



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei-J

CRIMINAL REVISION NO. 20 OF 2019

BONIFACE MUTUNGA MBUVI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original order by Hon. E. W. Wambugu (R.M) in Kithimani Senior Principal Magistrate's

Court Sexual Offence Case No. 37 of 2016)

RULING ON REVISION

1. This application for revision arises from the ruling of the learned trial Magistrate, Hon. E. W. Wambugu, SRM in Kithimani Principal Magistrate's Sexual Offence Case No. 37 of 2016, dated 13th March, 2018 wherein the applicant was sentenced to Twelve (12) years imprisonment for sexually assaulting the complainant, a minor aged Six (6) years, in her homestead contrary to section 5 (1) (a) (2) of the Sexual Offences Act.

2. The Applicant seeks for a review, under section 333 (2) of the Criminal Procedure Code and wants the court to consider the time spent in remand during the pendency of the trial.

3. The Applicant claimed that he was in Police custody since the date of arrest on 14th July 2016 till he was released on cash bail on 16th September 2016. Making a total of sixty-four (64) days in custody prior to his release on bond

4. The Applicant is challenging the decision of the learned trial Magistrate and is praying for the following orders:

i. The Applicant urges the Court to review the meted sentence and put into account the 2 years spent in remand custody before he was sentenced.

ii. The Applicant avers such period spent in remand was not factored from the imposed sentence as required by law and prays such period be discounted from the sentence meted.

iii. That the Applicant may make more prayers during hearing and determination of this application.

5. The Applicant chose to rely on the affidavit supporting his application. The Respondent, through state counsel Mr. Martin Mwangera opposed the application through oral arguments.

6. The parties later agreed to dispose the application by way of written submissions.

7. Respondents submitted that the 64 days the Applicant was in custody be factored in his sentence. The Respondent relied on the case of **Bernard Kimani Gacheru versus Republic (2002) eKLR** where the Court of Appeal stated:

“... sentence must depend on the facts of each case. The Appellate Court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor...”

8. I have considered the application. This is a simple application based on a pure point of law. From the record, the Applicant was arrested on 14th July 2016 and remained in remand till he was released on a cash bail on 16th September 2016. The Applicant was thus remanded in

prison for 64 days prior to his release on bond. It is noted that the period he was in custody was not considered by the trial court while passing sentence. The applicant's claim that he was in prison for two years is not correct as the record does not show the same and hence such a claim must be rejected. It seems the applicant wants the sentence to commence from the date of arrest namely 14.7.2016 yet he was released on bond in September 2016 and remained on bond until his conviction on 23.2. 2018. The claim therefore lacks merit and must be rejected.

9. Sentencing of an accused person is a matter of a right to a fair trial. Under the Constitution, the right to fair trial is one of the rights which cannot be limited. (See **Article 25** of the Constitution).

10. **Section 333 (1) & (2)** of the Criminal Procedure Code provides in mandatory terms that when a person is convicted, any period spent in custody prior to sentencing shall be taken into consideration. The section provides: -

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code 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. The Applicant was entitled to have the period that he had spent in remand considered or factored in the sentence. This was not done. The State conceded to the application. The record shows that he was in remand custody for sixty-four days (64) which is two months and four days. The same will be deducted from the 12 years meted on him leaving a sentence of eleven years nine months and twenty-six days. I find that the application has merit and is allowed. The sentence of 12 years imposed by the trial court on 13. 3. 2018 is hereby reviewed and set aside and substituted with a sentence of 11 years nine months and twenty- six days which shall commence from the date of conviction namely 23. 2. 2018.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF MARCH, 2021.

D. K Kemei

Judge