



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPLICATION NO. 132 OF 2017

CHARLES KIOKO KASUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was charged and convicted with the offence of attempted defilement contrary to Section 20(2) of the Sexual Offences Act. He was sentenced to 10 years imprisonment by the Chief Magistrates Court at Machakos and has now applied to this court under Section 333(2) of the Criminal Procedure Code for revision of sentence.
2. The state opposed the application vide submissions filed on 17.10.2019.
3. The application was disposed of by way of written submissions. The appellant submitted that the time served in remand be considered by this court. Mr. Cliff Machogu, prosecuting for the Respondent opposed the application.
4. The issue for determination is whether the court may grant the order sought.
5. The enabling law for revision is **Article 165(6) and (7) of the Constitution** and **Section 362 as read together with Section 364 of the Criminal Procedure Code**. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. Reproduced as follows:

“362. 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.”

364. (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

.....

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

(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.

.....;

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

6. Section 333 (2) of the Criminal Procedure Code that states:

“(2) 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.”

7. Having had due regard to Section 333 (2) of the Criminal Procedure Code together with **Article 165(6) and (7) of the Constitution** and **Section 362 as read together with Section 364 of the Criminal Procedure Code** I find that the application by the applicant has merit. The applicant has only approached this court for review of sentence as he has opted not to appeal against the conviction. He has urged this court to consider the period spent in custody. I am of the view that if he remained in custody for the duration of the hearing then he is entitled to have the period taken into account. I note that the charge sheet indicates that he was arrested on 29.5.2015 and that there was no indication that the applicant was out on bond. Accordingly, I find that the sentence imposed by the trial court must take into account the period spent in custody.

8. In the result I find the applicant’s application for review has merit. The sentence by the trial court is hereby reviewed to the extent that the 10 years imprisonment shall commence from the date of arrest namely 29.5.2015.

It is so ordered.

Dated and delivered at **Machakos** this **16th** day of **January, 2020**.

D. K. Kemei

Judge