



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 7 OF 2020

ROPHAS FURAHA NGOMBO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the DPP

JUDGMENT

The petitioner, **Rophas Furaha Ngombo**, was arrested on the 12th August 2014 and charged with the offence of defilement of a girl contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006. By a decision of **Hon. L. N. Juma, Resident Magistrate**, delivered on 31st May, 2017 in Kilifi Senior Principal Magistrate's Court Criminal Case No.334 of 2014, he was convicted and sentenced to fifteen (15) years imprisonment. He filed an appeal vide Malindi Criminal Appeal No. 23 of 2017.

His grounds of appeal were that:

- (i). The trial Magistrate erred in Law and fact by failing to consider that both the conviction and sentence is founded on a defective charge whose particulars are at variance with the evidence adduced;*
- (ii). The trial Magistrate erred in Law and fact by failing to consider that no birth certificate, no birth notification or age assessment report was prepared and produced as an exhibit to prove the exact age of the complainant at the time of the commission of the offence;*
- (iii). The trial Magistrate erred in Law and fact by failing to consider that medical treatment note (clinic card) being a professional medical document was produced as an exhibit by the police (PW4 – Investigating Officer) but not the medical officer.*
- (iv). The trial Magistrate erred in Law and fact by failing to consider that the appellant was a minor below the age of 18 years and his conviction was in breach of Article 53 (1) (f) of the Constitution; and*
- (v). The trial Magistrate erred in Law and fact by failing to consider the appellant's defence which was not challenged by the prosecution.*

After appreciating the appeal, by her decision of 3rd July 2018, **Learned Judge Njoki Mwangi J** concluded that the evidence against the appellant was overwhelming and the conviction was proper, the **Hon. Magistrate** imposed the only sentence provided by Law and she thereby dismissed the appeal in its entirety.

Dissatisfied, the petitioner moved to the Court of Appeal, filing Malindi Criminal Appeal No. 42 of 2018. In his second appeal, the petitioner contended that the High Court failed to consider that the provision in the Sexual Offences Act providing mandatory minimum sentence under Section 8 (4) violates Section 216 and 329 of the Criminal Procedure Code; it deprives the trial Court jurisdiction to pass an appropriate sentence; that the age of the complainant was not proved as no birth certificate or age assessment was produced; that the clinic card that was produced in proof of age was not certified; that contrary to Section 77 of the Evidence Act, medical treatment notes were produced before the trial Court by a police officer; that the complainant told the Court that she was eighteen (18) years and the appellant reasonably believed that she had the capacity to grant consent; that the Court did not consider that the appellant was a minor; and that his defence was not considered.

On 17th October 2019, the Court of Appeal upheld the conviction but set aside the sentence and substituted the initial fifteen (15) year sentence with an eight (8) year sentence to run from the date of conviction being 31st May 2017.

The Petitioner has now approached this Court asking it to consider the duration of time he had spent incarcerated in remand and that this be considered as part of his sentence. Additionally, he prays that having served two thirds of the eight (8) year sentence, he ought to be released on parole and the remainder of his sentence be commuted to a non-custodial sentence.

In what is clearly an inadvertent filing error, the petitioner herein also appears as a petitioner in Malindi Petition No. 14 of 2020, together with another accused person facing a completely different offence. He seeks the same reliefs as he does in this matter. Therefore, for the sake of clarity and to avoid any further confusion, this instant suit will be deemed as the duly filed Petition by the petitioner.

Determination

Requisite attention has been given to the Petition as filed and the averments and submissions contained therein. On the whole, the petitioner seeks this Court intervention to have the time he spent in pre-trial detention considered as part of his sentence. The Law in this instance is Section 333 of the Criminal Procedure Code which provides:

“333 (1) A warrant under the hand of the Judge or Magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing Judge or Magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of Section 38 of the Penal Code 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.”

The petitioner was initially sentenced to fifteen (15) years which sentence was reduced to eight (8) years. He admits in his submission that he was not incarcerated before trial. As such, he cannot benefit from Section 333 (2) of the Criminal Procedure Code.

On account of being released to serve a non-custodial sentence, the petitioner has not made a convincing case as to why he should be let out on parole. Of the eight (8) years he was sentenced to serve, he has served three (3) years four (4) months. He appears to make the case that the sentence is discriminatory and that he ought to benefit from a revision of his sentence. This Court cannot countenance such an argument. Having been lawfully convicted and sentenced of the offence by a competent Court, which conviction was twice affirmed on appeal, and sentence reduced from fifteen (15) years to eight (8) years imprisonment, I see no basis to interfere with of the decisions of the Trial Court, the High Court sitting on appeal and the Court of Appeal.

In the upshot, Petition No. 7 of 2020 is hereby disallowed in its entirety. The petitioner is to complete the remainder of his eight (8) year sentence being four (4) years and eight (8) months.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER, 2020

.....

R. NYAKUNDI

JUDGE