



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. E001 OF 2021

ERIC BUSHURU MUSHINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Eric Bushuru, the Applicant herein was charged in the main count with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 28th October, 2016 at [Particulars Withheld] Estate in Naivasha Sub-County within Nakuru County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of MN, a girl aged 16 years.
2. In the alternative, he was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that he intentionally and unlawfully caused his penis to come into contact with the vagina of MN, a girl aged 16 years.
3. After the trial, the Applicant was found guilty of the main charge, convicted accordingly and sentenced to serve 15 years imprisonment.
4. The Applicant did not prefer an appeal. Instead, he filed the instant application vide a Chamber Summons filed on 5th January, 2021 in which he sought revision of the sentence.
5. At the hearing of the application, he submitted that he was remorseful for what he did. He also submitted that the court should take into account the period he spent in custody before conviction.
6. Learned prosecutor, Ms. Maingi opposed the application. She submitted that the Applicant was sentenced under Section 8(4) of the Sexual Offences Act which provides for a minimum mandatory sentence of fifteen (15) years; and since the sentence was legal it was urged that the court should not set it aside. Ms. Maingi also submitted that the Applicant took advantage of a mentally challenged minor. She however had no objection to the period the Applicant stayed in remand before his conviction being considered to constitute part of the sentence.
7. In rejoinder, the Applicant submitted that he remained in remand for one year and two months.

DETERMINATION

8. I have considered the application and the respective submissions. **Section 8(4) of the Sexual Offences Act** provides that any person who commits an offence of defilement with a child between the age of 16 and 18 years is liable upon conviction to imprisonment to a term of not less than 15 years.
9. There is no doubt that the complainant, at the time of the offence was aged 16 years. The Applicant does not deny having committed the offence as he only seeks forgiveness. The provision under which he was sentenced provides for a minimum mandatory sentence of 15 years which is what the learned trial magistrate imposed. In that case, the court cannot vary the sentence as the same was legal.
10. However, the failure by the trial court to take into account the period the Applicant was in remand custody was contrary to the mandatory provisions of **Section 333(2) of the Criminal Procedure Code** which 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 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 (emphasis mine)."

11. This duty is also contained under *clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines* where it is provided that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

12. I have perused the trial court record. It shows that the Applicant was arrested on 28th October, 2016 and was sentenced on 7th December, 2017. He was in remand custody throughout the period of the trial. He was therefore in custody for a period of 1 year 1 month and 9 days which days I order be taken into account whilst computing the sentence.

13. In sum the application is dismissed save that the period the Applicant was in remand custody shall be taken into account. The ruling to be served upon the Officer in Charge of the prison for compliance. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 18TH NOVEMBER, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.
2. Miss Maingi for the Respondent.