



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. E001 OF 2020

BETWEEN

JUSTINE MACHUMA ONGERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court

at Naivasha in Criminal Case No. 44 of 2017 delivered by Hon. E. Kimilu (PM)

on 30th November 2018).

JUDGMENT

1. The Appellant, **Justine Machuma Ongera**, was charged and convicted of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars thereof were that on diverse dates between the 20th day of October 2016 and the 3rd day of September 2017 at [Particulars withheld] village in Naivasha sub-county within Nakuru County, intentionally and unlawfully caused his penis to penetrate the anus of **GSM**, a boy aged fourteen (14) years old. Thereafter, he was sentenced to serve twenty (20) years imprisonment.
2. He appealed against both conviction and sentence. However, at the hearing of his appeal, the Appellant withdrew the appeal against his conviction and decided to pursue the appeal against his sentence only. He urged the court to consider and take into account the period of 1 year and 2 months that he spent in remand custody before sentencing. Mr. Maingi learned state supports both conviction and sentence and did not oppose the Appellant's oral submissions.
3. I have perused the evidence on record as well as the judgment of the trial court and can confirm that the Appellant was convicted on the basis of sound evidence. Identification was proper as he was well known to PW1, the complainant. PW1 met him in December 2015 at his friend's house and visited his house severally between then and September 2017. There was medical evidence of penetration to support PW1's evidence that the Appellant inserted his penis into PW1's anus on a number of occasions between October 2016 and 3rd September 2017. The PRC form and P3 form produced in evidence both confirm that on examination, PW3's anal orifice was wide open with visible faecal matter. The anal muscles were loose so he could not hold faeces. As regards the victim's age, his birth certificate produced in evidence shows that PW3 was 14 years of age during the period he was defiled by the Appellant.
4. On sentence, the Appellant was sentenced to serve twenty (20) years imprisonment which is the minimum mandatory sentence for defilement of a child aged between twelve and fifteen years of age under **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. I have perused the trial court's record and it is clear that when passing the sentence, the trial court did not take into account the period which the Appellant spent in remand custody prior to being sentenced. This was contrary to the mandatory provisions of **333(2) of the Criminal Procedure Code** which provides 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 (emphasis mine).

5. This duty is also contained under *clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines* where it is provided that: -

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

6. From the record, it is evident that the Appellant was in remand custody throughout the trial period. He was arrested on 8th September 2017 and sentenced on 30th November 2018. This implies that the period of 1 year 2 months and 22 days spent in remand custody prior to sentencing must of necessity reduce the sentence imposed at the conclusion of the trial.

7. The upshot is that the Appellant’s appeal against sentence is merited. I order that the period of 1 year 2 months and 22 days be taken into account to constitute part of the sentence imposed by the trial court. The order shall be served on the officer-in-charge of the Prison where the Appellant is serving the sentence for compliance. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 18TH DAY OF NOVEMBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

IN THE PRESENCE OF;

1. APPELLANT IN PERSON.

2. MISS MAINGI FOR THE RESPONDENT.