



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO.E048 OF 2021

KENNEDY ODHIAMBO OKWE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, **KENNEDY ODHIAMBO OKWE** has, vide an undated Chamber Summons application sought to have the court,
 - a) *Invoke the provisions of Sections 137 I 2(a) of the Criminal Procedure Act;*
 - b) *Invoke the provisions of Article 50(p) of the Constitution;*
 - c) *To review the sentence downwards while invoking the principle of natural justice;*
 - d) *To note that the Applicant was a first offender;*
 - e) *To find that the Application is meritorious and grant orders that it deems fit to as a reprieve;*
 - f) *Invoke the provisions of Section 333(2) of the Criminal Procedure Code and consider the time spent in remand prison (from 16/10/2015 to 14/11/2019 4 years 29 days.*
2. The application is based on the **Supporting Affidavit** of the Applicant where it is deposed that the trial court, in sentencing the Applicant failed to take into account the provisions of **Sections 137 I 2(a) and 333(2)** of the **Criminal Procedure Act**. That the Applicant is seeking that the said provision be factored with regard to the sentence he is serving since he is a first offender.
3. In response thereto, the Respondent confirmed that indeed the Applicant was arraigned in court on **16th October, 2015**, was sentenced to serve ten (10) years imprisonment on **14th November, 2019** for the offence of **defilement contrary to Section 8(1) as read with Section 8(3)** of the **Sexual Offences Act** having spent four (4) years in remand (custody). She has also confirmed that the trial court did not consider this period in sentencing the Applicant and urged the court to exercise its discretion by considering the period the Applicant spend in custody in resentencing him.
4. Having listened to the oral submissions by the Applicant and Respondent with regard to the application for review of sentence, I have also read through the original proceedings of the trial court so as to establish whether the same is merited.
5. The application before me is akin to an application for revision and the same has been brought under the provisions of **Section 137 I 2(a)** of the **Criminal Procedure Act**, **Article 50(p)** of the **Constitution** and **Section 133(2)** of the **Criminal Procedure Code**.
6. **Section 137 I 2(a)** of the **Criminal Procedure Act** provides that:-

“In passing a sentence, the court shall take into account-

 - a) *the period during which the accused person has been in custody.”*
7. **Article 50 2(p)** of the **Constitution** provides that:-

“Every accused person has the right to a fair trial, which includes the right-

p) To the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence changed between the time that the offence was committed to the time of sentencing...”

8. **Section 333(2)** of the **Criminal Procedure Code** states that:-

“Subject to the provision of Section 38 of the Penal Code every sentence shall be deemed to commence from and to include the whole of the day of, to date on which it was pronounced, except where otherwise provided in this Code.”

provided that where the person sentenced under Subsection (1) from prior to such sentence, been held in custody, the sentence shall take account of the period spend in custody.”

9. I called for and the original record of proceedings in **Makadara Criminal Case No.3162 of 2015, REPUBLIC –vs- KENNEDY ODHIAMBO OKWE** in which the Applicant was convicted and sentenced was availed for my perusal.

10. I have read through the said record of proceedings and established that the Applicant was arrested on **16th October, 2015** and charged with the offence of Defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No.3 of 2006.**

The particulars were that:

“On the 6th day of October, 2015, at [Particulars Withheld] Estate within Nairobi County, the Applicant unlawfully and intentionally caused his penis to penetrate the vagina of VNN, a child of 12 years.”

11. In the alternative, the Applicant was charged with the offence of indecent assault to a child contrary to **Section 11(1) of the Sexual Offences Act, No.3 of 2006.**

The particulars were that:-

“On the 6th day of October, 2015 at [Particulars Withheld] Estate in Nairobi County, the Applicant unlawfully and intentionally committed an indecent act with VNN, a child aged 12 years by touching her private part namely the vagina.”

12. The Applicant was arraigned in court on **19th October, 2015** whereby the charge and its full particulars were read over and explained to him in a language that he understands and he pleaded **“NOT GUILTY”**. The matter proceeded to full hearing and the accused person was found guilty, convicted and sentenced to serve ten (10) years imprisonment for the offence of Defilement contrary to **Section 8 (1)(3) of the Sexual Offences Act** after his record, mitigation and social inquiry report was considered.

13. **Section 8(1)** provides that:-

“A person who commits an act which cause penetration with a child is guilty of an offence termed defilement”.

Section 8(3) of the **Sexual Offences Act** provides that:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”.

14. In view of the above provisions, and more particularly, the provision under **Section 8(3) of the Sexual Offences Act**, with regard to penalty, *“a person found guilty and convicted for the offence under Section 8(1) of the same Act is liable to imprisonment for a term of not less than twenty years.”* The sentence under the provision is of mandatory nature, and which the Applicant herein was entitled to.

15. So having been sentenced the Applicant to serve a term of ten(10) years imprisonment, I find the trial court had exercised its discretion and passed a very lenient sentence against the Applicant because what was reduced from the minimum mandatory sentence was more than the Applicant was entitled to at the time, considering he had four(4) years spent in custody. The record is clear that the trial Magistrate considered the period and in his ruling in sentencing the Appellant on **14th November, 2019** stated that:-

“The social Report is considered and he accused is sentenced considering the time spent in custody to serve 10 years in jail”.

16. From the foregoing, I find that even though the counsel for the State conceded with the Applicant, I find the application without merit and dismiss the same accordingly.

17. The sentence that was meted against the Applicant be and is hereby upheld.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS ...16TH DAY OF ...NOVEMBER....., 2021.

D. O. CHEPKWONY

JUDGE

In the presence of

Applicant in person

M/S Akunja counsel for Respondent

Gitonga - Court Assistant