



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC APPLICATION NO. 21 OF 2020

KHALIF MOHAMED GURE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant **Khalif Mohamed Gure** was faced with the offence of rape contrary to Section 3(1) (a) as read with 3(3) of the Sexual Offences Act NO.3 OF 2006.

The particulars thereof being that on the 18th February 2014 at [Particulars Withheld] Area within Garissa County he raped NMO (name withheld).

2. The Applicant denied the charge, the matter proceeded to full trial, he was found guilty of the offence, convicted and sentenced to 10 years imprisonment.

3. An appeal was preferred to this Court. The same was found to have no merit and was dismissed.

i. The Applicant has now moved the court by way of an application seeking for review of the sentence that was meted out on him by the trial court on grounds that the time he spent in custody was not taken into account at the time of sentencing.

4. The application was opposed by the State for reasons below stated.

The matter proceeded by way of submissions as follows;

Applicant's Submissions

In the submissions the Applicant urged the court to consider the 3 years 8 months he spent in custody as the same was not considered by the trial court.

Prosecution's Submissions

The prosecution submitted that this court is bereft of jurisdiction having handled the Appeal. Further the court affirmed the conviction and sentence. And the application is a disguised Appeal.

5. **Section 333(2)** of the Criminal Procedure Code provides

“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 for 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.”

6. The provision is also captured in the **Judiciary Sentencing Guidelines** mainly, **Clauses 7.10** and **7.11** as follows;

“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 proportionate 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 trial.”

7. The first appearance before a magistrate by the Applicant was on the 24th of February 2014. The Sentence meted out to the Applicant was delivered on the 30th of October 2017. The trial therefore took 3 years 8 months.

8. This court has considered the record further and note that the trial court did not indicate when passing sentence that it had taken into account the time the Appellant spent in custody. Three years 8 months in jail is no doubt a considerable time

9. The court also notes that the Applicant did not raise the issue on Appeal and therefore this court was not bound to consider the same.

10. The question in the court’s mind is whether the Applicant should suffer due to the fact that the trial court which was obligated to consider the time he spent in custody as stipulated in Section 333(2) of the Criminal Procedure Code, failed to do so and whether there is a time element when one’s right are ignored?

11. This court is convinced that it has a duty to protect the right of the accused irrespective of when the issue is brought to its attention where a requirement of the law was ignored or overlooked.

12. The offence of rape attracts a punishment of not less than 10 years. The trial court went with 10 years and without seeming to interfere with that discretion and only considering the time the Applicant spent in custody the sentence of 10 years is set aside and in its place taking into account the 3 years 8 months, the applicant is sentenced to 7 years two months.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 4th DAY OF NOVEMBER, 2021.

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ALI-ARONI

JUDGE