



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL REVISION NO. 30 OF 2019**

**(BEING REVIEW OF SENTENCING IN CMCRC NO.26 OF 2017)**

**ERIC MUNENE NJAGI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. A brief outline of the case was that the applicant **Eric Munene Njagi** was charged with the offence of committing an Indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006; the applicant was convicted and sentenced to serve a term of five (5) years imprisonment; Being aggrieved with the sentence, the applicant filed this instant application seeking revision of the sentence to a non-custodial term and the period spent in custody be taken into consideration;

2. At the hearing hereof the applicant was unrepresented whereas the respondent was represented by Prosecuting Counsel for the State Ms.Chemenjo and both parties made oral submissions; hereunder are the parties' respective submissions;

**APPLICANT'S CASE**

3. The application is for review of sentence under the provisions of Sections 362, 367 and 333(2) of the Criminal Procedure Code; that he had spent a period of more than two (2) years in custody from the time of his arrest; that this court be pleased to apply the latter section and to backdate the commencement date of his sentence to commence from the date of his arrest;

4. To support his prayer for review of sentence the applicant stated that he was a first offender and the sole bread winner of his family and urged the court to exercise leniency as he was now rehabilitated; he prayed that his application be allowed and that he be granted a non-custodial sentence or in the alternative the period spent in custody during the trial be deducted from his sentence.

**RESPONDENT'S CASE**

5. In response counsel was opposed to the prayer for the review of the sentence and submitted that the victim was a child of tender years and the trial court had been lenient by imposing the term of ten (10) years; counsel prayed that the application be dismissed;

**ISSUES FOR DETERMINATION**

6. After hearing the rival submissions this court has framed the following issues for determination;

- (i) whether the trial court erred in imposing the term of ten (10) years imprisonment;
- (ii) Whether to consider the date of arrest as the commencement date of the sentence;

**ANALYSIS**

**Whether the trial court erred in imposing the term of ten (10) years imprisonment**

7. In this instance the trial court convicted the applicant upon his own plea of guilty;

8. From the particulars of the facts adduced the applicant was living with the mother of the complainant who was a child of tender years aged three (3) years; the applicant was in a position of trust and had a duty to his step-child and breached this trust by intentionally and unlawfully

committing the indecent act on the minor's genital organs;

9. This court's powers of revision are set out under the provisions of Section 362 through to 366 of the Criminal Procedure Code; the applicable section for revision in this instance is found at Section 364 which reads as follows;

***“(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.***

***(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.”***

10. Before sentencing the applicant was called to mitigate and he prayed that the trial court considers that he was a first offender and was remorseful;

11. The provisions of Section 11(1) of the Sexual Offences Act provides for the punishment for the offence and reads as follows;

***“11.(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years”***

12. The applicant has not demonstrated that the trial court erred in imposing the term of ten (10) years imprisonment or committed any illegality, impropriety or mistake when sentencing the applicant; it is this court's considered view that the trial court did not overlook any material factor when passing sentence and took into consideration the circumstances of the case; it also took into consideration the fact that the appellant was a first time offender and that he was remorseful; the sentence is as provided by the law and is found to be legal and that there is no reason found that warrants interference with it as it is the minimum prescribed by law;

13. The prayer for revision of sentence to a non-custodial sentence is found lacking in merit and it is hereby disallowed.

**Whether to consider the initial date of arrest as the commencement date of the sentence;**

14. The applicant seeks for the review of his sentence and requests that the provisions of Section 333(2) be invoked and prays for an order that the sentence imposed to commence from the date of arrest.

15. The provisions of Section 333(2) of the Criminal Procedure Code reads as follows;

***“(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 of which it was pronounced, except where otherwise it is 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”.***

16. This court will take into consideration the period spent in remand from the date he was arrested to the time of conviction and will avail the benefit of the provisions of Section 333(2) to the applicant; therefore, commencement of his sentence shall run from the date of his arrest which was the 9/01/2017 as opposed to the date when he was convicted which was on the 30/01/2017;

**FINDINGS AND DETERMINATION**

17. For the foregoing reasons this court makes the following findings and determinations;

***(i) This court finds no good reason that warrants interference with the sentence which is found to be legal; and the sentence is hereby***

affirmed;

(ii) The sentence shall commence from the date of arrest being 9/01/2017 as stated on the Charge Sheet.

Orders accordingly.

**Dated, Signed and Delivered Electronically at Embu this 10<sup>th</sup> day of September, 2020.**

**HON. A. MSHILA**

**JUDGE**