



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL REVISION NO. 21 OF 2019

NICHOLAS MUTISO NZIOKA.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. The appellant was charged and convicted with the offence of attempted defilement contrary to 9(1) as read with Section 9(2) of the Sexual Offences Act. He was sentenced to 6 years of imprisonment by the Senior Principal Magistrates Court at Kangundo and has now applied to this court under Section 333(2) of the Criminal Procedure Code for revision of sentence.
2. There is no indication of any response by the state to the application.
3. The application was disposed of by way of oral and written submissions. The appellant submitted that he was arrested on 28.4.2014 and was granted bond but failed to raise the same hence remained in custody for 5 years until retrial on 27.8.2016 and on 21.2.2018 he was sentenced to 6 years imprisonment . The applicant submitted that he be sentenced to the time served. The applicant submitted in his written submissions that he attended rehabilitation and correctional programs hence he sought an opportunity for a reduction of sentence to the time served. Mr. Cliff Machogu, prosecution counsel, submitted that the application lacked merit and that the trial court considered the time served when it sentenced him to six years imprisonment.
4. The issue for determination is whether the court may grant the orders sought.
5. The application invokes the revisional powers of the High Court under Section 362 and 364 of the Criminal Procedure Code that empowers the High Court to revise the orders of subordinate courts.
6. A look at Section 9(1) as read with Section 9(2) of the Sexual Offences Act shows that the finding of the trial court is within the law hence there is no reason to interfere with the sentence of the trial court.
7. Section 382 of the Criminal Procedure Code 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.”

8. I find no error or irregularity or illegality of principle when the court sentenced the appellant to 6 years imprisonment as the trial court did consider the period spent in remand custody. Indeed the offence committed attracted a minimum sentence of ten years imprisonment and hence the trial magistrate factored the four years spent in custody in arriving at a sentence of six years. The magistrate’s hands were tied and could only impose the minimum sentence provided. It is clear that the trial magistrate upon receiving the appellant’s mitigation knocked off four years spent in custody and then imposed the remainder of six years. The trial magistrate ought to have indicated this on the record so as to prevent any confusion in the mind of the appellant. As the appellant has now moved this court, then it is my duty to ensure that I set the record straight by setting aside the sentence and impose the appropriate sentence.

9. With regard to the submission that his time in custody should be considered, Sections 333 (2) of the Criminal Procedure Code that 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.”

10. Having had due regard to Section 333 (2) of the Criminal Procedure Code I find that the sentence ought to commence from the date of arrest. As the minimum sentence provided is ten years imprisonment, the trial court’s sentence must be interfered with by substituting it with a sentence of ten (10) years and that the same will commence from the date of arrest namely 26.4.2014.

11. In the result the applicant’s application partly succeeds. The sentence by the trial court is set aside and substituted with a sentence of ten (10) years commencing from the date of arrest namely **26.4.2014**.

It is so ordered.

Dated and delivered at Machakos this 28th day of November, 2019.

D. K. Kemei

Judge