



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 473 OF 2018.

IN THE MATTER OF SECTION 362 OF THE CRIMINAL PROCEDURE CODE, CAP 75 OF THE LAWS OF KENYA.

AND

IN THE MATTER OF SECTION 137(i)(2a) AND SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE, CAP 75 OF THE LAWS OF KENYA.

BENJAMIN MANJONI ONYACHI.....APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING.

1. Benjamin Manjoni Onyachi, hereafter the Applicant, brought the present application filed on 4th May, 2018 seeking a revision of the sentence. He was charged with the offence of rape contrary to Section 4 of the Sexual offences Act No. 3 of 2006 in that on the 19th Day of My, 2015 at Ngong Forest within Lang'ata Sub County of the Nairobi County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of P I without her consent. In the alternative he was charged with an indecent act contrary to Section 11(Aa) of the Sexual offences Act. He was conviction in the main charge in Count I and sentenced to serve five(5) years imprisonment. He deposed that he had spent two years in remand custody during his trial and sought to have the period considered as part of the sentence. He thus prayed for leniency as he was remorseful and humbled. Further, that he had learnt many skills in custody which would assist him in the future.

2. Ms. Atina for the Respondent opposed the application. She submitted that Section 3 of the Sexual Offences Act provides for a minimum of five years imprisonment and is binding to the court. That if the court were to consider the period spent in custody it would sentence the Appellant to a period less than what is provided by the law thereby occasioning an illegality.

3. In reply, the Appellant submitted that the court should apply its discretion and consider the period spent in custody.

DETERMINATION.

4. The Applicant seeks to have the sentence of five years passed by the trial court revised to take into account the period he spent in remand as provided by Section 333 of the Criminal Procedure Code. The same provides as follows;

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code 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.

5. It is clear that the provision applies only where a convict is sentenced to a term of imprisonment and pursuant to a Warrant of Commitment. Of relevance to the present application is subsection (2) which sets out what constitutes the period of imprisonment. However, a proviso is set out to this subsection which indicates that a sentence of imprisonment **shall take into account the period that has been**

spent in custody. This proviso relates to the period that has been spent in custody prior to the sentence pursuant to the conviction which relates to pre-charge and remand detention for those who fail to meet bond and bail terms. The relevance of the section is that it ensures that the accused is not subjected to an inordinate sentence above and beyond the required punishment in law. This may occasion an injustice particularly when it is taken into account that the convict remained in remand whilst harboring a presumption of innocence.

6. Therefore, notwithstanding the provision of a mandatory minimum sentence, the trial court should pass the lawful sentence then subsequently state that the sentence shall take into account the period the convict was detained in custody as provided at Section 333(2) of the Criminal Procedure Code.

7. It is then the responsibility of this court where a case is deserved to exercise its powers under Section 362 of the Criminal Procedure Code and Article 165(6) of the Constitution to remedy the impropriety in sentencing. I will proceed to do so. The Applicant was in custody from the date of his arrest on 9th May, 2015 until his conviction on 29th June, 2017, a period of two years one month and 20 days. This period shall be taken into account whilst tabulating the jail term.

8. Accordingly, the application succeeds. This same is allowed. The Applicant shall serve the five year jail term less the period spent in custody.

DATED AND DELIVERED ON THIS 27TH DAY OF SEPTEMBER, 2018

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.
2. Miss Atina for the Respondent.