REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 165 OF 2019.

JONATHAN ODHIAMBO OWITI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Revision arising from original conviction and sentence in; Criminal Case Number 3866 of 2011; Republic vs- Jonathan Odhiambo Owiti; in the Chief Magistrates' Court at Makadara)

RULING

1. The application herein was filed vide an undated chamber summons, brought under the provisions of; section 137(1) and 362 of the Criminal Procedure Code, (Cap 75) Laws of Kenya (herein "the Code").

2. The Applicant is seeking for an order that, the court be pleased to grant him reprieve in terms of the sentence he is serving and/or invoke the provisions of, section 333(2) of the Code and consider the time spent in custody. It is supported by an undated affidavit sworn by the Applicant.

3. The application was heard on 25th January, 2021, where upon the Applicant appeared in person and reiterated the contents of the application and the supporting affidavit. In a nutshell, he deposed that, he was charged and convicted for the offence of; attempted defilement contrary to; section 9(1) and (2) of the Sexual Offences Act No. 3 of 2006 (herein "the Act") and an alternative count of; indecent act with a child contrary to section 11(1) of the Act. He was subsequently convicted on the main count, on 27th September 2018, and sentenced to serve, ten (10) years imprisonment. However, he avers that, the period of seven (7) years he was in custody was not considered.

4. However, the Application was opposed by the Respondent through oral submissions tendered by; the Learned State Counsel; Ms. Chege, who confirmed that, the Applicant was charged with an offence of; attempted defilement and sentenced to ten (10) years imprisonment as provided for under the law. That, there are no mitigating factors to justify the orders sought by the applicant. Further, due to the nature of the offence, the sentence is legal and proper. She prayed that, the application be dismissed and the Applicant fully serve the sentence meted upon him. The Applicant did not respond to the Respondent's submissions, despite the court having explained to him the same in Swahili language.

5. Be that as it were, I have considered the arguments advanced on the application 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 arrested on; 17th August, 2011 and arraigned before court on 19th August, 2011, charged with the offence of; attempted defilement contrary to; section 9(1) and (2) of the Act and an alternative count of: committing an indecent act with the child contrary to section 11 (1) of the Act. He pleaded not guilty on both counts.

6. The case proceeded to full hearing on 15th May, 2012, whereby the prosecution called five (5) witnesses. The Complainant testified that, on the 6th August, 2011, she went to church for service. The Applicant was the guard at the Church. He promised to buy her a sweet. She went to play with other children. Later she found the Applicant wiping chairs.

7. That, he took her to the rear part of the church and placed her on his lap as he sat down on the floor. He removed, "his thing for urinating and inserted into her organ for urinating, that is, the vagina". He then told her not to tell anyone. However, she told her mother who reported the matter to the police and she was issued with a P.3 form. She was then taken to Nairobi Women's Hospital for examination and thereafter she examined by the Police Surgeon, Dr. Joseph Maundu, who produced his medical report and the P. 3 form prepared by Dr. Kamau (who was ill and out of the country).

8. Further, PW4, Mr. Edward Mbugua a Clinical Officer at; Nairobi Women's Hospital, produced the medical report prepared by; Dr. Thuo

who was unavailable on the date of hearing. That the medical reports indicated that, the complainant had suffered sexual assault. The Applicant was arrested and charged accordingly.

9. The prosecution closed its case on 3rd April, 2017. The trial court subsequently delivered a ruling on 12th April, 2017, wherein it found that, the accused had a case to answer, and placed him on his defence. The Applicant elected to give an unsworn statement and testified that, on the material date, the 6th August, 2011, he was a caretaker at the Great Common Fellowship Church, Kayole. He was working when; four girls came to him asking to assist clean the desks. That, he could not have defiled the complainant in the presence of other children, nor was it possible for him to do so, as neighbors living next to the church would have seen him.

10. The trial court considered the evidence adduced and delivered its judgement on 27th September, 2018, and found the Applicant guilty of the offence of; attempted defilement contrary to; section 9 (1) (2) of the Act and convicted him under Section 215 of the Code. The applicant was treated as a first offender as he had no previous criminal record of conviction.

11. In mitigation, he pleaded for a non-custodial sentence for the reasons that, he was taking care of his mother, a wife and children. However, the trial court noted that, unfortunately, the minimum sentence for the offence was ten (10) years imprisonment and imposed a sentence of; ten (10) years imprisonment.

12. Be that as it were, the Applicant's grievance is that, the period he spent in custody was not considered during the sentencing process. In that regard, the record shows that, upon pleading not guilty, the Applicant was released on a cash bail terms of; Kshs. 50,000. He remained in remand custody for twelve (12) days, until 30th August, 2011, when he was released.

13. However, the same court record indicates that, on 26th April, 2013, he absconded the proceedings whereupon a warrant of arrest was issued. He was later arrested and taken to court on; 27th May, 2013, but after explaining the reasons of his absence, the court suspended the bail terms for a period of two weeks and he was remanded again. On 10th June, 2013, the bail terms were enhanced to, cash bail of; Kshs. 100,000. The Applicant remained in custody until; 5th August 2013, when he was released after two months and nine (9) days. Therefore, in total, he was in custody for the initial 12 days and then two months and nine (9) days, about eight one (81) days.

14. To revert back to issue herein, which is basically reduction of sentence, I note section 333(2) of the Code provides 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."*

15. In the same vein, 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."*

16. 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.*

17. However, it suffices to note, revision of sentence is provided for by sections 362 and 364 of the Code, which states 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."*

Section 364 of the *Criminal Procedure Code* provides that:

> *(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.*

18. Further, 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 sell 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)."*
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> *In Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -*
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> "*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."*

19. In addition, in exercising supervisory jurisdiction under Article 165(6) of the Constitution of Kenya 2010, 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. Its powers are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court.

20. In the instant matter, the Applicant was charged under section 9(1) and (2) of the Act, which provides as follows:

> *(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.*
>
> *(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.*

21. From the above provisions, it is clear that, the Applicant was granted the minimum sentence provided for under the law. The Learned Honourable Trial Magistrate stated that, "unfortunately, the only sentence provided is not less than 10 years. I therefore sentence the accused to serve ten (10) years in jail/ R/A 14 days". It is therefore clear that, the 81 days the Applicant in custody was not considered.

22. It is also noteworthy that, the minimum statutory sentences have been declared to be unlawful, vide the decision in; *Francis Karioko Muruatetu & Another Vs Republic SC Petition No. 16 of 2015*. Be that as it were, it should be noted that, it is a maxim of equity that, "that he who goes to equity, must go with clean hands". The period of two (2) months and nine (9) days the applicant was in custody arose as a result of his failure to attend proceedings. He had absconded proceeding. It will therefore be a mockery of the criminal justice system to allow him to benefit from his own unlawful action. Further, "justice is weighed on a scale that must balance". It must not only be done but be seen to be done.

23. In that case, the only genuine period the Applicant is entitled to remission is twelve (12) days only. The reduction of the same from the sentence imposed will not have any significant effect. As a result of the aforesaid, I find no merit in the application and I dismiss it in its entirety and confirm the sentence herein as pronounced by the trial court.

24. Those then are the orders of the court.

Dated, delivered virtually and signed on this 8th day of February, 2021, virtually

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant present in person.

Ms. Ndombi for the Respondent

Rose the Court Assistant.