



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**CRIMINAL REVISION NO. E003 OF 2020**

**PATRICK MWENDA KITHINJI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. Before this court is an undated Notice of Motion application that was filed in court on 9<sup>th</sup> November 2020. It seeks for the review of the Applicant's 10 years' imprisonment sentence to a 5 years' imprisonment sentence or a fine of Kshs. 50,000/= in line with the provisions of **Article 50(2)(p) of the Constitution of Kenya (2010)**.

2. From the court record, the Applicant was charged and convicted vide **Senior Resident Magistrates Court Sexual Offences Case No. 10 of 2014 (Chuka)** with the offence of rape contrary to **Section 3(1), (3)(a)(b) of the Sexual Offences Act, No. 3 of 2006** (hereinafter referred to as "**the Act**").

3. The particulars of the charge were that in 4<sup>th</sup> March 2014 in Keira Location within Tharaka Nithi County, the Applicant intentionally and unlawfully used force and caused his penis to penetrate the vagina of NK aged 40 years old.

4. In the alternative, the Applicant faced the charge of **committing** an indecent act with an adult contrary to **Section 11(A) of the Act**. The particulars of this alternative charge were that on 4<sup>th</sup> March 2014 in Keira Location within Tharaka Nithi County, the Applicant intentionally touched the vagina of NK aged 40 years old with his penis against her will.

5. The Applicant also faced a second charge of assault causing actual bodily harm contrary to **Section 251 of the Penal Code**. The particulars of the second charge were that on 4<sup>th</sup> March 2014 in Keira Location within Tharaka Nithi County, the Applicant unlawfully assaulted NK thereby occasioning her actual bodily harm.

6. The Applicant denied both charges and after a full trial, he was found guilty the main charge and sentenced to serve ten (10) years imprisonment. For this reason, he was consequently acquitted on the alternative charge to the main charge. As regards the second charge, the trial court also found the Applicant guilty of the offence and sentenced him to serve one (1) year imprisonment. The sentences were then ordered to run concurrently.

7. The Application was supported by an undated and an uncommissioned affidavit of Patrick Mwenda Kithinji and based on the grounds, *inter alia*, that:

- a. The sentencing trial magistrate did not adhere to Article 50(2)(p) while sentencing the Applicant.
- b. This court should consider the 6 years the Applicant has served in prison as sufficient punishment for the offence.
- c. The Applicant is remorseful and reformed hence seeks for leniency from this honourable court.

8. The Application was canvassed by way of written submissions. The Applicant and the Respondent filed their respective written submissions on 21<sup>st</sup> September 2021 and 2<sup>nd</sup> September 2021.

**The power of Revision**

The appellant seeks review. It is presumed that he has come to this court under **Section 362 & 364 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya)**. These are powers of court on revision.

**Section 362** provides:

*“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, legal it or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.*

On the other hand, **Section 364** provides:

*“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may; -*

*(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*

*(b) in the case of any other order other than an order of acquittal, alter or reverse the order.*

*(c) in proceedings under section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.*

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

*(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.*

*(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.*

*(5) 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.”*

From the foregoing provisions, it is clear that the High Court may exercise revisional jurisdiction in case of a conviction or in any other order. This jurisdiction will be exercised if the court is satisfied that any finding, sentence or order recorded or passed or the regularity of any proceedings of any court which is sub-ordinate to the High Court did not meet the required standards of correctness, legality and propriety. What may not be reviewed under this jurisdiction is an order of acquittal.

The High Court has been given wide discretion to make any order or give any direction which it considers appropriate. This is meant to ensure fairness in the administration of justice and to protect the rights of the accused person. The **Constitution under Article 165 (6) and (7)** entrenches the supervisory jurisdiction of the High Court over the sub-ordinate courts. The article provides:-

*“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”*

In view of the foregoing I opine that the application is properly before this court. I will proceed to analyze the application.

#### **Issue for determination**

9. Considering the pleadings and submissions of the parties, it is my view that the main issue for determination is whether the undated application filed on 9<sup>th</sup> November 2020 is merited.

#### **Analysis**

10. **Article 50(2)** of the **Constitution** states that:

**“Every accused person has the right to a fair trial, which includes the right-**

...

...

**(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”**

11. The offence of rape and the ingredients of the same are provided for in **Section 3(1) of the Act** as follows: -

**“3.(1) A person commits the offence termed rape if –**

**(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**

**(b) the other person does not consent to the penetration;**

**(c) the consent is obtained by force or by means of threats or intimidation of any kind.”**

12. **Section 3(2) of the Act** also provides that:

**“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not less than ten years which may be enhanced to imprisonment for life.”**

13. On the second charge for the offence of assault causing actual bodily harm, **Section 251 of the Penal Code** provides that:

**“any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.”**

14. From the foregoing, it clear that the Applicant was wrong to allege that he sentence ought to be reviewed to 5 years imprisonment for committing an indecent act with an adult contrary to **Section 11(A) of the Act**. As noted above, the Applicant was acquitted of the alternative charge having been found guilty of the main first charge. In the circumstances, it follows that **Article 50(p) of the Constitution** does not apply in this case as the punishment for the offences he was found guilty of are prescribed in statute and have not changed.

15. As regards the contention that the trial court did not consider the time the Applicant had spent in prison, **Section 333(2) of the Criminal Procedure Court** provides that:

**“(2) Subject to the provisions of section 38 of the Penal Code 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.”**

16. According to **The Judiciary Sentencing Policy Guidelines**:

**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.**

17. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in computing the period of the sentence. In this case, the Applicant was arrested on 10<sup>th</sup> May 2014. On 28<sup>th</sup> July 2014 the Applicant was released on bond terms. He then contravened the bond terms and a warrant of arrest was issued against him. He was consequently arrested and remanded in custody on 6<sup>th</sup> September 2016 until the final conclusion of the matter on 27<sup>th</sup> April 2017. This means that the Applicant spent eight (8) months in custody pending determination of the trial. In the circumstances, it is my view that the same should be considered and deducted out of the ten (10) years’ sentence meted.

**In conclusion:**

I find that the prayers, (a), (b), and (c) are without merits and are accordingly dismissed.

The sentence of **ten (10) years** meted out on the applicant shall be reduced by **eight (8) months** being the period the applicant spent in custody pending trial.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY OF DECEMBER 2021.**

**L.W GITARI**

**JUDGE**

**16/12/2021**

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

**16/12/2021**