Njihia v Republic (Miscellaneous Criminal Application E043 of 2021)
[2022] KEHC 16992 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16992 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION E043 OF 2021

GWN MACHARIA, J

DECEMBER 20, 2022

BETWEEN

JOSEPH GATHURA NJIHIA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

RULING ON REVISION OF SENTENCE

1. The application herein is filed by the Applicant in person as a miscellaneous application though the prayer sought is for revision of his sentence. He approached the court vide a Chamber Summons filed on March 1, 2021 which is supported by an affidavit sworn by himself on even date as well as what he referred to as 'Memorandum of review of sentence" which in principle lists his mitigation grounds on which he seeks a review of the sentence.

2. To buttress that indeed the instant application seeks a review of sentence, in submission, he urged the court to compute the balance of his sentence into a probation sentence so that he can go home and earn a living and take care of children of his sister.

3. There was no objection to the application by learned State Counsel, Ms. Kirenge for the Respondent.

4. Before I delve into the merit of the application, it is paramount I mention that attached to the instant file is a file in HC Criminal Revision No. 043 of 2022- Joseph Gathura Njehia -v- Republic. No pleadings are inside that file. I cannot tell how the Revision application file was opened without any papers. It may be that the Applicant sent a request while in prison on account that the instant application had not been heard. Since two parallel files seeking similar prayers cannot run simultaneously, I order that the file in Revision No. 043 of 2022 be and hereby closed. This implies that the instant application is ripe for hearing. As to the form the application takes, is not much an issue as the Applicant is in person and justice ought not to be denied on account of formalities.

5. The Applicant was charged in the Senior Principal Magistrate's Court at Engineer Sexual Offence Case No. 23 of 2019 with the offence of attempted defilement under Section 9(1) as read with Section 9(2) of the *Sexual offences Act* No. 3 of 2006. The particulars were that on the 11th day of May, 2029 at around 1700 hours at Mawingu area in Kipipiri Sub county within Nyandarua County, intentionally attempted to cause his penis to penetrate the vagina of NMW a child of five years. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* in that he intentionally touched the vagina of NMW a child aged 5 years with his penis.

6. Upon a full trial, the Applicant was found guilty of the main charge and sentenced to serve 10 years imprisonment. It appears he never filed an appeal against the judgment of the trial court, hence the instant application for revision of the sentence.

7. This court has accordingly called for the original trial court file pursuant to Section 362 of the *Criminal Procedure Code* so that it can examine the record and satisfy 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 the subordinate court.

8. The sentence imposed was pursuant to Section 9(2) of the *Sexual Offences Act* which provides that:

> "A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

9. The above section provides for a minimum sentence and is couched in mandatory terms. This means that the discretion of the court is only in so far as the maximum sentence is concerned. A trial court cannot exercise its discretion when imposing the prescribed minimum mandatory sentence. It follows that the learned trial magistrate did not err in sentencing. She did not apply any incorrectness, illegality or impropriety in passing the sentence. Furthermore, had the Applicant succeeded in his intention, the result would have been to ruin an innocent 5-year old girl. He deserves clemency from no one.

10. Suffice it to state, Section 333(2) of the *Criminal Procedure Code* provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

> "Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to conclude 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."

11. It is notable that the Applicant was in remand custody throughout the trial period. I have looked at the sentencing ruling and clearly the learned trial magistrate did not have regard to the provisions of Section 333(2) of the *CPC*. This is the only ground on which the application would succeed.

12. In the result, the application partially succeeds with orders that the period the Applicant was in remand custody prior to sentencing of 4 months shall be considered to constitute part of the sentence. Upon delivery of this ruling, the trial court file shall be remitted back to the trial court.

13. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 20TH DECEMBER, 2022.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

Applicant in person.

Mr.Michuki for the Respondent.