REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. 163 OF 2019

PSA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In his undated chamber summons filed on 4th June 2019, the applicant, *PSA* moved this court seeking revision of the sentence imposed on him by the trial court in Makadara Chief Magistrate's Court Criminal Case No. 5161 of 2018.

2. In the affidavit supporting the application, the applicant averred that he was convicted of the offence of incest contrary to *Section 20* of the *Sexual Offences Act* and was sentenced to serve 10 years imprisonment; that in sentencing him, the trial court erred as it failed to take into account the period he had spent in custody prior to the date of his sentence contrary to the provisions of *Section 333 (2)* of the *Criminal Procedure Code*. He therefore urged the court to reduce the sentence meted on him with the period he had spent in custody during the trial. In addition, he invited the court to note that he was a first offender and he was deserving of the relief sought.

3. At the hearing, both parties elected to canvass the application through oral submissions.

In his submissions, the applicant reiterated the depositions in his supporting affidavit noting that the period he had spent in custody amounted to three years and eight months.

4. The respondent through learned prosecuting counsel *Mr. Kiragu* opposed the application. He submitted that the offence for which the applicant was convicted attracted a sentence of life imprisonment and that the sentence of 10 years imprisonment was very lenient; that in passing the sentence, the learned trial magistrate took into account the period the applicant was in custody prior to the date of his conviction and sentence. He urged me to uphold the impugned sentence and dismiss the application for lack of merit.

5. This being an application invoking the court's revisionary jurisdiction, it is important to set out the law that governs the exercise of the court's power of revision in criminal cases. *Section 362* as read with *Section 364* of the *Criminal Procedure Code* donates to this court power to call for and examine the record of criminal proceedings before any subordinate court to satisfy itself as to the correctness, legality or proprietary of any finding, sentence or orders recorded or passed by the trial court and if not so satisfied, to make an appropriate order either altering or reversing the impugned order, sentence or finding.

6. *Section 333 (2)* of the *Criminal Procedure Code* which the learned trial magistrate allegedly violated when sentencing the applicant is in the following terms:

> ***"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."***

7. In interpreting this provision, the Court of Appeal in ***Ahamad Abolfathi Mohammed & Another V Republic, [2018] eKLR*** when noting that the High Court erred in ordering that the appellant's sentence should commence from the date of conviction by the trial court stated as follows:

> ***"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."

8. I wholly agree with the Court of Appeal's interpretation of the proviso to *Section 333 (2)* of the *Criminal Procedure Code* save to add that the provision is couched in mandatory terms and failure to comply with it amounts to a serious error of law which may have the effect of denying an accused person his constitutionally guaranteed right of equality before the law and the right to equal protection and benefit of the law enshrined in *Article 27 (1)* of the *Constitution of Kenya, 2010*.

9. I have read the original record of the trial court which was availed to this court. I note that the applicant was charged and convicted of the offence of incest contrary to *Section 20 (1)* of the *Sexual Offences Act* which provides as follows:

"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, grand- daughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

10. It is clear from the above provision that the punishment prescribed by the law for the offence of incest differs depending on the age of the female victim. If the victim is an adult, the convict is liable to imprisonment for a term not less than ten years but if the victim is a minor, that is, under the age of 18 years, the convict is liable to life imprisonment.

11. In this case, the age of the victim was not specified in the particulars supporting the charge and in the testimony of witnesses who testified before the trial court. Consequently, *Mr. Kiragu's* submission that the punishment that was applicable to the applicant was life imprisonment does not hold any water more so when one considers that life imprisonment where the victim was a minor was prescribed as a maximum sentence. This means that the trial court had discretion to impose any sentence between ten years and life imprisonment or any other appropriate sentence given the jurisprudence relating to minimum mandatory sentences developed by the Supreme Court in ***Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR***.

12. As noted earlier, the High Court in its supervisory jurisdiction can only interfere with the trial court's decision on sentencing or any order made in the course of criminal proceedings if it is demonstrated that in making the decision or order, the trial court made an error of law or there was impropriety in the proceedings leading to the sentence or the order challenged on revision.

13. When passing sentence, the learned trial magistrate stated as follows:

"I have considered the mitigation by the accused, punishment prescribed by law and time spent in remand (four years) … and sentence the accused to serve 10 years imprisonment."

14. From the learned trial magistrate presentence notes, though he miscalculated the period the applicant had spent in custody by adding a few months, I have no doubt in my mind that he was alive to the proviso to *Section 333 (2)* of the *Criminal Procedure Code* and that he actually took it into account when sentencing the applicant.

15. My reading of the lower court's record does not show or suggest that the learned trial magistrate made any error on the law applicable to sentencing or that there was any impropriety or irregularity in the manner in which the applicant was sentenced. Although I appreciate the gravity and seriousness of the offence of incest and even if I may be of the view that the sentence imposed on the applicant was quite lenient given the facts of this case, this by itself cannot justify interference with the sentence since it is trite that sentencing is at the discretion of the trial court and unless it is demonstrated that the sentence was illegal for one reason or another or that it was manifestly excessive, there would be no basis to disturb the sentence as doing so would amount to substituting this court's discretion with that of the trial court.

16. In view of the foregoing, I am satisfied that the applicant's application lacks merit and it is hereby dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 15th day of April 2021.

C. W. GITHUA

JUDGE

In the presence of:

The applicant

Ms. Kimaru for the respondent

Ms Karwitha: Court Assistant