REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 58 OF 2019

JOHN MULI MUSAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the sentence in Machakos Chief Magistrate's Court (C.K. Kisiangani -RM),

in Criminal Case. SOA 436 of 2013 vide judgment delivered on 15.5.2015)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MULI MUSAU.....ACCUSED

JUDGEMENT

1. This is an appeal from the sentence of Hon. C.K. Kisiangani, Resident Magistrate in Criminal Case No. 436 of 2013 on 15.5.2015. The Appellant was on 6.5.2013 charged with the offence of defilement contrary to what is indicated as Section 9(1) as read with 9(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "on the 5th day of May 2013 at within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **SM** a child aged about 7 years. The appellant also faced the alternative count of an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. The appeal was lodged on 25.3.2019 and pursuant to leave that was granted on 25.6.2019 by this court to file the same out of time the same is deemed to be properly on record. The appellant's case is three-fold. Firstly that he is a family man with 4 children. Secondly that he is the sole bread winner since his wife is unemployed. Thirdly that he had learnt the values of patience and hard work and promised to be a law abiding citizen.

3. The appellant made an application vide notice of motion that he sought to invoke the revisionary powers of the court under Section 362 of the Criminal Procedure Code. The appellant prayed that the court order that his sentence run from the date of arrest in line with Section 333(2) of the Criminal Procedure Code. The applicant in his submissions placed reliance on the case of **Ahamad Abolfathi Mohammed & Another v R (2018) eKLR,** Section 333(2) of the Criminal Procedure Code and Para 7.10 of the Judiciary Sentencing Policy Guidelines in arguing that this court ought to consider the time he served in custody. According to the appellant the trial court erroneously sentenced him from 15th May, 2015 instead of 6th May, 2013 and in this regard the time he spent in custody ought to be considered by this court. The appellant submitted that this error had a negative bearing on the application of Section 46 (2) of the Prisons Act for remission and in this regard placed reliance on the case of **Sammy Musembi Mbugua & 4 Others v A.G. & Another (2019) eKLR.**

4. The counsel for the state in their submissions addressed the issue of conviction that is not the subject of the appeal. Counsel also in the same submissions in addressing the issue of whether the sentence was excessive submitted that judicial discretion was taken away by the law in prescribing minimum sentences and thus the sentence meted by the trial court was fair. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

5. This being a first appeal, this court is obligated to subject the evidence in the trial court to fresh scrutiny and come up with an independent

decision. This appeal is limited to the sentence only and the court shall limit the scope of its scrutiny.

6. In the trial court, after the appellant pleaded not guilty, he was subjected to the trial process whereupon the court convicted him of the minor and cognate offence of attempted defilement and after considering the mitigation sentenced him to 10 years imprisonment. There was no indication as to when the sentence was to run.

7. The submissions by learned counsel for the Respondent appear to take a hard stance yet under the provisions of section 333(2) of the Criminal Procedure Code period spent in custody must be factored during sentencing. Having considered the appeal and the respective submissions of the parties, the issue for determination is whether the appeal and / or application has merit.

8. This is an appeal that seeks to interfere with the discretion exercised by the trial court in passing the 10 years imprisonment sentence that the appellant earned. The appellant's gravamen is that the time he spent in custody was not considered.

9. When carrying out sentencing in Kenya, courts are guided by the judiciary Sentencing Policy guidelines. This is not to say that there is a one size fits all approach to sentencing and in this regard it suffices to cite paragraph 7.7 that is to the effect that "*There have been divergent practices in respect to the impact of the time served in custody during trial on the sentence imposed. Some courts have been keen to consider the pre-conviction detention and have imposed a shorter sentence.*[48] *Others have not been taking this into account*.

10. However in the same guidelines **Time Served in Custody Prior to Conviction is addressed thus:**

> *7.10 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.49*
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> *7.11 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.*
>
> *7.12 An offender convicted of a misdemeanour and had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely under section 35 (1) of the Penal Code*."

11. **Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:**

> "*Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings*."

12. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **Ogolla & S/O Owuor v Republic [1954] EACA 270** where the court stated:

> **"***The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James Vs. Republic [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.***"**

13. Section 333 (2) of the Criminal Procedure Code states:

> "*(2) 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."***

14. Having had due regard to Section 333 (2) of the Criminal Procedure Code and the sentencing guidelines I find that the intimation by the appellant/applicant in so far as it relates to the cited section has merit. Accordingly, this court finds that the computation of ten (10) years that the Applicant/Appellant was sentenced be inclusive of the time that he was in custody. This is because according to the charge sheet, he was arrested on 5.5.2013 and there is no indication that he was out on bond and as such the said period spent in custody must be taken into account.

15. In the result the appeal on sentence partly succeeds. The sentence of ten years imposed by the trial court shall commence from the date of arrest namely 5.5.2013.

It is so ordered.

Dated and delivered at **Machakos** this **29th** day of **April, 2020.**

D. K. Kemei

Judge