



REPUBLIC OF KENYA



KENYA LAW
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**Macharia v Republic (Criminal Revision E117 of 2022)
[2023] KEHC 154 (KLR) (5 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E117 OF 2022
GL NZIOKA, J
JANUARY 5, 2023**

BETWEEN

JESSE KINUTHIA MACHARIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Principal Magistrate's Court at Engineer vide Criminal Case Sexual Offence No 14 of 2017, charged with the offence of sexual assault contrary to section 5(1)(a) (i) as read with section 5(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge are as per the charge sheet.
2. The applicant pleaded not guilty to the charge and the case proceeded to full hearing. At the conclusion of the case the Honourable Trial Magistrate convicted him and sentenced him to serve a term of ten (10) years imprisonment.
3. However, the applicant now seeks for sentence review based on notice of motion application filed in court on; August 8, 2022, in which he prays that the court reviews and reduces his sentence to the period served. He relies on the memorandum of sentence review in which he states in the mitigating grounds as follows: -
 - a. That, I am a first offender.
 - b. That, I have no pending appeal.
 - c. That, I am remorseful of my offence and have learnt to be a law-abiding citizen and rehabilitated well enough.
 - d. That, I am from a poor but a humble family background.



- e. That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.
 - f. That, I am not appealing against sentence and conviction but applying for a review of sentence.
4. The application was opposed by the Respondent through grounds of opposition dated; October 11, 2022, in which it is stated that:
- a. That, the respondent is opposed to further review of sentence by this court as prayed by the appellant.
 - b. That, this court is *functus officio* in this matter, having conducted a sentence review in Miscellaneous Application No 4 of 2020.
 - c. That, this application is unmerited and ought to be dismissed forthwith.
 - d. That the reasons whereof we pray that this Honourable court be pleased to dismiss the application.
5. The probation service filed a report dated October 11, 2022 and indicated that the applicant Is 37 years old, married with one child in grade six (6). That, the applicant has P1 certificate from Kaimosi Teachers College and was employed as a teacher in the same school where the complainant was.
6. That, he had a permanent place of abode and his family members are willing to receive him, if his given a non-custodial sentence. Further, the village elder is agreeable to the applicant's release stating that he has learnt his lesson during the period he has so far spent in prison.
7. Furthermore, the applicant has so far served two (2) years and nine (9) months in prison, during which period he has been teaching other inmates and been appointed as the Principal at the Naivasha Medium Prison. That, he has no record of indiscipline at the Prison and is recommended for favourable review.
8. However, the report further indicates that, the applicant still claims that the offence was a set up by the victim's mother after he rejected her advances. That, the applicant seeks for leniency and is remorseful. That during the hearing of the case in the subordinate court. he was in custody for seven (7) months.
9. It noteworthy though that, the probation officer's report does capture the victim and her family's view as they were allegedly not traced
10. Be that as it were, the Respondent filed submission dated, October 12, 2022 and stated submitted that, the applicant sexually assaulted the complainant who was five (5) years old, yet he was her a teacher and duty bound to protect. That, the circumstances were aggravated and resulted to the injury of the complainant.
11. The Respondent urged the court to disregard the pre-sentence report that doesn't capture the victim's views and show that the applicant is not remorseful for the offence as he still denies committing the offence. That, in the circumstance a deterrence sentence is appropriate.
12. At the conclusion of the arguments by the parties, I note that, the law that govern the revisionary power of the High Court is stipulated under sections 362 of the [Criminal Procedure Code](#) which states as follows:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or



propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

13. However, that section should be read together with section 364 of the [Criminal Procedure Code](#) which states as follow: -

“In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

14. It is clear from the above provisions that, the Court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

15. It therefore follows that, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; [Major SS Khanna vs Brig FJ Dillon](#) 1964 AIR 497, 1964 SCR (4) 409).

16. It is also noteworthy that, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; [Wesley Kiptui Rutto & Another vs Republic](#) [2017] eKLR, [Republic vs Everlyne Wamuyu Ngumo](#) (2016) eKLR, [Public Prosecutors vs Muhavi Bi Mond Jani & Another](#) 1996 4 LRC 728, 743-5, [DPP vs Samuel Kimuche](#).



17. Having considered the application, I find that, the offence with which, the applicant is convicted and sentenced of, is provided for under section 5(1)(a)(i) as read with Section 5(2) which states as follows: -

- "(1) Any person who unlawfully—
 - (a) penetrates the genital organs of another person with—
 - (i) any part of the body of another or that person; is guilty of an offence termed sexual assault.
- (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."

18. It is clear from the aforesaid that, the sentence provided for the offence is a mandatory minimum sentence of ten (10) years imprisonment that may be enhanced to life imprisonment. In the present case, the applicant was sentenced to imprisonment for ten (10) years, being the minimum sentence applicable. The sentence is therefore within the prescribed sentence under the law and is therefore legal, proper and correct.

19. The applicant also seeks to be considered for release under the provisions of [Community Service Orders Act](#), No 10 of 1998. However, section 3 therefore stipulates that: -

- "(1) Where any person is convicted of an offence punishable with—
 - (a) imprisonment for a term not exceeding three years, with or without the option of a fine; or
 - (b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service."

20. In that regard, it is noteworthy that, the applicant was sentenced to ten (10) years imprisonment on January 16, 2020. He has more than three (3) years to go. Therefore, he cannot be considered for a non-custodial sentence under the [Community Service Orders Act](#).

21. The applicant further seeks that; the period he was in custody be considered. That, he was in remand for seven (7) months. I have gone through the trial court record and note that the applicant was arrested on March 5, 2017. He was given bail on March 10, 2017 but managed to get bond on July 19, 2017. He was in remand for a period of four (4) months.

22. In that case, the provisions of; section 333 (2) of the [Criminal Procedure Code](#) is couched in mandatory terms that the trial court while meting out a sentence shall take into account the period the convict spent in custody.

23. The aforesaid provisions states as follows: -

“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”

24. In the same vein, the Court of Appeal in the case of; *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR stated that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code...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....“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(s) 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.”

25. Be that as it were, the applicant avers that, he filed a Miscellaneous application number 4 of 2020 wherein the period he was in custody of seven (7) months was considered as a result the custodial sentence he is serving was reduced from ten (10) years to nine (9) years and five (5) months. As such the application herein to consider the same period is not tenable.
26. The upshot of the aforesaid is that, the application herein has no merit and it is dismissed.
27. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 5TH OF JANUARY 2023.

GRACE L. NZIOKA

JUDGE

In the presence of;

Applicant in person/virtually

Mr Michuki for the Respondent

Ogutu: Court Assistant

