JKK v Republic (Criminal Revision 176 of 2023)
[2025] KEHC 7473 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7473 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL REVISION 176 OF 2023

EM MURIITHI, J

MAY 29, 2025

BETWEEN

JKK ..... APPLICANT

AND

REPUBLIC ..... PROSECUTION

RULING

1. The appellant was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offence Act* No. 3 of 2006. The particulars of the offence are that on 19th September, 2019 at around 21.00 hours at [particulars withheld] in [particulars withheld] sub-county, the accused caused his penis to penetrate the vagina of HM, a girl aged 12 years who was to his knowledge his granddaughter.

2. He was tried, convicted and sentenced to serve 20 years' imprisonment on 9th September, 2021. He did not lodge an appeal. He now seeks revision of the sentence.

3. The accused submits that his mitigation at the lower court was not considered. He states that he is a first offender, young and a remorseful for the offence. Further, he has been rehabilitated while in prison. He is a father of one child and his wife is unemployed. Lastly, he prays that the period he spends in custody be considered.

4. The prosecution submits that the application for a sentence review is premature as he stands to benefit from section 46 of the *Prison Act*, being consideration of remission on industry and good conduct.

Issue

5. Whether the honourable court would review the 20 years' sentence.

Analysis

6. The applicant was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offence Act* No. 3 of 2006.

> "
>
> "20(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

7. The victim was 12 years at the time of the offence and the applicant was sentenced to 20 years in prison. The sentence is reasonable in the circumstances and it cannot be said to be excessive.

No revision at behest of a person who could have appealed

8. The applicant did not appeal although he could have from his conviction and sentence in terms section 347 of the *Criminal Procedure Code*, which provides as follwos:

> "347. Appeal to High Court
>
> 1. Save as is in this Part provided—
>
> a. a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and
>
> b. Repealed by *Act No. 5 of 2003*, s. 93.
>
> 2. An appeal to the High Court may be on a matter of fact as well as on a matter of law.
>
> [*Act No. 17 of 1967*, s. 30, *Act No. 5 of 2003*, s. 93.]"

9. Under section 364 (5) of the *Criminal Procedure Code*, revision shall not be entertained at the application of a person who could have appealed but failed to do so, as follows:

> "(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. The application for revision is, therefore, not competent.

Pre-trial detention

11. However, the Court is bound by statute, of its own motion, to consider an issue of legality of sentence which has been brought or comes to its notice in terms of section 364 (1) of the *Criminal Procedure Code* as follows:

> " 364. Powers of High Court on revision
>
> 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."

12. The applicant was arrested on 23rd September, 2019 and remained in custody until the day of his sentencing on 9th September, 2021. The custodial sentence should have reduced by the two years he had served in custody and cited section 333(2) of the *Criminal Procedure Code*, which provides 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 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."

13. The applicant cited Court of Appeal decision *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR.

14. The applicant submitted on several mitigating grounds to plead his case for revision of the sentence to a lesser sentence. He has reformed while in prison. The same should be considered by the court. The applicant has already served three years in prison.

15. The Court notes that the trial court did not factor, as required by section 333(2) of the *Criminal Procedure Code*, the period of pre-trial detention of two years. In the decision *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR where the Court of Appeal said:

> " The appellants have been in custody from the date of their arrest on 19th June 2012. 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(s) 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

Orders

16. Accordingly, for the reasons set out above, having confirmed that the applicant was in pre-trial detention since arrest on 21/9/2019, the Court directs that the sentence of imprisonment for twenty (20) years shall commence on the 21/9/2019 when the applicant was arrested to await his trial.

17. File Closed.

    Order Accordingly.

DATED AND DELIVERED THIS 29TH DAY OF MAY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for DPP.

Applicant in person.