



**Rose v Republic (Criminal Appeal 107 of 2017)  
[2024] KEHC 6339 (KLR) (31 May 2024) (Revision)**

Neutral citation: [2024] KEHC 6339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL 107 OF 2017**

**A MSHILA, J**

**MAY 31, 2024**

**BETWEEN**

**RAPHEAL GICHINGU ROSE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being Review of Sentencing in Gatundu SPMCR No.33 of 2016)*

**REVISION**

1. A brief outline of the case was that the applicant was charged with two (2) separate counts of gang rape c/s 10 of the *Sexual Offences Act* No.3 of 2006.
2. The particulars of the offence on the first count are that on the 8<sup>th</sup> day of November, 2016 at Kiganjo Youth Polytechnic in Gatundu South Sub County within Kiambu County the applicant in association with others intentionally and unlawfully did an act which caused penetration into the genitals of SWW a child aged 16 years.
3. On the second count on the 14<sup>th</sup> day of November, 2016 at Kiganjo Youth Polytechnic in Gatundu South Sub County within Kiambu County the applicant in association with others intentionally and unlawfully did an act which caused penetration into the genitals of SWW a child aged 16 years.
4. The applicant's alternate charge was c/s 11(1) of the *Sexual Offences Act*; the particulars of the alternate offence are that on the 8<sup>th</sup> day of November, 2016 and 14<sup>th</sup> day of November, 2016 at Kiganjo Youth Polytechnic in Gatundu South Sub County within Kiambu County the Applicant in association with others intentionally and unlawfully touched the buttocks, breasts and the vagina of SWW a child aged 16 years.
5. The applicant was found guilty on both counts and was convicted and sentenced to serve a term of twenty (20) years imprisonment; Being aggrieved by the conviction and sentence, the appellant filed



this instant Petition of Appeal that is HCRA No. 107 of 2017; the applicant chose to abandon the appeal on conviction and sentence and instead opted to pursue a revision of his sentence as provided for under section 333(2) of the Criminal Procedure Code.

6. At the hearing hereof the Applicant was unrepresented whereas the Respondent was represented by Prosecuting Counsel Ms Ndeda; both parties made oral submissions; hereunder are the parties respective submissions;

### **Applicant's Case**

7. The application is for review of sentence under the provisions of Section 333(2) of the Criminal Procedure Code; that this court be pleased to apply the aforesaid section and to backdate the commencement date of his sentence to commence from the date of his arrest which was on November 18, 2016. He submitted that he was remanded in custody throughout the pendency of the hearing to the determination of his case as he was unable to raise the Cash Bail.

### **Respondent's Case**

8. Counsel for the Respondent in response stated that the State was not opposed to the application and the date of arrest be taken into consideration as the commencement date of the sentence.

### **Issues for Determination**

9. After hearing the rival submissions this court has framed only one issue for determination which is whether the trial court erred in failing to consider the date of arrest as the commencement date of the sentence;

### **Analysis**

#### **Whether to consider the date of arrest as the Commencement Date of the Sentence;**

10. Upon perusal of the court record this court notes that the applicant had been charged in SPMCR No.33 of 2016 with two (2) separate counts of gang rape c/s 10 of the Sexual Offences Act No.3 of 2006 and was convicted and sentenced on the 29/05/2014; being aggrieved with the trial court's decision the applicant preferred this instant appeal in the High Court;
11. The trial court record reflects that the applicant who was the 2<sup>nd</sup> accused was on 21/11/2016 granted a Bond in the sum of Kshs.300,000/- which was later on 3/2/2017 reduced to cash bail of Kshs.180,000/-; the applicant it appears was unable raise either the bond or cash bail and was remanded throughout the pendency of the trial.
12. The trial court found the applicant guilty and convicted him and on the 16/08/2017 passed sentence on both counts; on the 1<sup>st</sup> count he was sentenced to Twenty (20) years and on the 2<sup>nd</sup> count the sentence was fifteen (15) years both sentences were to run concurrently.
13. On the 7/03/2024 the applicant made an oral application to withdraw his appeal and sought for the review of his sentence and requested that the provisions of section 333(2) be invoked and prayed for an order that the sentences imposed do commence from the date of arrest.
14. 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”.

15. The trial courts record speaks for itself and upon careful perusal of the ruling on sentence it is apparent that the trial court did not take into consideration the duration the applicant spent in remand.
16. The applicant was arrested on 18/11/2016 and was sentenced on 16/08/2017; The period translates to a period of approximately nine (9) months;
17. This court is satisfied that trial court erred in failing to consider the provisions of section 333(2) of the *Criminal Procedure Code*. This court is satisfied that the applicant is deserving of the benefit of the provisions of section 333(2) of the *Criminal Procedure Code*; the period of nine (9) months spent in remand from the date he was arrested be discounted from the term of twenty (20) years.

### **Findings and Determination**

18. For the foregoing reasons this court makes the following findings and determinations;
  - i. This court finds that the application has merit and is hereby allowed;
  - ii. The sentence shall commence from the date of arrest which is stated on the Charge Sheet as being 18/11/2016; the time spent in remand be discounted from the imposed sentence

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 31<sup>ST</sup> DAY OF MAY, 2024.**

**A. MSHILA**

**JUDGE**

In the presence of;

Mourice – Court Assistant

N/A by the State

N/A for the appellant

