



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL REVISION NO. E037 OF 2021

STEPHEN KAMAU NDUNGU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was charged under **Section 9(1) and (2)** of the **Sexual Offences Act** for the attempted defilement of a minor with the particulars being that he intentionally attempted to cause his penis to penetrate the vagina of EWK a girl aged 9 years. In the alternative he was charged under **Section 11(1)** of the **Sexual Offences Act** with committing an indecent act with a child in that he unlawfully and intentionally committed an indecent act by touching the female genital organ namely vagina of EWK a child aged 9 years with his penis. The Applicant was convicted under **Section 9 (1) and (2)** of the main charge on the 13/02/2020 and sentenced to serve ten (10) years imprisonment.

2. The Applicant did not prefer an appeal to this Court. Instead, he filed the instant application vide a Chamber Summons on 1st March, 2021 by which he asks the Court to review his sentence by substituting the jail term with a sentence under the Community Service Orders or any other sentence the court may deem just to grant.

3. The application was supported by an affidavit sworn by himself as well as “Memorandum of Revision”. It is in the latter that he spelt out the grounds on which the sentence should be revised namely:

- i. That he is 62 years old.
- ii. That he is a father of 4 children and sole bread winner to the family.
- iii. That he is from a poor family background.
- iv. That he is a first offender.
- v. That he is suffering from a chronic disease (epilepsy).
- vi. That he is not appealing against conviction and sentence but applying for review of sentence.
- vii. That the court be lenient, reduce the sentence, order for probation for the remainder of the sentence to enable him serve his family and build the Nation.

4. The application was heard orally on 10th November, 2021 with the Applicant being in person and learned State Counsel, Miss Maingi representing the Respondent. The Applicant additionally submitted that the court should be merciful because all his teeth has fallen off and he was suffering from epilepsy.

5. On her part, Miss Maingi submitted that under **Section 9 (2)** of the **Sexual Offences Act**, the sentence was legal and the Applicant was not entitled to a review.

Determination.

6. I have considered the application as well as the respective submissions. The revisionary powers of this court comprise supervisory jurisdiction of the Court over the Subordinate Courts. The same is provided for under **Article 165 (6)** of the **Constitution** which states as follows;

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

7. Further **Section 362** of the **Criminal Procedure Code** reads as follows;

“The High Court may 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.

8. The orders which this court can give under **Section 362** of the **Criminal Procedure Code** are spelt out under **Section 364** of the **Criminal Procedure Code** in the following manner;

“(1) 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, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under [Section 203](#) or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

9. This court has accordingly called for the original trial court record. Indeed, the Applicant was sentenced to serve ten years imprisonment after the trial. He was charged under **Section 9 (1)** as read with **Section 9 (2)** of the **Sexual Offences Act**. **Section 9 (1)** provides for the offence of attempted defilement whilst **9 (2)** spells out the penalty for the offence as follows:

“A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”

10. The penalty provision is couched in mandatory terms such that the trial court cannot vary the sentence irrespective of the circumstances under which it is committed. What this means is the court would interfere with the sentence only on account of illegality. This is not however the position as the learned trial magistrate sentenced the Applicant to the mandatory ten year jail term. The court would have no reason to interfere with the sentence.

11. All the same, Under **Section 333 (2)** of the **Criminal Procedure Code**, the Code is mandated to consider the period the accused spent in remand custody to constitute part of the sentence. For avoidance of doubt, the provision reads:

“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).

12. 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.”

13. I have looked at the trial court record and it attests that the Applicant was in custody throughout the trial. He was arrested on 12/9/2019 and was sentenced on 13th February, 2020. This means that he was in custody for a period of five (5) months and one (1) day which period the learned trial magistrate ought to ordered constitutes part of the sentence.

14. In the end, the application partially succeeds. The same is dismissed except that the 5 months and 1 day period the Applicant was in remand custody prior to sentencing should be deducted from the 10-year jail term. This Ruling should be served upon the Officer in charge of the prison for compliance.

DATED AND DELIVERED AT NAIVASHA THIS 2ND DAY OF DECEMBER, 2021.

G. W. NGENYE-MACHARIA

JUDGE

IN THE PRESENCE OF:

- 1. STEPHEN KAMAU NDUNGU - APPLICANT IN PERSON**
- 2. MS MAINGI FOR THE RESPONDENT**