

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR REV. NO. 165 OF 2020

KIOKO MUSYOKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This matter having been argued through written submissions by both the applicant and the Director of Public Prosecutions as an appeal, I note that it is not appeal but merely an application for review of sentence. I will thus treat it as an application for review of sentence.

2. The application was filed on 28th May 2020 under Article 21(1)(3), 22(1), 47(1), 165(3)(b)(d)(ii) of the Constitution, and section 333(2) of the Criminal Procedure Code (Cap. 75). The applicant while relying on the case of **Evans Wanjala Wanyonyi –vs- Republic [2019] eKLR – Criminal Appeal No. 312 of 2019 - Eldoret** Court of Appeal, asks that this court takes into account any mitigating factors relating to the matter and give him an appropriate reprieve (of the sentence imposed).

3. In particular, the applicant relies on section 333(2) of the Criminal Procedure Code, which required the trial court to take into account the period an accused person is held in custody during trial in sentencing, which according to him, was not taken into account by the trial court in sentencing him.

4. Having perused and considered the written submissions of both the appellant and the Director of Public Prosecutions, and the trial court proceedings, I note that the applicant pleaded guilty at the trial, after the first witness had tendered evidence in chief, which was a mitigating factor as the court did not have to proceed with the full trial. The Prosecutor also said that the applicant was a first offender. In his mitigation, the applicant said that he had not done a similar act before and asked for the court's forgiveness. The court on its part, recorded that though it had considered the mitigating factors, the offence was serious and rampant in the area, and sentenced the applicant to 10 years imprisonment, the minimum statutory sentence for the offence of indecent act.

5. In my view, from the above position, it cannot be said from the record, that the court did not take into account the mitigating factors, including factoring the requirements of section 333(2) of the Criminal Procedure Code, before meting out sentence on the applicant herein.

6. However, the sentence imposed by the trial court was the minimum statutory sentence. With regard to imposition of minimum sentences, the Court of Appeal in the case of **Evans Wanjala Wanyonyi –vs- Republic [2019] eKLR** applied the reasoning in the Supreme Court decision in the case of **Francis Muruatetu & Another –vs- Republic (2015) eKLR** and treated the statutory minimum sentence as a discretionary sentence, whereby depending on the particular

circumstances of each case, the court could mete out less serve sentences.

7. Coming to our present case, from the evidence on record tendered by the victim (Pw1), and the facts summarised by the Prosecutor following the change of plea to guilty, it is clear that the applicant merely touched the breasts of the victim that night because he was drunk and was careless enough to think that such an act was a small matter. It is clear also that he had no further sexual intention, as he knew that other children were present in that same room. He thus appears to have been a careless and foolish adult, who overreached himself that night due to having taken alcohol.

8. In those circumstances, in my view, had there been no provision for a minimum statutory sentence, even with the seriousness of the offence the magistrate could certainly have meted out a less severe sentence than the set minimum sentence. On that account, I will thus interfere with the sentence imposed and order that the applicant will instead serve four (4) years imprisonment from the date he was sentenced by the trial court. I rely on the reasoning in the Court of Appeal decision in **Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR**.

9. Consequently, I allow the application for review of sentence, set aside the sentence imposed by the trial magistrate, and order that instead the applicant will serve four (4) years imprisonment from the date he was sentenced by the trial court.

DELIVERED, SIGNED & DATED THIS 22ND DAY OF SEPTEMBER 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE