement and sentenced to serve ten (10) years in prison.

3. The above forms the background to the current Application in which the Applicant seeks an order for inclusion of the period spent in remand prison in computing the sentence afresh, pursuant to Section 333 of the Criminal Procedure Code.

**Submissions**

4. The Applicant in his homemade submissions asked the Court to consider the period which he had spent in remand as part of the sentence he ought to serve. He also submitted that his wife was since deceased and his children were alone with no one to fend for them. He submitted that even though he was satisfied with the conviction and did not wish to appeal against it, he prayed that the Court revises his sentence to include the 9 months he had spent in custody in remand in accordance with sections 137 (1), (2a) and 333 of the Criminal Procedure Code. This Court however observes that the applicable section was Section 333 of the Criminal Procedure Code.

5. The Respondent on the other hand urged the Court not to vary the sentence as a period of 10 years sentence was within the law.

6. Upon considering the Application, the Record from the trial court and the opposing arguments of the parties, the only issue for determination is whether the Application is merited and sentence ought to be revised.

7. Article 50 of the Constitution of Kenya, 2010 provides on the right to fair hearing that: -

*(2) Every accused person has the right to a fair trial, which includes the right—*

*(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.*

8. **The Criminal Procedure Code, Cap 75 Laws of Kenya provides: -**

333. Warrant in case of sentence of imprisonment

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) 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.

9. Sentencing is an important aspect of the administration of justice. Noting that sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts.

10. Courts are replete with cases that demonstrate the objectives of sentencing. In **R. vs. Scott (2005) NSWCCA 152, Howie J Grove and Barr JJ stated:**

***“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”***

11. Similarly, in a New Zealand decision, **R vs. AEM (200)** it was decided: -

***“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”***

12. In Kenya, sentencing is governed by the Judiciary Sentencing Policy Guidelines 2016. In order to safeguard decisions made through the exercise of judicial discretion, the Guidelines 2016 exist to ensure that judicial officers do not, in a whimsical manner met out sentences that are not only disparate and inconsistent but also disproportionate and unjustified under the circumstances of each case. The guidelines outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

*“Sentences are imposed to meet the following objectives:*

(1) **Retribution:** *To punish the offender for his/her criminal conduct in a just manner.*

(2) **Deterrence:** *To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.*

(3) **Rehabilitation:** *To enable the offender reform from his criminal disposition and become a law abiding person.*

(4) **Restorative justice:** *To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.*

(5) **Community protection:** *To protect the community by incapacitating the offender.*

(6) **Denunciation:** *To communicate the community's condemnation of the criminal conduct.*

13. In the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic, Petition Number 15 of 2015**, the Court in considering the provisions of section 329 of the Criminal Procedure Code gave guidance on sentencing as follows:

***“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”***

14. In the present case, the trial magistrate noted that the Applicant was a first offender. He went ahead to call for a pre-sentence (social inquiry) report and noted that the Applicant in his mitigation, stated that his family depended on him. It was on this basis that he sentenced the Applicant to the minimum statutory period of 10 years. The basis of this present Application however, is neither to contest the conviction nor the sentence. The Applicant's sole prayer is that the Court considers the period he had spent in pre-trial custody and commute the same in the final sentence.

15. I have perused the trial file and noted that there is no indication by the learned trial magistrate as to whether he did not make a consideration of the time spent by the Applicant herein in custody. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

16. In the case of **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR**, the Court of Appeal held 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. 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 19<sup>th</sup> June 2012.”* See also **Bethwel Wilson Kibor vs. Republic [2009] eKLR**.

17. It follows then that the trial court ought to have stated in its decision that it indeed considered the time spent by the accused and that it had factored it in the final sentence. Failure to do so meant that the period was not taken into consideration.

18. From the charge sheet, the Applicant was arrested on 23<sup>rd</sup> February, 2016. He was granted bond and a surety of a similar amount of Kshs. 100,000/= which he was unable to pay. He therefore remained in custody until the conclusion of the trial on 7<sup>th</sup> November, 2016. It is evident that the period he had spent in remand was 8 months 15 days. It is the period which ought to have been considered in the final sentence as rightfully submitted by the Applicant.

19. This application has however opened a Pandora’s box. It was attracted the court’s attention to the sentence meted out to the Applicant and kicked in the provisions of Article 165 as well as Section 362, and 364 of the Criminal Procedure Code.

Article 165 provides thus:

Article 165

*(1) 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.”*

**20. Section 364 of the Criminal Procedure Code gives the High Court the power to revise Sentence. It provides 364. Powers of the High Court on Revision**

*(1) In the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for order, or which otherwise comes to its knowledge, the High Court may –*

*(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 had had an opportunity of being heard either personally or by an advocate in his own defense:*

*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)*

21. It is incumbent upon this Court therefore to consider in totality, the decision of the trial magistrate against the parameters of correctness, legality and propriety. I have come to the finding that this sentence was not in accordance with the law.

22. The Section under which the Applicant was charged under Section 8(3) of the Sexual Offences Act which provides thus:-

**“Section 8 – Defilement**

*(4) 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 20 years.”*

23. It is clear therefore that the sentence meted by the trial court was illegal and too lenient. The facts of the case demonstrate that victim was

minor aged 13 years old at the time of commission of the offence. The law is clear that the punishment for a person convicted defiling a child aged between twelve and fifteen years is 20 years' imprisonment.

24. I have however already found that the sentence meted out was illegal as the Applicant deserved a sentence of 20 years' imprisonment. I find it mischievous that the Applicant who is already enjoying a far lenient sentence would fall back on Section 333(21) of the Criminal Procedure Code that would only apply if he was serving the proper sentence stipulated under Section 8(3) of the Sexual Offences Act.

25. In the end, I exercise discretion not to enhance the Applicant's sentence. He shall however not benefit from a further reduction of his sentence. His application is thus dismissed.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED THIS 31ST DAY OF MARCH, 2022.**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Mr. Waweru holding brief Mr. Muriithi for the State, Applicant present in person and Kiprotich (Court Assistant).**