

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.704 OF 2018

FELIX ODHIAMBO OYOO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Felix Odhiambo Oyoo was convicted of the charge of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. He was sentenced to serve ten (10) years imprisonment on 28th April 2015. The Applicant made an application to this court for an order of revision so that the period that he spent in remand custody is taken into consideration. The Applicant stated that he was in remand custody for a period of eighteen (18) months prior to his conviction by the trial court. This period was not taken into account when he was sentenced by the trial court. The Applicant further states that in the period of his incarceration, he has undertaken various courses which had improved him as a person. He has undertaken courses of carpentry and joinery, life skills, career coaching and entrepreneurship, peer counselling, painting and bible studies. He was remorseful for the offence that he committed and pleads with the court to exercise leniency on him and reduce the term of imprisonment that was imposed on him.

Ms. Nyauncho for the State, having perused the proceedings of the trial court, was satisfied that indeed the Applicant was in custody for a period of eighteen (18) months prior to his conviction. She agreed with the Applicant that this period ought to be taken into consideration.

This court has considered the Applicant's application for reduction of sentence by this court taking into account the period that he was in pre-trial custody prior to his conviction. The Court of Appeal in Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016 (unreported) held thus at Page 28:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

In the present application, **Section 9(2)** of the **Sexual Offences Act** provides that if any person is convicted of the offence of attempted defilement of a child, he is liable to be sentenced to serve a term of not less than ten (10) years imprisonment. That is the minimum sentence that can be meted out to a convict under the said section. It was therefore clear to this court that the trial magistrate did not take into account the period that the Applicant was in remand custody prior to his conviction when the sentence was meted out to him. That period shall be taken into account by this court pursuant to the above decision of the Court of Appeal. The prosecution conceded that indeed this period was not taken into consideration. Having taken that period into account, and noting that the Applicant is entitled to remission, this court, in the circumstances shall commute the custodial sentence of the Applicant to the already period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE