

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO. 150 OF 2017

DANIEL NDUNG’U NGUGI.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant approached this court seeking a review of his sentence in a Chamber Summons filed on 16th May, 2017. In the same application, he applied for leave to appeal out of time. At the hearing of the application he abandoned the latter prayer, opting to proceed with the review application. His prayer is basically that the court considers the period he was in remand custody prior to the sentencing of 2 ½ years to be taken into account to constitute part of the sentence.

2. The Applicant was charged with the offence of rape contrary to **Section 3(1)(a)(c)** as read with **Sub-Section (3) of the Sexual Offences Act**. It was alleged that on 9th May, 2014 in Nairobi East District within Nairobi County, with another before court intentionally and unlawfully caused his penis to penetrate the vagina of CN by use of force. He was charged in the alternative with committing an indecent act with an adult contrary to **Section 11(1) of the Sexual Offences Act**.

3. In Count 1 he was charged with stealing from a person contrary to **Section 279(a) of the Penal Code** in that on 9th May, 2014 in Nairobi East District within Nairobi County stole a mobile phone make Nokia 1110 and cash Kshs. 3,000/= all valued at Kshs. 5,500/= the property of CK from the person of the said person CK. In the alternative, he was charged with handling stolen goods contrary to **Section 322(1)(2) of the Penal Code** in that otherwise than in the course of stealing dishonestly retained one mobile phone make 1110 knowing or having reason to believe it to be stolen goods.

4. On conclusion of the trial, he was acquitted in Count II and its alternative charge but convicted for the offence of rape in Count I. The sentence was passed on 9th December, 2016. In passing the sentence, the learned trial magistrate ordered that the period of 2 ½ years that the Applicant had served in custody be considered, consequent which he was to serve 7 ½ years imprisonment. In so holding the learned magistrate delivered himself as follows:

“I have considered the mitigation. The offence attracts a minimum sentence of 10 years. I sentence the accused to 10 years imprisonment. He has 14 days right of appeal. I note that he was been in remand for 2 and a half years. He shall serve 7 and half years imprisonment.”

5. It is not therefore factual that the trial court in passing the sentence failed to take into account the period the Applicant was in remand custody prior to his conviction. Although he additionally prayed for leniency, the view of this court is that rape is a serious offence that strips the victim the human dignity. It causes trauma that is unlikely to fade off for the balance of the life of the victim.

6. Indeed, the learned trial magistrate only imposed the minimum sentence provided by the law. It is a sentence that this court is unwilling to disturb. The Applicant must serve the entire balance of his sentence so that it can serve as a deterrence and retribution. In the circumstances, I find this application unmeritorious and I dismiss it.

Dated and Delivered at Nairobi this 2nd day of October, 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.

2. Mr. Momanyi for the respondent