

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CRIMINAL MISC. REVISION NO. E009 'B' OF 2021

ERIC SAFARI MUTHUI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Applicant herein filed an application on **28th January, 2021** seeking for review of sentence that had been passed by **Hon. E. W. Wambugu at Kithimani Principal Magistrate's Court S.O.A NO. 6 of 2018** dated **5th March, 2019** in which the Applicant was sentenced to serve **fifteen (15) years'** imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006.

2. Vide his application, the Applicant contends that the sentence meted out on him did not take into account the period he had spent in custody. He relies on the provisions of section **333(2)** of the **Criminal Procedure Code** and now prays that the sentence be ordered to commence from the time of arrest. The Applicant finally maintained that he is now a family man and the sole bread winner for his young family who depend on him for support. He also pointed out that he has not been idle in prison as he has already earned skills in upholstery and tailoring.

3. The Applicant presented oral submissions while the respondent filed written submissions.

4. The Applicant submitted that the trial court's harsh sentence should be reviewed. He urged the court to set aside the sentence of 15 years' imprisonment and substitute it with a commensurate one which takes into the provisions of section 333(2) of the Criminal Procedure Code.

5. Mr. Mwongera learned counsel for the Respondent vide submissions dated **8th July, 2021** submitted that indeed the Applicant had been in custody since the date of arrest namely **13th March, 2018** and remained in custody until the date of sentence namely **5th March, 2019** which totals to a period of 11 months and 21 days. Learned counsel submitted that the said period be factored in the review of the sentence. Reliance was placed in the case of **Bernard Kimani Gacheru Vs. Republic [2002] eKLR** and **Evans Kalo Vs. Republic (2020) eKLR**.

6. I have given due consideration to the application for revision of sentence as well as the submissions. The Applicant is seeking a review of his sentence and has put a lot of emphasis on the provisions of section **333(2)** of the **Criminal Procedure Code**. The Applicant had been convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve **15 years'** imprisonment. It is not in dispute that the Applicant is not appealing against conviction but on sentence only. It is also not in dispute that the Applicant remained in custody for the entire duration of the trial. It is also not in dispute that pursuant to section **333(2)** of the **Criminal Procedure Code** the period spent in custody must be factored so as to conform with section 38 of the Penal Code. It is also not in doubt that under section 8(4) of the Sexual Offences Act No. 3 of 2006 a person found guilty of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. That being the position, the only issue for determination is whether the revision sought is merited.

7. It is trite law that sentencing is a matter for the discretion of a trial court. The Court of Appeal as early as 2002 in the case of **Bernard Kimani Gacheru Vs Republic [2002]** held as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if the Appellate court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the above matters already stated is shown to exist.”

8. The Applicant has now implored this court to review the sentence imposed by the trial court and to factor the period spent in custody. It is noted that the Applicant had been charged under section 8(1) as read with section 8(4) of the Sexual Offences Act wherein the minimum sentence provided for is **15 years'** imprisonment. Indeed, the Applicant was sentenced to the said term of imprisonment. The circumstances of the case appear rather tragic in that the Applicant and the victim had been in a relationship and the defilement ordeal led to the siring of another minor and that the victim was residing at the Applicant's place as his spouse prior to his arrest and remand. The victim had testified for the prosecution and stated that she was never forced to have sexual intercourse with the Applicant. The Applicant also maintains that the victim whom he claims to be his wife has been visiting him with his child while he is serving his sentence.

9. It is noted that the trial court did not factor the period spent in custody yet the Applicant is entitled thereto by virtue of the mandatory provisions of section 333(2) of the Criminal Procedure Code. The sentence meted out was the minimum possible in law as provided under section 8(4) of the Sexual Offences Act. It is instructive that the applicant does not challenge the imposed sentence but for the period spent in custody only.

10. In light of the foregoing observations, the application for review has merit. The same is allowed. The sentence imposed by the trial court of 15 years' imprisonment is ordered to commence from the date of arrest namely **13th March, 2018**.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 23RD DAY OF SEPTEMBER, 2021

D. K. Kemei

Judge