



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. E010 OF 2020**

**DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**VERSUS**

**CLEMENT MULINGE MUNUVE .....RESPONDENT**

*(Being an application arising from a Judgment of: Stephen Jalang'o Principal Magistrate on 20<sup>th</sup> September 2019 in*

*Chief Magistrate's Criminal Case No. 157 of 2017 at Makadara)*

**RULING**

1. The application herein is a notice of motion dated; 27<sup>th</sup> January 2020, wherein the Applicant is seeking for orders that, the court be pleased to, invoke the provision of; section 137(1) (a) and 333(2) of the Criminal Procedure Code and all other enabling provisions of the law and, review the sentence imposed upon him, vide Chief Magistrate's Court, in criminal case number 157 of 2017.
2. The application is supported by the affidavit annexed thereto, sworn by the Applicant, wherein he deposes that, he was charged with an offence of; indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. He was subsequently convicted and sentenced to serve, five (5) years imprisonment.
3. However, he avers that, at the time of pronouncing the sentence, the trial court did not take into account the period he was in custody of; one (1) year and twelve (12) days and further prays that, the court orders the sentence meted to commence from the date of his arrest being; 2<sup>nd</sup> November 2017. That, he is a first offender, breadwinner and/or a key pillar of his young family and aged parents. He has duly reformed and has been rehabilitated and learned the value of patience and honesty.
4. However, the Respondent opposed the application by submitting orally that, the Applicant was charged with the offence of; indecent act with a minor aged 13 years and sentenced to serve five (5) years imprisonment. The sentence provided for the offence is a custodial sentence of not less than ten (10) years. Therefore, the trial court must have considered the period the Applicant was in custody while sentencing him. As such, the court should not interfere with the sentence; as it is proper and legal. I have considered the application and the arguments advanced in support and/or against it.
5. However, for better understanding of the same, I shall set out the background facts in a nutshell. The Applicant was arrested on; 2<sup>nd</sup> November 2017, and arraigned in court on; 6<sup>th</sup> November 2017 charged with an offence of; indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. He pleaded not guilty to the charge and the particulars thereof.
6. The particulars of the charge states that, on 30<sup>th</sup> October 2017, at [particulars withheld] estate in, Embakasi Sub-County, within Nairobi County, the Applicant, unlawfully and intentionally touched with his hands, the breasts of "IVG" a girl aged 13 years.
7. The case proceeded to full hearing whereupon, the Applicant was placed on his defence and at the conclusion of the hearing, the court delivered a judgment on; 20<sup>th</sup> September 2019, wherein the Applicant was found guilty, convicted and sentenced as aforesaid. The Applicant is not challenging the conviction but the sentence and in particular commencement date.
8. In that regard, I note that after pronouncing the verdict of guilty and convicting the accused, the prosecutor informed the court that, he was a first offender. In mitigation, the Applicant told the court that: -

*"He is disabled, that he helped the child. He is an orphan that his brother depends on him"*

9. The trial court then stated that; it had considered the punishment prescribed by the law, mitigation by the accused and sentenced the accused to serve five years' imprisonment, with 14 days of appeal.

10. The provisions of the law that, empowers and/or jurisdiction of the High court to revise sentence are provided for under; Article 165(6) of the Constitution of Kenya, 2020, which states as follows: -

*“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any persons or authority exercising a judicial or quasi-judicial function, but not over a superior court”*

11. Similarly, the provisions of; 362 of the Criminal Procedure Code states that; -

*“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying 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 any such subordinate court.”*

12. In the same vein, the provisions of; section 364 of the Criminal Procedure Code states that: -

*“(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 orders, or which otherwise comes to its knowledge, the High Court may;*

*(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*

*(b) In the case of any other order other than an order of acquittal, alter or reverse the order.*

*(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”*

13. Finally, sentence may be revised under the provisions of; section 333(2) of the Criminal Procedure Code which provides as follows;

*“(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.”*

**14. It is clear from the aforesaid provisions that, a sentence will be revised in relation to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and the regularity of any proceedings of any subordinate court.**

15. In the case of; Ahamad Abolfathi Mohammed & Another vs. Republic (2018) the Court of Appeal stated that:

*“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.”*

16. In the instant matter, the trial court did not expressly state that, it had taken into account the period the Applicant was in custody. I note from the record that, the Applicant was in custody from 2<sup>nd</sup> November 2017, to 14<sup>th</sup> November 2018, when he was released on bond. Thus he was in custody for a period of one (1) year and twelve (12) days. That period should have been considered.

17. In that regard, I order that, the period of sentence herein shall be reduced by a period of; one (1) year and twelve (12) days. Consequently, the Applicant shall serve a total period of; three (3) years, eleven (11) months and eighteen (18) days. The court's records shall be amended to reflect the revised sentence accordingly.

18. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 17TH MARCH 2021 VIRTUALLY.**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:**

**Applicant in person**

**Ms Kibathi for the Respondent**

**Edwin the Court Assistant**

**GRACE L. NZIOKA**

**JUDGE**