REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CRIMINAL REVISION APPL. NO. E003 OF 2021

ANTONY KIREGA GICHURE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The applicant herein **ANTONY KIREGA GICHURE** had been charged with the offence of defilement contrary to section 8 (1)(3) of the Sexual Offences Act No.3 of 2006. He also faced an alternative count of indecent act with a child contrary to section **11(1)** of the **Sexual Offences Act No. 3 of 2006**. He pleaded not guilty and the case proceeded to full hearing. He was subsequently convicted on the main count and ordered to serve 5 years' imprisonment.

2. Aggrieved, the Applicant filed the present application on 13th January, 2021 in which he seeks revision of sentence pursuant to the provisions of section **362 and 364** of the **Criminal Procedure Code** and **Article 165** of the **Constitution of Kenya** seeking that the court does review sentence by taking account of the time spent in custody as provided in section **333(2)** of the **Criminal Procedure Code**.

3. The application is premised on grounds that: -

> ***a) Pursuant to the provisions of section 362 and 364 of the Criminal Procedure Code and Article 165 of the Constitution of Kenya, this court has the Jurisdiction to enter a sentence review in the matter falling within its jurisdiction;***
>
> ***b) The Applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 and later convicted to serve 5 years' imprisonment on 9th of July, 2020;***
>
> ***c) The Honourable Court to be pleased to consider the 2 years' period that the Applicant spent in remand prison while awaiting the final determination of his case pursuant to section 333(2) of the Criminal Procedure Code;***
>
> ***d) The Honourable Court to also consider other mitigating factors and grant the applicant favourable sentence review.***

4. The application was canvassed by way of written submissions.

5. The Applicant submitted that time spent in custody before sentencing was not considered which was in contravention of section 333 (2) of the Criminal Procedure Code and section 46 (2) of the Prisons Act. He relied on the case of **Ahamad Abolfathi Mohammed & Another Vs Republic (2018) eKLR.**

6. The Respondent through learned counsel Mr. Mwongera opposed the application on the ground that the sentence meted out on the applicant was too lenient yet the requisite sentence for the offence committed ought to be 20 years' imprisonment. He submitted that the applicant may be considered for the period spent in custody during the trial period. Learned counsel noted that the applicant was arrested on 24th September, 2018 and appeared for plea on 26th September, 2018. He was sentenced to serve 5 years' on 9th July, 2020 and he thus spent a total of **Six Hundred and Fifty-Five (655)** days **(1 year 9 months 16 days)** in custody prior to his conviction and sentence. He relied on the case of **Bernard Kimani Gacheru** vs **Republic (2002) eKLR** and **Evans Kalo** vs **Republic (2020) eKLR** and urged the court to enhance the Applicant's sentence to 20 years' as the sentence issued by the learned magistrate is too lenient with regards to the offence of defilement and the court to factor in the days spent by the Applicant in custody.

7. I have considered the application and the submissions presented as well as the relevant law. I find the following issues for determination;

a) Whether the application has merit in so far as it is founded on section 333 (2) of the CPC.

b) ***Whether the trial magistrate's sentence of 5 years was too lenient with regards to the offence of defilement*****.**

8. On the first issue, it is trite law that this court can only exercise supervisory jurisdiction over subordinate courts. The enabling law for revision is **Article 165(6)** and **(7)** of the **Constitution** and section **362** as read together with section **364 of the Criminal Procedure Code.**

9. The revisionary jurisdiction of this court is wide in scope but it is limited to the parameters set out in **section 362** of the **Criminal Procedure Code** which states as follows:

> ***"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."***

10. In my view, section 362 should be read together with section 364 of the Criminal Procedure Code which specifies the orders the court can make, in its discretion, if it is satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the court to exercise any of the powers conferred on it as an appellate court by Sections 354, 357 and 358 of the Criminal Procedure Code if what is impugned is a conviction and if it is any other order except an order of acquittal, the court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.

