

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.70 OF 2019

PETER MWANIA MAKITE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Peter Mwanja Makite was convicted of the charge of **indecent assault of a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The trial court found that the prosecution had established to the required standard of proof beyond any reasonable doubt that the Applicant did on 8th December 2015 at Magadi in Kajiado County intentionally touched the vagina and buttocks of TK, a minor aged eleven (11) years using his penis and fingers. The Applicant was sentenced to serve ten (10) years imprisonment on 7th September 2017.

The Applicant has applied to this court to have the period that he was in remand custody taken into account in determining the custodial sentence that he is to serve. According to the Applicant, the period of twenty (20) months that he was in pre-trial custody was not taken into account before the trial court meted the sentence. Mr. Momanyi for the State confirmed that indeed the Applicant was in pre-trial remand custody from 17th December 2015 when the Applicant took plea to 7th September 2017 when he was sentenced. He was not averse to this period being taken into account in determining the custodial sentence to be served by the Applicant.

Section 333(2) of the **Criminal Procedure Code** requires a sentencing court to take into account the period that the convict was in remand custody to determine the custodial period that such a convict may serve. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) held thus at Page 28:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

This court, having perused the proceedings of the trial court is satisfied that indeed the trial magistrate did not take into account the period that the Applicant was in remand custody prior to sentencing him to serve the custodial term of ten (10) years imprisonment. In that regard, this court will remedy the omission by taking into account the period that the Applicant was in remand custody and accordingly reducing the term of imprisonment that was imposed on the Applicant by the trial court.

In the premises therefore, this court sets aside the sentence of ten (10) years imprisonment that was imposed by the trial court and substitutes it with a sentence of eight (8) years imprisonment with effect from 7th September 2017 when the Applicant was convicted and sentenced by the trial court. For the avoidance of doubt, the Applicant shall benefit from remission of his sentence if he so qualifies. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE