



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. E042 OF 2020

SULEIMAN MUTUKU SYOKAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Suleiman Mutuku Syokau**, the applicant, was arraigned in court following allegations of having committed offences of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the Penal Code. Particulars being that on the 4th of February 2018, along Shimo La Tewa Road in Industrial Area, within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistols and knives robbed CMM cash Kshs 500/- and one jacket valued at Kshs. 800/- and at the time of such robbery used actual violence to the said CMM; Gang-rape contrary to **Section 10** of the Sexual Offences Act. Particulars being that on the night of 4th February 2018, along Shimo La Tewa Road in Industrial Area within Nairobi County, in association with two others still at large, intentionally and unlawfully caused his penis to penetrate the vagina of CMM without her consent; And an alternative charge of committing an Indecent Act with an adult contrary to **Section 11(A)** of the Sexual Offences Act. Particulars being that on the night of 4th February 2018 along Shimo La Tewa Road in Industrial Area within Nairobi County, intentionally touched the vagina of CMM with his penis against her will. He was tried, convicted of both counts and sentenced to serve six (6) years imprisonment for the offence of robbery with violence and two (2) years imprisonment for the offence of committing an indecent act with an adult. The court further ordered the applicant to be under probation supervision for one (1) year upon completion of sentence.

2. The gist of the matter was that on the 4th February 2018 at Shimo La Tewa, Industrial area, jointly with others who were not in court, armed with pistols and knives robbed CM of Ksh.800/- Actual violence was used and the appellant also touched the vagina of the complainant against her will.

3. The applicant was heard on Mitigation. He pointed out the fact of having been in custody for two (2) years. He pleaded for leniency and notified the court of having sustained gun wounds.

4. By an application dated 6th October 2020 the applicant seeks review of the sentence from the term of imprisonment to a non-custodial one with an option of fine.

5. The application is supported by an affidavit sworn by the applicant where he deposes that he was in remand custody for 2 ½ years; he is married and has one child; a mother and four (4) sisters who depend on him.

6. The application is opposed by the State/Respondent. Ms. Chege learned Counsel for the State urged that the applicant should have preferred an appeal.

7. I have considered the application herein, supporting affidavit and rival submissions of both parties. This court has been called upon to exercise its revisionary jurisdiction which is founded on **Section 362** of the Criminal Procedure Code (CPC) which provides thus:

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.

8. It is trite that a party who is aggrieved by the decision of the lower court may appeal or seek review. In event that the party opts to seek review the court will be limited to irregularities or incorrectness of the decision. An appeal would be broader. **Section 364(5)** of the CPC provides that:

When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

9. In the case of ***Republic -vs- Mark Lloyd Steveson (2016) eKLR Ngugi J.*** had this to state:

“In my view, the correct reading of the section is that a party who has a right of appeal cannot “insist” on invoking the High Court’s power of review; in other

words, such a party does not have a right to have the court review the decision she/he is aggrieved of. The only sure way to have such grievances heard and considered as a matter of right is through an appeal.”

10. In the instant application, since the term ‘sentence’ is considered part of what can be corrected, if irregular, this court has to enquire whether an injustice was occasioned.

11. I have been called upon to interfere with the sentence meted

out. The offence committed was grave. In a case of robbery with violence the Statute provides for a death penalty. Committing an indecent act with an adult attracts a sentence of five (5) years imprisonment or a fine of fifty thousand shillings or both. The trial court exercised discretion that it had then (See ***Francis Muruatetu & Another -vs- republic (2017) eKLR*** and took into consideration time spent in remand custody. The applicant has not pointed out existence of any

irregularity that would actuate this court to correct. This being the case I find the application lacking merit. Accordingly, it is dismissed.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 25TH DAY OF NOVEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Applicant

Ms. Akunja - ODPP