



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL DIVISION

CRIMINAL REVISION NO. 12 OF 2019

CONSOLIDATED WITH CR.REV.113 OF 2020

AND CRIMINAL REVISION NO.114 OF 2020

(BEING REVIEW OF SENTENCING IN CM.CR.C NO.474 OF 2017)

IGK1ST APPLICANT

NR.....2ND APPLICANT

TSN.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. A brief outline of the case is that the applicants **IGK, NR and TSN** were charged with the offence of Aiding in Female Genital Mutilation c/s 20 as read with Section 29 of the Prohibition of Female Genital Mutilation Act (No.32 of 2011 Laws of Kenya); the applicants were convicted and each sentenced to serve a term of seven (7) years imprisonment; and the 2nd applicant was also convicted and sentenced on Count II for a term of three (3) years which was to run concurrently with that of Count I;
2. Being aggrieved by the sentences, they initially filed an Appeal which was withdrawn on the 9/12/2019; they proceeded to file the instant applications seeking a revision of their sentences as they contend that the sentences were harsh and excessive in the circumstances of the offence;
3. At the hearing hereof the applicants were unrepresented whereas the respondent was represented by Prosecuting Counsel Ms Chemenjo; all the parties made oral submissions; hereunder are the parties' respective submissions;

APPLICANTS' CASE

4. The application is for review of sentence under the provisions of Section 362 and 364 of the Criminal Procedure Code; and their prayers were that the court revises their sentences either to a non-custodial sentence or the sentences be revised downwards;
5. To support their prayers for the review of the sentences the applicants relied on the penalty provision of the Act which provides a minimum sentence of three (3) years; they also stated that they were first offenders, and were very remorseful for the actions that led to their conviction; and in the time spent in custody they had learnt from their mistakes;
6. The applicants also prayed that the period spent in custody from the date of their arrest be taken into consideration; so that the commencement date of their sentences be backdated to commence from the date of their arrest as opposed to the date of their conviction;

RESPONDENT'S CASE

7. In response counsel opposed the application for the review of the sentence; the victim was a child aged 15 years at the time the offence was committed; the 1st applicant was the mother of the child, the 2nd applicant was the grandmother and the 3rd applicant was the father and

that they had all failed in their duties of protecting their child/grandchild; and submitted that the sentence that had been imposed of seven (7) years was lawful and was as provided by law;

8. In conclusion counsel submitted that the applications for the review of sentence were not merited and should be dismissed; but was not opposed to the one (1) year spent in remand being taken into consideration;

ISSUES FOR DETERMINATION

9. After hearing the rival submissions this court has framed only two issues for determination which are as follows;

- (i) Whether the trial court erred when sentencing the applicants; whether to review their sentences;
- (ii) Whether to review the commencement date of the sentences;

ANALYSIS

Whether the trial court erred when sentencing the applicants; whether to review their sentences;

10. The court record reflects that the applicants had been charged in CMCR Case No.474/2017 with the offence of Aiding Female Genital Mutilation c/s 20 as read with Section 29 of the Prohibition of Female Genital Mutilation Act; the 2nd applicant has a second Count of allowing her premises to be used to carry out the offence; they were all convicted and sentenced to serve a term of seven (7) years imprisonment; with the 2nd applicant being given an additional three (3) years imprisonment for count II; both sentences were to run concurrently;

11. The applicants now seek the review of their sentences under the provisions of Sections 362 and 364 of the Criminal Procedure Code; and prayed for revision of sentence to a non-custodial sentence or a reduction downwards;

12. The court record reflects that before passing sentence the trial court invited the applicants to mitigate; and although they all stated that they were first offenders the trial court did not give them the benefit of the minimum sentence;

13. The applicable law is found at Section 29 of the Act and it is the penalty provision for all the offences set out therein; the section reads as follows;

“ 29. Penalty Section

A person who commits an offence under this Act is liable, on conviction to imprisonment for a term of not less than three years or to a fine of not less than two hundred thousand shillings, or both.”

14. The sentence imposed by the trial court was for a term of seven (7) years on Count I and three (3) years on Count II; the contention by the applicants is that the sentences imposed upon them were harsh and excessive considering that they were first time offenders;

15. The trial court had the benefit of seeing the applicants and after hearing the case, exercised its discretion after conviction by sentencing them to a higher penalty than the minimum of three (3) years; the applicants argue that they are first offenders but this was taken into consideration by the trial court;

16. The sentences are found to be lawful and are as provided for in law; therefore, it is evident that the trial court did not act upon a wrong principle of law nor had it failed to take into account the proper provisions of the law when passing the sentences;

17. This court concurs with the trial court's sentiments that the three who were the principal care givers of the child were the same ones who abdicated from their responsibilities and exposed her to an act that is prohibited in law; therefore, there are no good reasons found by this court for it to invoke its supervisory powers of revision so as to interfere with the sentences imposed;

18. The applications for revision are found to be unmerited;

Whether to review the commencement date of the sentence;

19. The applicants had also requested that the provisions of Section 333(2) of the Criminal Procedure Code be invoked and prayed for an order that the sentences imposed to start from the date of arrest.

20. The provisions of Section 333(2) of the Criminal Procedure Code reads as follows;

“(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 of which it was pronounced, except where otherwise it is 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”.

21. The record reflects that the applicants were arrested on the 2/12/2017 and their case was determined on the 10/12/2018; they were all admitted to bond which was set at Kshs.500,000/- together with a surety of a similar amount; being unable to meet the terms the applicants remained in custody throughout the tenancy of their trial; their incarceration cannot be attributed to denial of bail but rather to their inability to satisfy the terms and conditions;

22. The above notwithstanding this court will take into consideration the period the applicants spent in custody; which was from the date they were arrested to the date of their conviction and sentencing; and this court shall avail the benefits of the provisions of Section 333(2) to the applicants;

23. The applicants were arrested on the 2/12/2017 and were convicted and sentenced on the 10/12/2018; the period they spent in remand translates to approximately one (1) year; this period shall be reduced from their sentences.

FINDINGS AND DETERMINATION

24. For the foregoing reasons this court makes the following findings and determinations;

(i) The applications for revision of the sentences are found to be unmerited and are hereby disallowed;

(ii) The sentences imposed of seven (7) years are found to be within the law.

(iii) The application for review of the commencement date of the sentences to run from the date of arrest is found to be merited and is hereby allowed;

(iv) The sentences shall commence from the date of arrest which as per the Charge Sheet is stated as being the 2/12/2017;

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 29th day of October, 2020.

HON. A. MSHILA

JUDGE