



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC APPLICATION NO. E254 OF 2020**

**IN THE MATTER OF: SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE (CAP 75) LAWS OF KENYA**

**AND**

**IN THE MATTER OF: CRIMINAL CASE NO. 3883 OF 2014 AT MAKADARA LAW COURTS**

**GABRIEL MUTHIGANI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The subject application herein is dated 30<sup>th</sup> September 2020, brought under the provisions of; Section 333 (2) of the Criminal Procedure Code, (Cap 75) Laws of Kenya (herein “the Code”). The Applicant is seeking for orders as here below reproduced: -

a. Spent.

b. That, this Honorable court be pleased to exercise the power of the High court and invoke the provisions of; Section 333 (2) of the CPC, as regards to the period spent in custody from the date of arrest on; 12/8/2014, to date of conviction on 12/9/2019;

c. That, this Honorable court be pleased to exercise the provisions of; Article 165 (3) (a) of the Constitution of Kenya 2010 and invoke the provisions of; 333 (2) of the CPC and impose an appropriate sentence to be served as the period spent in custody was not factored by the Honorable Magistrate on; 12/11/2019, as prayed herein;

d. That, this application is supported by the annexed affidavit of; Gabriel Muthigani, amongst other grounds to be addressed during the hearing of this application.

2. The application is further supported by the affidavit of the even date, sworn by the Applicant, wherein he deposes that, he was arraigned at Makadara Law Courts, vide Criminal Case No. 3883 of 2014, charged with the offence of: defilement of a child contrary to; section 8 (1), as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006, (herein “the Act”), and an alternative count of: committing an indecent act with the child contrary to; Section 11 (1) of the Act. He was subsequently convicted on the main count on, 12<sup>th</sup> November 2019 and sentenced to serve; fifteen (15) years imprisonment. It is this sentence that is, the subject of the application herein He argues that the period spent in custody of five (5), years and four (4), months was not considered when the sentence was meted.

3. However, although the Respondent did not file a formal response to the application, the Learned State Counsel; Ms. Chege, confirmed that, the Applicant was convicted on; 12<sup>th</sup> November 2019 and sentenced fifteen (15) years imprisonment for the offence of defilement, as aforesaid. However, before pronouncing the sentence, the court considered the period he spent in custody. That, as the sentence meted is proper and legal, the application should be dismissed.

4. However, the Applicant in response, told the court that, he has reformed as a result of the conviction and has acquired skill while in custody. If released, he would like to utilize it, and take care of his family members who rely on him for subsistence.

5. I have considered the arguments advanced by both parties. However, for better understanding of the matter, it is important to set out the brief factual background thereof. In a nutshell, the Applicant was charged with the offence of; defilement contrary to; section 8(1) as read with section 8(2) of the Act. The particulars thereof read that, on the 1<sup>st</sup> day of August, 2014, at Mathare Area III, in Nairobi within Nairobi

County, he intentionally caused his penis to penetrate the vagina of; JM, a child aged six (6) years. He was further charged in the alternative count; with the offence of; committing an indecent act with a child contrary to section 11 (1) of the Act. Similarly, the particulars thereof read that, on the same date and place as stated under the main count, he intentionally, touched the breast, buttocks and with his penis the vagina of; JM, a child aged six (6) years.

6. The Applicant pleaded not guilty to both counts. The case proceeded to a full hearing. The prosecution called a total of eight witnesses. The accused testified on his own and did not call any witness. The prosecution's case was that, PW 1 was going home from school when she met a stranger on the way, and he led her to a place near a church, removed his "organ which he uses for urinating and put it in her mouth and in her genitals" He then put soil in her mouth to stop her from shouting, as she had started to shout. The man went away and left her at the scene.

7. The complainant left for home and while on the way, he met her parents, brother and a mother to one Dantech, whom she was playing with before, she was taken away. She reported to them what had happened and was taken for treatment and given medication. The Applicant was subsequently arrested and charged accordingly.

