



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 63 OF 2018

GEOFFREY WANJALA WANYONYI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The Applicant, George Wanjala Wanyonyi was convicted of the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. After full hearing, the trial court found that indeed the Applicant had on 23rd June 2013 at Maili Saba area within Trans-Nzoia County intentionally caused his penis to penetrate the vagina of JN, a minor aged 13 years. Having found that the prosecution had proved its case beyond reasonable doubt, the court convicted the Applicant and incarcerated him to **20 years imprisonment**. This was on **07th October 2014**. The Applicant exercised his right of Appeal. By judgment delivered on **22nd September 2016**, the High Court dismissed the Appeal and upheld the conviction and sentence of the trial Court. No further appeal was preferred.

The Applicant moves this Court seeking to be granted a non-custodial sentence and take into account the period in custody. The Applicant beseeches this Court to grant a probation or community service order as an alternative sentence. The Application is supported by the grounds on the face of the application and by an Affidavit in support thereof.

When the parties appeared before this Court 28th April 2021 for oral submissions, the Applicant submitted that he is remorseful and has since reformed having undertaken various theological courses. He annexed various certificates in regard to the courses he had completed. He counsels other prisoners. According to the Applicant, his reformation was confirmed by letter from the Prison authorities. He will be a useful member to the society if given a second chance. He is married with two children. He should be given a chance to raise his family. He is now aware of the repercussions of committing another offence. He urged the court to place him on probationary terms on the remainder of the sentence having served a custodial term of almost 9 years; remand and imprisonment inclusive.

Mr. Omooria for the State opposed the Application. He submitted that this Court lacked jurisdiction to review the sentence. His remedy lay in revision. Having submitted that no cogent grounds underpinned the Application, he urged this Court to dismiss the Application.

This Court has considered the Application and the rival submissions made by parties herein. The Applicant does not wish to challenge the conviction. It is his prayer that the Court reviews the sentence to a non-custodial one for the remaining term having served almost 9 years since his arraignment in Court.

The prosecution opposes the Applicant on the grounds that the same has no basis in law.

For this Court to interfere with the sentence of the trial Court, the Applicant must establish certain factors to enable this Court invoke its revisionary jurisdictions as provided by **Section 362 and 364** of the **Criminal Procedure Act**. In **Wanjema –vs- Republic [1971] E.A. 493** the Court held thus:

“An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

The nature of the Application for revision by the Applicant in these proceedings is to reconsider the sentence. The Applicant contends that he

has been serving a custodial sentence being placed in lawful custody on 24th June 2013. He seeks to serve a non-custodial sentence for the remainder of his sentence. Accordingly, it appears that the Applicant is not challenging the legality of the sentence. He seeking the exercise of this Court's discretion to reduce the custodial term that was imposed on him by the trial Court.

The Courts have previously dealt with Applications such as the present one. For instance, the Court in **Boniface Gitonga Mwenda V Republic [2021] eKLR** held as follows:

“However, as I have noted, the applicant herein appealed the trial court’s decision to this court. The court in dismissing the appeal against the sentence held that the trial court’s sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to 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. (See Section 362-364 of the Criminal Procedure Code).

Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn’t have jurisdiction in that respect and as such, the prayer to that respect ought to fail.”

This Court concurs with the above decision. The Applicant exercised his right of Appeal. He did not appeal to the Court Appeal. What the Applicant is essentially asking this Court to do is to sit on an Appeal of its own decision. That is not proper. As rightly pointed out by the Respondent, the Applicant’s recourse was for re-sentencing. In any event, this Court is satisfied that the punishment fitted the crime in this case.

In the circumstances, I am not satisfied that the Applicant is entitled to the reliefs sought. Consequently, I find no merit in the Application and proceed to dismiss the same accordingly.

It is so ordered.

DATED AT KITALE ON THIS 10TH DAY OF MAY, 2021.

L. KIMARU

JUDGE