



**Kabomi v Republic (Criminal Revision E420 of 2023)
[2023] KEHC 23976 (KLR) (Crim) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E420 OF 2023
DR KAVEDZA, J
OCTOBER 24, 2023**

BETWEEN

JOHN ABUGA KABOMI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged, convicted and sentenced to ten (10) years imprisonment, for the offence of Defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006.
2. The applicant has now filed a notice of motion application under certificate of urgency, dated 24th January 2021, seeking review of his sentence; that he be considered for a non-custodial sentence.
3. The application is supported by grounds in the affidavit of the applicant, John Abuga Kabomi, where he urged the court to consider him for a non-custodial sentence, as he is disabled, thus being in custody is oppressing and demeaning, causing him mental anguish.
4. He further averred that he is remorseful for the offence committed and seeks leniency so that he can fend for his family who depend on him.
5. The respondent opposed the application vide grounds of opposition dated 23rd May 2023. The respondent urged the court to dismiss the application on grounds that the application is misconceived and unsubstantiated, that it is an abuse of court process and that it lacks merit.

Applicant's written submissions

6. The applicant submitted that this court has jurisdiction under Article 165(3) (b) and (d) of the *Constitution* to hear and determine the application as it raises issues of fundamental rights and



freedoms. It was his submission that by virtue of being disabled, his continued stay in custody is demeaning, harsh, excessive, and contravenes the spirit of the constitution under Articles 28 and 29.

7. Lastly, the applicant in his submissions further implored this court take into account that he is a first-time offender who undertakes not to engage in criminal activity, and who has embraced prison reforms and rehabilitation programs. To support this, the applicant submitted that while serving his time in prison, he trained as a paralegal under an initiative by Justice Defenders, a non-governmental organisation. As a result, he serves his fellow prisoners in drafting legal documents, thereby helping to bridge access to justice, which is hardly affordable to many of them.
8. As I perused the court file, I took note of a letter dated 13th September 2021 from Miriam Wachira, the Country Director, Justice Defenders- Kenya, confirming that indeed the applicant is a trained paralegal at Nairobi Medium Prison since December 2020. The letter further indicated that the applicant has been instrumental in providing legal aid to fellow inmates and he has undertaken several roles among them, being the deputy registrar of the Justice Defenders legal office at Nairobi Medium Prison.

Respondent's written submissions

9. While the respondent filed their submissions in this matter, the said submissions address the merits of the applicant's conviction, and whether the offence was sufficiently proven. The applicant on the other hand is not challenging the merits of his conviction, what he is seeking is a sentence review. I therefore find that the said submissions by the respondent do not serve to help this court come to a determination on the matter at hand.

Analysis and Determination

10. This court has carefully considered the arguments made by the applicant to this application. It has also had the benefit of perusing the proceedings and the judgment of the trial court. The issue for determination by this court is whether the Applicant made a case for this court to review the custodial sentence that was imposed on him.
11. It is trite law that this court will not interfere with the sentencing discretion of a trial court unless it is established that the said court overlooked some material facts or took into account some wrong material or acted on wrong principles of the law [see *Bernard Kimani Gacheru v Republic* [2002] eKLR].
12. Further, section 333 (2) of the *Criminal Procedure Code*, which invokes the revisionary jurisdiction of this court as donated by section 362 of the *Criminal Procedure Code* 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.”
13. From my reading of the ruling on sentencing, I note that the trial court considered all relevant factors including the fact that the applicant is a person with disability who deserves some lenience. Considering that section 8(1) as read with 8(3) of the *Sexual Offences Act* imposes a maximum penalty of life imprisonment for the offense of defilement, and taking into account that the applicant exploited a child who considered him a parent, I am convinced that the trial magistrate appropriately exercised her discretion in imposing a sentence of ten (10) years. The sentence was not illegal, harsh or excessive in the circumstances of the case; I therefore decline to interfere with the sentence meted out against the applicant.



14. It is however noteworthy that the applicant was in remand custody from the date of arrest, 06/8/2018, to 15/11/2018 when he was released on bail (a total of 101 days in custody).

15. Section 333 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides that:

“(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.”

16. Further, the *Judiciary Sentencing Policy Guidelines* states as follows as regards the foregoing section:

“The proviso to Section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

17. Based on the foregoing provisions, I direct that the period spent in remand custody be included in the computation.

18. In the end, the application is dismissed, save that the 101 days in which the applicant was in remand custody prior to being granted bail to be computed.

19. This ruling should be served upon the officer in charge of the prison for compliance.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2023.

D. KAVEDZA

JUDGE

In the presence of:

Mr/Ms. for the State.

Applicant present (VTC)