8. On the other part, the accused in a sworn statement testified that, he only learnt of the charges after arrest, but admitted on cross examination that, he did not know the complainant before the incident.

9. Upon considering the evidence in total, the court found that the prosecution had proved its case beyond reasonable doubt and convicted the Applicant on the main count of defilement. However, before sentence, the Applicant was given an opportunity to offer mitigation, whereupon he simply stated "I ask for proceedings" The trial court then ordered for pre-sentence report. On 12<sup>th</sup> November 2019, before pronouncing the sentence, the Honourable Trial Magistrate stated that as follows: -

"Pre-sentence and mitigation and time spent in custody is considered and the accused is sentenced to serve 15 years in jail. R/A 24 days"

10. However, the Applicant has sought that, this court invokes its powers under section 333 (2) of Code and consider the period spent in custody. The subject provisions states as follows: -

"(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."

11. In the same vein, the Court of Appeal has pronounced itself on these provisions in the case of; *Bethwel Wilson Kibor vs. Republic [2009] eKLR*, and stated as follows:

"By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the Appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009, he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

12. Similarly, the Court of Appeal in the case of; *Ahamad Abolfathi Mohammed & Another vs. Republic (2018)* stated that: -

"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. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "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(2) 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

13. Finally, the Judiciary Sentencing Policy Guidelines states that: -

"7.10: 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.

7.11. 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.

7.12. An offender convicted of a misdemeanor and had been in custody through-out the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely, under section 35 (1) of the Penal Code.

14. Be that as it were, before I deal with the issue of whether the court herein took into account the period the Applicant was in custody while the sentencing him, I shall address the powers of the court to revise a sentence. In that regard, revision of sentence is provided for by sections 362 and 364 of the Code, as follows:

“362. “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.”

“364. (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 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.

15. Similarly, the Court of Appeal in the case of; *Ogolla s/o Owuor vs Republic. (1954) EACA 270*, held that, the principles that an appellate court will consider while exercising its discretion to interfere with a sentence imposed by the trial court are now well settled that;

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

In *Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated thus: -

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”

16. In addition, in exercising supervisory jurisdiction under Article 165(6) of the Constitution, the High Court does not under its powers of revision, exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based.

17. To revert back to the issue herein, as to whether to revise the sentence imposed herein, I note section 8(1), (2), Act, provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to Imprisonment for life.

18. Therefore, the sentence of fifteen (15) years imprisonment, meted herein is lawful and/or proper under the law. It is not harsh or excessive by any means and/or standard, in the light of the provisions of section, 8(2) above. However, the question remains as to whether; the period in custody was considered. From the record, from 19<sup>th</sup> August 2014, when the Applicant took plea, he was granted cash bail of; Kshs 100, 000 or bond of same amount with surety of similar amount. There is no evidence he was ever released on cash bail or bond. He was therefore in custody from 19<sup>th</sup> August, 2014 to the date of sentence on 12<sup>th</sup> November 2019. Pursuant to the legal provision of section 333(2) referred to herein, that period should have been considered.

19. However, the record indicates that, the learned Honourable Trial Magistrate merely stated that; the period in custody was considered, but did not indicate that, the sentence meted was to run from the date of arrest. It suffices to note that, the provisions of section 333(2) are couched in mandatory terms, that “the sentence shall take account of the period spent in custody”.

20. Having considered that, the Learned Trial Magistrate did expressly state when the fifteen (15) years imprisonment commenced, I am inclined to revise the sentence by stating that “the fifteen (15) years’ sentence imposed shall run from the date of arrest of the Applicant, being the 14<sup>th</sup> August 2014. Consequently, the relevant amendments on the sentence shall be effected and/or calculated.

Further, the relevant documents shall be prepared and served upon all the parties affected and /or are necessary.

21. It is so ordered.

**Dated, delivered virtually and signed on this 8<sup>th</sup> day of February, 2021**

**GRACE L NZIOKA,**

**JUDGE**

In the presence of:

Applicant in person;

Ms Ndombi for the Respondent;

Rose

the

Court

Assistance.