11. In this case, the Applicant contends that the sentence passed by the trial court was erroneous as the learned trial magistrate failed to take into account the time he had spent in custody contrary to the dictates of section 333 (2) of the Criminal Procedure Code. Section 333 (2**)** is in the following terms:

> ***"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."***

12. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In **Ahamad Abolfathi Mohammed & Another V Republic, [2018] eKLR**, the Court of Appeal when dealing with an appeal in which the High Court was faulted for, inter alia, substituting the sentence imposed on the appellants by the trial court and ordering that it shall take effect from the date of conviction by the trial court stated thus:

> ***"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. …. 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."***

13. I have read the record of the trial court. It reveals that the Applicant was convicted of the offence of defiling a child aged 15 years and was sentenced to serve 5 years' imprisonment. The record confirms the Applicant's contention that in his pre-sentence notes, the learned trial magistrate did not indicate that he had taken into account the period the Applicant had spent in custody during the trial and that he did not order that the said period will form part of his sentence. Indeed, the record of the trial court is silent on whether the sentence was to commence from the date of arrest or conviction as it has transpired that the applicant remained in custody throughout the trial. Since section 333(2) of the Criminal Procedure Code is couched in mandatory terms, then the first issue has been satisfied by the applicant and hence the period spent in custody must be factored in his sentence.

14. On the second issue, iam in agreement with the Respondent's submission that the punishment prescribed for the offence of defilement where the victim is aged between 12 and 15 years old is a sentence of 20 years or more. The evidence in this case discloses that the victim was in that age bracket as can be seen from the chargesheet where the applicant was charged with the offence of defilement contrary to section 8 (1**)** as read with section 8 (3) of the Sexual Offences *Act***.**

15. The trial court despite the evidence adduced during the trial showing the age of the victim, proceeded to impose a sentence on the Applicant which did not conform to the Sexual Offences Act provision under which he was charged and which provided for a mandatory minimum sentence of not less than 20 years' imprisonment.

16. In his mitigation, the Applicant pleaded for leniency saying that he was a young man of the age of 24 years' old. In passing sentence, the learned trial magistrate did note that considering that there were no aggravating circumstances and bearing in mind the Muruatetu case proceeded to impose a sentence of 5 years' imprisonment but he did not indicate whether he had considered the period the Applicant had spent in custody during the trial.

17. Furthermore, it is now well settled following the Supreme Court's decision in **Francis Karioko Muruatetu -Vs- Republic [2017] eKLR** the mandatory nature of minimum sentences prescribed by Sexual Offences Act is not applicable to sexual offences.

18. The argument by the Respondent that the sentence that was applicable to the Applicant ought to be not less than 20 years' imprisonment given the age of the victim and that the sentence of 5 years' imprisonment was very lenient is persuasive and must be considered herein. It is clear that the trial court must have considered irrelevant factors and thus arrived at an erroneous sentence which merits this court to interfere. A perusal of the birth notification serial number 0280352 produced as an exhibit shows that the complainant was born on 25/11/2003 and hence at the time of the alleged incident she was aged about 14 years ten months and three days which was 15 years shy by one month and 27 days. It is thus clear that the age was within the relevant age bracket of between 12 and 15 years as contemplated by section 8(1) as read with section 8(3) of the Sexual Offences Act in which the minimum sentence is 20 years' imprisonment.

19. In the case **Shadrack Kipkoech Kogo - Vs - R., Eldoret Criminal Appeal No.253 OF 2003** the Court of Appeal stated thus: -

> ***"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."***

20. In addition, in exercising supervisory jurisdiction under Article 165(6**)** of the Constitution, the High Court does not under its powers of revision, exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based.

21. To revert back to the issue herein, as to whether to revise the sentence imposed herein, I note section 8(1), (3) of the Sexual Offences Act provides as follows:

> (1) ***A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(3) A person who commits am offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

22. In this instance, the Respondent is 24 years old and obviously took advantage of a 15-year-old school going girl and perhaps put to rest all her ambition for further studies and career. The effect of the offence on the minor are long lasting and the psychological effect is even worse. I find the sentence of five (5**)** years imprisonment that was meted herein is improper and unlawful. The same must be revised and substituted with the commensurate sentence of twenty years' imprisonment and which is to commence from the date of arrest namely 24/9/2018.

23. In light of the foregoing observations, the trial court's sentence of five (5) years dated 9/7/2020 is hereby reviewed and set aside and substituted with a sentence of twenty years' (20) imprisonment which shall commence from the date of arrest namely 24/9/2018.

Orders accordingly.

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

D. K. Kemei

Judge