



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 31 OF 2019

ROBERT KINYUA NYAGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the undated application filed by the applicant seeking revision of his ten (10) year sentence emanating from his conviction for the offence of rape contrary to section 8 (3) of the Sexual Offences Act.
2. The applicant also seeks that the period spent in custody be considered in his sentence as the same was not taken into consideration by the trial magistrate. It is the applicant's case that he has since reformed having served 1/3 of his sentence and as such that he is entitled to review of his sentence.
3. The applicant herein was charged with the offence of defilement to person with mental disability that was committed in full view of a family member contrary to Section 7 of the Sexual Offences Act No. 3 of 2006. The trial court convicted the applicant and sentenced him to 10 years' imprisonment.
4. Being dissatisfied with the trial court's conviction and sentence, the applicant filed Criminal Appeal No. 44 of 2014 which was dismissed for lack of merit.
5. In rejoinder, Ms. Lokorio for the respondent opposed the application on the grounds that the applicant was seeking a lenient sentence. Reliance was placed on the case of **Criminal Appeal No. 180 of 2014 W.K. v Republic** where it was held that the mandatory minimum sentence should not be disturbed in sexual offences cases. Ms. Lokorio thus asked the court to uphold the trial court's sentence.

B. Analysis of the Law

6. The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides 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”.

7. Section 364 of the Criminal Procedure Code provides interalia that the High Court in its revision jurisdiction cannot reverse or alter an order of acquittal. Secondly, the court cannot make an order that is likely to cause prejudice to the accused person without according him an opportunity to be heard either personally or by an advocate. Thirdly, when an appeal arises from such sentence finding or order of the magistrate's court and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed.

8. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by **Waweru, J** in **Republic vs. Samuel Gathuo Kamau [2016] eKLR**, where the Learned Judge observed that:

“Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the

Criminal Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code.”

9. The applicant herein was charged with the offence of defilement in respect of a victim with mental disability contrary to Section 7 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on the 8th day of April 2013 at [particulars withheld] village, Gaturi location within Embu County, the applicant intentionally and unlawfully caused his genital organs to penetrate the genital organ vagina of VI alias P Without her consent within the view of a brother RKM a child aged 11 years.

10. The trial court convicted the applicant and sentenced him to ten (10) years imprisonment. Being dissatisfied with the trial court’s conviction and sentence, the applicant filed Criminal Appeal No. 44 of 2014 which was dismissed for lack of merit.

11. The applicant having filed an appeal which was dismissed. The provisions of Section 364 of the Criminal Procedure Code envisage a situation where the accused person after conviction files a revision. The case before me is one where the applicant’s appeal was dismissed by the High Court and then he has come to seek for revision.

12. The powers of the appeal court under Section 348A of the Criminal Procedure Code include acquittal, sentence, upholding the findings of the trial court among others. I have no doubt that the appeal court dealt with the issue of both conviction and sentence by the trial court.

13. The provisions of Section 362 as read with Section 364 are clear that a revision is not an appeal and only envisages situations where the trial court made a mistake, error, illegality or impropriety that the High Court may revise is satisfied that the trial court faltered.

14. In my view, this court in its revisionary powers cannot purport to sit on a second appeal from the judgment of a court of equal jurisdiction. It is trite law that a convicted person ought to choose either file a revision or an appeal but he cannot do both or one after the other.

15. It is my considered view that the prayer for revision is misconceived and is not properly before the court.

16. The applicant had a second prayer that his sentence be ordered to run from the date of conviction. This prayer was made under Section 333(2) of the Criminal Procedure Code which provides: -

333(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. I have perused the trial court record and noted that the applicant spent more than one (1) year in custody pending disposal of the trial, that is from 9/04/2013 when he was arrested to 1/08/2014 when he was convicted.

17. I have perused the trial court record and noted that the applicant spent more than one (1) year custody pending disposal of the trial, that is from 9/04/2013 when he was arrested to 1/08/2014 when he was convicted. The record shows that this period was not taken into consideration by the trial magistrate when imposing sentence.

18. It is my considered view that the said period ought to have been factored in the sentencing by the trial court in view of the provisions of Section 333(2) of the Criminal Procedure Code.

19. The application is partly successful in regard to the second prayer and allow it accordingly. The sentence of ten (10) years imprisonment imposed on the applicant on 1st August 2014 shall run from the date of arrest the 9th April 2013.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant present