REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPLICATION NO.19 OF 2020

BODHA MARO SALAT.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant Bodha Maro Salat was charged with the offence of defilement contrary to section 9(1) (2) of the Sexual Offences Act. He also faced two other counts of assault contrary to section 251 of the Penal Code, in case No. 2067 of 2012 at the Chief Magistrate's Court at Garissa. The Senior Principal Magistrate B. J. Ndeda convicted and sentenced the Applicant to 10 years for the offence of defilement and 1 year each for the offences of assault.

2. The Applicant preferred an Appeal No. 93 of 2013 and **Dulu J** dismissed the same, affirmed the sentences save that he ordered the sentences to run consecutively.

3. The Applicant moved this court on 28th November, 2019 seeking for resentencing by the court applying the provision of section 333(2) of the Criminal Procedure Code.

4. At the hearing of the application the Applicant informed the court that he had only 1 month to serve. The court learnt that his sentenced has been reduced by way of remission.

5. The State did not oppose the application and was of the view that both the High Court and the trial court failed to apply the provision of section 333(3) of the Criminal Procedure Code.

Section 333(2) provides that:

> **"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 day of, the date on which it was pronounced, exclude where otherwise provided for in this code.**
>
> **Provided that where the person sentenced under section (1) has, prior to such sentence, been held in custody the sentence shall take account of the period spent in jail."**

6. I have considered the application, supporting affidavit and the entire record.

7. The case against the applicant is one where he attempted to defile his own relative a distant cousin aged 14 years as she was herding goats in the bush. Her rescue by other herders was a challenge as the Applicant who was armed became violent. He only let go when the victim's uncle and other persons confronted him, in the process of the rescue he injured one complainant and escaped. The following day during his arrest the Applicant injured one person.

8. In **Nku Cr. Application No. 88 of 2019 – John Kagunda Kariuki vs R** a case similar to the one before court in which the applicant sought resentencing, though not based on section 333(2) **Ngugi J** addressed the rampant applications being filed in the high court, where he stated and I am persuaded with his sentiments:

> **"8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision of Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable**

situation where all previously sentenced prisoners would seek review of their sentences."

9. Likewise in circumstances where section 333(2) has been overlooked by a court, being a matter of law the same should be taken up on appeal. The Applicant had an opportunity to raise the issue of section 333(2) at trial and at the High Court on appeal, he did not. He still had an opportunity to refer the matter to the Court of Appeal, he did not either.

10. His application before this court is tantamount to seeking to appeal against the judgement of a concurrent court which cannot stand.

11. Even without the reasoning above the circumstances and even if there was no consideration of section 333(3) the sentence was lenient as the applicant got the minimum sentence prescribed. This court is not persuaded that he deserved anything less.

Section 9(1) and (2) of the **Sexual Offences Act** deals with the issue of attempted defilement in the following terms:

> **"(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.**
>
> **(2) 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."**

12. Sexual offences are rampant in this region, young girls seem to be in danger of predators such as the Applicant. I take note that nowhere does the Applicant show remorsefulness of his barbaric act. The Sexual Offences Act was enacted with the hope of dealing with predators such as the Applicant and the view of this court is that such persons ought to face the full wrath of the law.

13. For the reason above the application is dismissed.

DELIVERED AND SIGNED AT GARISSA THIS 27TH DAY OF MAY 2021.

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ALI-ARONI

JUDGE