



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 229 OF 2019

BAKARI SAFARI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He was alternatively charged with the offence of indecent act with a child contrary to Section 11(1) of the same Act. He pleaded not guilty to the offences. The trial magistrate court found the Petitioner guilty of the main offence of defilement, and convicted him accordingly and sentenced him to life imprisonment. The Petitioner appealed against the sentence and conviction and the same was substituted with a 15 years' sentence.

2. The brief facts of the charge were as follows: on 1/2/2015 at [particulars withheld] area in Kisauni sub-county within Mombasa the Petitioner intentionally and unlawfully caused his penis to penetrate into the vagina of SMM, a girl aged 8 years.

3. **Ms. Balongo**, learned prosecutor submitted that the Petitioner by moving this Court seeking that time spent in custody at the time of trial should be included in the 15 years' sentence, seems not to have read the judgment or that he did not understand the same. Counsel submitted that it is expressly stated in the judgment that the time spent in custody is inclusive of the 15 years' sentence.

4. Paragraph 87 of the judgment of the Mombasa High Court Appeal No. 75 of 2016 dated 17/12/2018 reads:

“...in the premises, I quash the sentence meted on the Appellant and substitute therefore a sentence of 15 years, the same to take into account the period he has been in custody.”

Ms. Balongo submitted that this means that the time spent in custody was inclusive in the sentence and hence there was no need for the Petitioner herein to move the Court.

5. My reading of Judge Odunga's ruling stated above is that the Judge left the period the Petitioner had been in remand to be determined and then factored into the said 15 years. So the only thing the Petitioner needs to do is to ascertain the time he spent in remand.

6. Although the Petitioner states that he spent 1 year 6 months in remand, there is no evidence of that, and that is most likely the reason the learned Judge did not include it in the judgment. So, if the Petitioner shows to the prison authorities evidence that he spent 1 year 6 months in remand the said 1 year 6 months shall be deducted from the 15 year sentence.

7. In the upshot, petition is allowed upon the Petitioner showing to the prison authority that he spent 1 year 6 months in remand.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 27th day of May, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant