



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL REVISION NO. E017 OF 2020

DAVID KAMAU WANENE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Background

1. The Applicant was charged under **Section 8 (1) and 8 (4) of the Sexual Offences Act** for defilement of a minor with the particulars being that on the 17th December, 2011 at Magumu Location within Nyandarua County did unlawfully cause his genital organ namely penis to penetrate the genital namely vagina of PW a child aged 17 years In the alternative, that he committed an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act**. The Applicant was convicted under **Section 8 (1) and 8(4) of the Sexual Offences Act** and acquitted in the alternative charge on the 25/10/2013. He was sentenced to serve fifteen (15) years imprisonment.
2. Dissatisfied with the trial court's judgment he appealed against both the conviction and sentence vide **Naivasha High Court Criminal Appeal No. 48 of 2015** which from the court record seems abandoned altogether.
3. The Applicant has approached this court vide a Chamber Summons application filed on 28th December, 2020 in which he prays to this court to review(reduce) his sentence by either putting him on Community Service Orders after reducing his sentence or any other relief that the court may deem fit.
4. In what he referred to as a 'Memorandum of Sentence Revision' filed on 28th December, 2020 the Applicant cited, cited several grounds on which he sought the review, *inter alia*, that he was a first offender, was aged 59 years and was a family man and that he was of poor health.
5. At the hearing of the application, he abandoned all the grounds and only submitted that he wanted the court to take into account the period he was in remand custody prior to sentencing. He submitted that he would like to go look after his family. He submitted that he was sentenced to 15 years imprisonment with a remainder of 16 months of his sentence.
6. Learned State Counsel, Miss Maingi had no objection to the application.

Determination.

7. The only issue for determination herein is whether the Application is merited. It is important to underscore that the sentence meted was legal pursuant to **Section 8 (4) of the Sexual Offences Act** which spells out the penalty for the offence charged as follows:

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

8. Back to the Applicant's prayer, under **Section 333 (2) of the Criminal Procedure Code**, the court is mandated to consider the period the accused spent in remand custody to constitute part of the sentence. For avoidance of doubt, the provision reads:

“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. (Emphasis mine).

9. This duty is also contained under *clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines* where it is provided that:-

“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.”

10. The trial court record reflects that the Applicant was in custody throughout the trial. He was arrested on 20th December, 2011 and was sentenced on 19th April, 2013. This means that he was in custody for a period of one (1) year and four (4) months which period the learned trial magistrate ought to have considered as part of the sentence.

11. From the foregoing, the application succeeds. The same is allowed with an order that the one (1) year and four (4) months period the Applicant was in remand custody prior to sentencing should be deducted from the 15-year jail term.

12. It is so ordered.

Dated and Delivered at Naivasha this 3rd Day of February, 2022.

G. W. NGENYE-MACHARIA

JUDGE

1. Applicant in person.

2. Miss Maingi for the Respondent.