



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 72 OF 2020

STEPHEN MUGENDI NDWIGA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioner herein moved this court vide a petition dated 12.08.2020 and despite the petitioner having sought for various orders and/or declarations, it is clear that the petitioner basically seeks for the orders that the time he spent in custody be taken into consideration.

2. It is his case that he was convicted of the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 in Criminal Case No. 997 of 2013 and sentenced to ten (10) years imprisonment. That he did not appeal against both conviction and sentence. He now comes before this court invoking the provisions of Section 333(2) of the Criminal Procedure Code and while seeking for orders that the time he spent in custody be taken into consideration.

3. The petition was canvassed orally and the petitioner reiterated his prayer that the court do take into consideration the time he spent in custody. Ms Mati, the Learned Prosecution counsel opposed the petition for the reasons that the petitioner was charged with the offence of defilement and sentenced to serve ten (10) years imprisonment and the age of the minor was ten years. That as such the trial court took into account the time he spent in custody and the principles in Muruatetu.

4. I have considered the petition and the oral submissions made by the parties herein and it is my considered view that the main issue for determination is whether the petition is merited.

5. However, before I proceed to consider the merits of the petition, I note that both the petitioner and the respondent misstated facts in relation to the matter herein. I have perused the trial court's records and I note that the petitioner herein was convicted of the offence of committing an indecent act with a child below 18 years and not defilement. The sentence for the said offence under section 11(1) of Sexual Offences Act is **imprisonment for a term of not less than ten years.**

6. That having been sorted, I now turn to the merits of the petition. As I have already noted, the petitioner seeks for review of the sentence meted and in doing so the court do consider the period the petitioner had spent in custody.

7. At the preliminary, I note that the petitioner presented his grievance in a form of a constitutional petition and wherein he cited a number of articles of the constitution as having been contravened. However, the principles of drafting Constitutional Petitions were clearly captured in the case of Anarita Karimi Njeru v Republic [1979] eKLR where Trevalyan J (as he then was) and Hancox J (as he then was) held that; -

**“.....if a person is seeking redress from High Court on a matter which involves a reference to the Constitution it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”**

8. As a basic minimum, therefore, a petitioner is required to cite the provisions of the constitution which have allegedly been violated, and the manner in which they have been violated and the remedy which he seeks, for the violation. In demonstrating the manner in which there has been a violation, a petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation. (See Stephen Nyarangi Onsuma and Another vs. George Magoha & 7others (2014) eKLR).

9. However, in the instant case, apart from the petitioner having cited the provisions of the constitution which he alleges to have been contravened, he did not plead as to the manner in which the same provisions were infringed. As such the petition before this court ought to fail.

10. However, I note that the petition is in relation to judgment and sentence of a subordinate court and wherein the court sentenced the petitioner to ten (10) years imprisonment. Section 362 of the Criminal Procedure Code bestows this court with revisionary jurisdiction. Under this jurisdiction, the court has the powers to 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.

11. As it can be seen from this section, this court's jurisdiction therein is not only exercisable where the subordinate court has made a finding, sentence or order but it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well. Under section 364, this court can exercise the revisionary jurisdiction 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.

12. Under section 333(2) of the Criminal Procedure Code, it is provided that; -

**“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.”**

**(See Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR).**

13. It therefore means that where it comes to the notice of this court that the period spent in custody was not taken into account by the subordinate court during sentencing, the said sentence can be reviewed by this court on the basis that the same is illegal, incorrect and improper.

14. The trial court while sentencing observed that

**“...In sentencing, I consider his actions of having indecent act with a young girl who is his cousin to have been a beastly act. Instead of protecting her from others he took advantage of her age and committed such acts with her. The penalty imposed by section 11(1) of the SOA is mandatory sentencing and I cannot go contrary to the law. I therefore sentence him to imprisonment for 10 years”.**

15. The petitioner deposed that the trial court did not take into account the period he had spent in custody. Though he did not state the said period, I have perused the trial court's record and I note that the petitioner was arraigned in court on 20.11.2013 and was admitted to bail but he was released on 24.09.2014 after one Andrew Peter Kariuki stood surety for him. As such, the trial court, despite the law having provided for the minimum sentence, ought to have taken into consideration the ten (10) months the petitioner herein had spent in custody. There is nothing on record to show that the trial court indeed took into consideration the said period.

16. It is therefore my considered view that this court ought to review the sentence meted upon the petitioner herein by invoking the provisions of Section 362 and 364 and deduct the said ten (10) months from the sentence meted upon the petitioner.

17. I do hereby order that the said period of 10 months be deducted from the applicant's sentence term.

18. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11<sup>TH</sup> DAY OF MAY, 2021**

**L. NJUGUNA**

**JUDGE**

.....for the Petitioner

.....for the Respondent