



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

REVISION E002 OF 2021

SAMUEL ORUARU ONDIEKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Samwel Oruaru Ondieki was charged with attempted **Defilement Contrary to Section 9(2) of the Sexual Offences Act No. 3 of 2006**.
2. It was alleged that on 1st July 2013 in Gilgil District, Nakuru County, he intentionally committed an act by attempting to insert his male genital organ (penis) into the female genital organ (vagina) of JS a child aged eight (8) years. In the alternative he was charged with **Indecent Act with a child Contrary to Section 11(1) of the same Act**.
3. It was alleged that on the same date, place and time he committed the offence by touching the genital organs (vagina and buttocks) of JS a child aged eight (8) years old.
4. On 19th December 2013, after prosecution heard three (3) witnesses the accused decided to change plea.
5. Plea was taken afresh on 17th January 2014. The applicant pleaded guilty and was convicted. The Prosecution indicated he was a 1st offender.
6. In his mitigation, he stated that on the day before he committed the offence, a friend had given him some drugs and he did not know what he was doing.
7. On 5th February 2014, the learned trial court considered his mitigation, that he was first offender, and although the minimum sentence was ten (10) years for that offence taking into consideration the age of the child, sentenced the applicant to fifteen (15) years imprisonment.
8. The applicant brought this application filed on 18th February 2012 for revision pursuant to **Section 362 of the Criminal Procedure Code**. He also invoked **Section 333 (2) of the Penal Code** to urge this court to take into consideration the period he spent in custody before he was sentenced. His prayer is simple, that this court considers the period he spent in custody and also look at the imposition of the minimum sentence in his case in the light of the case cited as **Francis Karioko Muruatetu & Others Petition Number 15 and 16 of 2015 [2017] eKLR**.
9. He urges the court to invoke **Section 35 of the Penal Code** and find that the sentence served is sufficient and to grant his liberty by releasing him on conditional or unconditional discharge.
10. The application was supported by the grounds on the face of the application. In the Supporting Affidavit he deponed that he had abandoned his right of appeal to pave for this review.
11. He also filed submissions, forwarded to court through email on 7th May 2021.
12. At the hearing of the application, he relied on the affidavit and submissions, adding that he was now reformed, trained and had a positive recommendation from the in charge of the Prison and if released would go home and support himself. Academically, he had sat class eight (8) while in custody.
13. Ms Murunga appeared for DPP, she had no objection to application of **Section 333 (2) of the Criminal Procedure Code** to the Applicants' case.

Analysis and determination

14. The power of the High Court on revisions is set out under **Article 165(6) and (7) of the Constitution**

(6) 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.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

15. **And Section 362 of the Criminal Procedure Code which gives the power to**;

...examine the record of any criminal proceedings before any subordinate for the purpose of satisfying itself as to the correctness, legality and propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.

16. At **Section 354(3) (b)** of the Criminal Procedure Code the court may in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence; **Section 333(2) of the Criminal Procedure Code** makes it mandatory for the sentencing court to take account of the period spent in custody by the accused prior to the sentence.

17. The issues are;

i) Whether the trial court considered the period accused spent in custody in the sentence of 5th February 2014 and if not whether the same can be accounted for.

ii) Whether in light of Dismas Wafula Kilwake [2018] eKLR and Muruatetu case the imposition of the minimum sentence was appropriate in this case.

On the first issue

It is evident from the sentence that the learned trial court made no mention of the period accused spent in custody. Accused was granted bond but was not able to raise the bond terms and remain in custody all the while 3rd July 2013 to 5th February 2014 when he was sentenced, a period of seven (7) months.

On the 2nd issue

It is true that in Muruatetu the Supreme Court declared the mandatory nature of death sentence to be unconstitutional, and that in Dismas Kilwake the Court of Appeal held that the principles of the unconstitutionality of minimum sentences in Muruatetu were applicable to s. 8 of the Sexual **Offences Act**. The Court stated:

In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

18. In this case the applicant says he has forfeited his appeal to pave way for review. Therefore the only way I can consider the applicant's sentence within this application is to consider the question of its propriety in the circumstances of his case. The circumstances are that the trial magistrate heard the complainant and two other witnesses before the applicant pleaded guilty. She took into consideration the age of the complainant and the trauma the child may have suffered, in meting out the sentence she did. In so doing the trial court exercised its discretion in sentencing the applicant. In doing so she enhanced the sentence

19. Is there any reason to interfere with that sentence under the provisions of **Section 362 of the Criminal Procedure Code**?

20. To answer that we must look at the powers of the court in exercising its revisionary powers.

21. It is not disputed that the applicant was a 1st offender. He was entitled to that consideration. Other than considering the age of the complainant in arriving at the sentence, there was nothing else on record to justify the enhanced sentence of fifteen (15) years imprisonment, raising the issue as to the propriety of the sentence.

22. With that in mind, and in the circumstances of this case the application for revision succeeds.

23. The fifteen (15) years term of imprisonment be and is hereby set aside and substituted with ten (10) years' imprisonment to run from 3rd July 2013.

24. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA ZOOM THIS 30TH DAY OF JUNE, 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of:

C/A Edna

For applicant

Ms. Murunga for state

Applicant present virtually