



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.194 OF 2019**

**ELPHALET YOUNEY MUGANZI.....APPLICANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Elphalet Youney Muganzi was convicted of the charge of **rape** contrary to **Section 3(1)** as read with **Section 3(3)** of the **Sexual Offences Act**. The trial court found that the prosecution had established to the required standard of proof that the Applicant intentionally and unlawfully caused his penis to penetrate the vagina of SO by threatening to cut her with a panga. The Applicant was sentenced to serve ten (10) years imprisonment on 30<sup>th</sup> May 2019.

The Applicant was aggrieved by this sentence. He has applied to this court to revise the same on the grounds that the trial court did not take into account all the relevant factors or ignored some of the relevant factors in arriving at the said decision to sentence him to serve the custodial sentence. These factors include the fact that he was in remand custody for a period of three (3) years and seven (7) months prior to his conviction. He was a first offender; was remorseful and was the sole breadwinner of his young and vulnerable family. The Applicant stated that during his incarceration, he lost both his wife and mother. He pleaded with the court to take these factors into account and revise the sentence that was imposed by the trial court.

During the hearing of the application, the Applicant presented to court several certificates which indicated that he had undertaken several courses while in prison that made him grow both spiritually and intellectually. He had become a better person in the period that he has been in prison. Ms. Akunja for the State conceded that indeed the trial court did not take into account the period that the Applicant was in remand custody before meting out the sentence. In that regard, she urged the court to take the same into consideration.

In the present application, the Applicant challenges the exercise of judicial discretion by the trial court. This court can only interfere with such exercise of sentencing discretion in circumstances that are now settled in law. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

*“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In **Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000** this Court stated thus:*

*“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”*

In the present application, it was clear to the court that indeed the trial court did not take into account the period that the Applicant was in remand custody when it sentenced him to serve the custodial sentence. This court has perused the trial court’s notes when it sentenced the Applicant. The court observed that the minimum custodial sentence that is provided under **Section 3(3)** of the **Sexual Offences Act** is ten (10) years imprisonment. That is the custodial period that the Applicant was sentenced to serve. The trial court did not take into consideration the period of three (3) years and seven (7) months that the Applicant was in remand custody prior to his conviction. This was contrary to the provisions of **Section 333(2)** of the **Criminal Procedure Code** that requires this period to be taken into consideration.

In the premises therefore, the custodial sentence of ten (10) years imprisonment imposed by the trial court shall be reduced by three (3) years and seven (7) months with effect from 30<sup>th</sup> May 2019. The Applicant shall therefore serve a custodial sentence of six (6) years and five (5) months with effect from that date. It is so ordered.

**DATED AT NAIROBI THIS 25<sup>TH</sup> FEBRUARY 2020**

**L. KIMARU**

JUDGE