



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E024 OF 2020

(FROM HCCR APP 48 OF 2011 AT MALINDI)

**THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND
PROTECTION FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL**

HIGH COURT PRACTICE RULES 2013

AND

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLE 23 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLE 19, 20, 21, 22, 23, 24, 25, 27, 28,

48, 50, 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 8 (1) AS READ WITH 8 (3) OF

THE SEXUAL OFFENCES ACT NO. 3 OF 2006

BETWEEN

SAID CHANGAWA JEFFA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

The Petitioner in person

Mr. Mwangi for the state

R U L I N G

that the petitioner was never given an opportunity to offer mitigation. Further, that the trial Court failed to take into account Section 333 (2) of the Criminal Procedure which provides for credit sentence on the period spent in remand custody.

Background

The petitioner herein was initially indicted, tried, convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

Being aggrieved with conviction and sentence, he preferred an appeal to the High Court and thereafter to the Court of Appeal as the Apex Court. On 15.3.2018, his appeal was entirely dismissed. His appeal for review of sentence is anchored on the premise of Article 50 (2) (Q) of the Constitution, which expressly states as follows:

“That a convicted person has a right to apply for review of sentence to a higher Court as prescribed by Law. The Law herein is as founded in Article 50 (6) (a) and (b) of the same constitution Provides (a) “If the persons appeal if any has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed to appeal and new and compelling evidence has become available.”

Attention is now given to applying the principle on new and compelling evidence that the trial Court in mandatory sentences ought to have taken into account Section 333 (2) of the Criminal Procedure Code on pre-conviction period spent in remand custody. Applying this principle to the case there is no conflict or ambiguity between Section 8 (3) of the Sexual Offences Act and Section 333 (2) of the Criminal Procedure Code.

Therefore a Court Judgment which is in the letter of mandatory minimum sentences cannot be said to have offended Section 333 (2) of the Criminal Procedure Code. Indeed, it would be safer for any Court to be guided with the manifestations under the Sexual Offences Act. Such example of presumption is the fact of Section 333 (2) of the Code not ousting the provisions on mandatory minimum sentences. This view was reinforced in connection with the dicta in **Muruatetu II**, where the Supreme Court emphasized that in the context of unconstitutionality of mandatory death penalty it only applies to the construction and interpretation of Section 204 of the Penal Code. The latter understanding is in consonant with the principle of legality of sentence under Section 8 (3) of the Sexual Offences Act.

It is therefore prudent to conclude that the petition lacks merit and the same ought to be dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER, 2021

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R. NYAKUNDI

JUDGE