



REPUBLIC OF KENYA



KENYA LAW
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**Onyambi v Republic (Criminal Revision E122 of 2022)
[2023] KEHC 1449 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E122 OF 2022
FR OLEL, J
FEBRUARY 16, 2023**

BETWEEN

GEOFFREY NYANDWARO ONYAMBI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged and convicted of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act* in Naivasha criminal case No 032 Of 2017 and sentenced to thirteen (13) years on October 29, 2022. The applicant subsequently filed a revision of his sentence to include the time spent in custody and reduction of the same. The application is based on the grounds on the face of the said application filed in court on August 23, 2022 and the supporting affidavit thereof.
2. The respondent, through state counsel Mr Alex Ndiema opposed the application through oral arguments and he did submit that the conviction and sentence was proper and lawful and there was no need to interfere with the same.

B. Analysis of Law

3. I have considered the application by the applicant as well as the response by the state counsel. Upon receipt of the request for revision of sentence, this court directed that a Probation Officer's report be filed on the convict for consideration by the Court. The probation department did file their report on dated October 11, 2022 by one Kamau M. Joel. The appellant was found to be of 54 years of age and was a father was of 8 children. The same report made a positive recommendation for review of the applicant's sentence.



4. The powers of the High court in revision are contained in Section 362 through to 366 of the [Criminal Procedure Code](#) (cap 75). Section 362 specifically provides 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”.

5. What the High Court can do under its revision jurisdiction is stated under Section 364 of the [Criminal Procedure Code](#) Cap 5, which states as follows: -

“(1) 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 section 354, 357 and 358, and may enhance sentence;

(b) In the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

6. The maximum sentence provided for the offence of indecent assault is a term of not less than ten years imprisonment. The sentence of thirteen (13) years imposed was within the law considering that the applicant was a first offender and the complainant was his daughter.

7. It has not been demonstrated that the trial magistrate committed any illegality, impropriety or mistake in sentencing the applicant.

8. I am also alive to [The Sentencing Policy Guidelines](#) page 21 which provides:

“Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated



with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending.”

9. I have also take into consideration the mitigation of the applicant in this application and that the probation report filed is favorable. Be that as it may, it would have been more appropriate for the appellant to appeal as against the sentence. The provisions of sec 364 (5) limits this court’s jurisdiction to interfere with sentence as imposed.

On section 333(2) of the CPC

10. The appellant also pleaded with this court to consider the period he was in remand (one year and six months) and the same be considered as part of the sentence pursuant to provisions of section 333(2) of the Penal Code.
11. Decisional law as well as legal writing’s emphasize that courts must give full effect of section 333(2) of the Criminal Procedure Code. See Court of Appeal in Abamed Abolfatbi Mobammed & another v Republic (2018) eKLR and also Bethwel Wilson Kibor v Republic (2009) eKLR
12. Section 333(2) of the CPC creates an obligation on the court to take into account the time spent in custody and its purpose is to prevent subjecting a person to more severe sentence than prescribed in law. Accordingly, the section pertains to fair trial and justice. Failure to give full effect of this section will lead to a violation of right in particular Article 50(2)(q), and Article 27(1) and (2). This court must give effect to this provisions to give effect to the law.
13. The applicant stated that he had been in custody for a period of one year, six months before he was sentenced and this period was not included in his sentence. I have gone through the court file. The applicant was initially charged May 17, 2017 and admitted to Bond of Kshs 200, 000/= plus one surety. The accused severally skipped court sessions and warrants of arrest were issued. On April 30, 2018 he was brought to court under warrant of arrest and his surety applied to be discharged.
14. On 13.6.2018 the appellant was admitted to new bond terms of Ksh.300,000 with one surety or Kshs 100,000/=. On release the applicant again absconded and failed to attend court and new warrant of arrest were issued on July 3, 2019. , when he appeared in court on August 15, 2019 his bond was cancelled and the court direct that he shall remain in remand until the case was heard and determined. The applicant thus remained in custody from August 2019 to October 2020 when he was convicted and sentenced to serve 13 years imprisonment. This period in one year and two months not six months as alleged by the applicant.
15. In light of the above I do review the applicant’s sentence and direct that the period of one year and two months when he was in remand is to be included as part of his sentence of 13 years delivered on October 29, 2022.
16. It is so ordered.

DATED, DELIVERED AND SIGNED AT MACHAKOS (VIRTUALLY) THIS 16TH DAY OF FEBRUARY 2023.

FRANCIS RAYOLA

JUDGE

In the presence of: -



Mr Alex Ndiema for State

Applicant present

