Case Number:	Criminal Revision E390 of 2021
Date Delivered:	21 Mar 2022
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Lilian Nabwire Mutende
Citation:	Patrick Ambani Kenyani v Republic [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION-MILIMANI

CRIMINAL REVISION NO. E390 OF 2021

PATRICK AMBANI KENYANI.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING

1. **Patrick Ambani Kenyani,** the Applicant, was charged, convicted and sentenced to a term of twelve (12) years imprisonment for the offence of defilement contrary to **Section 8(1)(2)** of the Sexual Offences Act. Through an undated application filed herein on the 5th November, 2021, he seeks revision of the sentence on grounds that the lower court failed to consider the period spent in remand. In a supporting affidavit, the applicant depones that he spent one (1) year, six (6) months in remand prior to determination of the case. That he was a first offender and is remorseful.

2. That he has six (6) children; was the sole breadwinner; and his incarceration has deprived his children a parent.

3. That he has acquired entrepreneur and life skills; spiritual nourishment and would use this once he gains his freedom. Therefore, he prays to serve the remaining term of the sentence as a non-custodial one.

4. The particulars of the offence were that on the 14th July, 2018, the applicant unlawfully and intentionally caused his genital organ to penetrate the female genital organ /vagina of **S.N,** a child aged 11 years.

5. The State through learned Counsel Ms. Kibathi opposed the appeal on grounds that time spent in custody was considered and the sentence imposed was lenient.

6. The power of his court in its revisionary jurisdiction is founded under **Section 362** of the Criminal Procedure Code (CPC). The law enacts that:

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.''

7. Following the conviction of the applicant, the trial court invited him to tender evidence pursuant to **Section 216** of the CPC, that would inform the court of the proper sentence to mete out. In mitigation he stated that he was an orphan; his family was in a bad state and that his children were sent out of school. He prayed for leniency and a non-custodial sentence.

8. The court took into consideration the fact of the applicant having been a first offender and that he had been in prison since July, 2018. The court was guided by the judiciary principles of sentencing and section 8 of the Sexual Offence Act and meted out the sentence.

9. **Section 333 (2**) of the CPC provides that :

(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.

10. It is not in dispute that the applicant was in custody during trial having been arraigned on 26th July,2018, a fact noted by the trial court. What it did not expressly state was that the period spent in custody prior to the sentencing was to be deducted from the final sentence.

11. In the case of **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** the Court of Appeal held that:

"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* ***of the Criminal Procedure Code. 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(2) 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."***

12. The revisionary power that this court has been called upon to exercise is also limited to errors or omissions that are apparent on the face of the record or where the court is called upon to avoid an injustice. This is a case where the sentence provided for is life imprisonment but the court settled for a lesser and definite duration.

13. In the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270** the Court of Appeal held that:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R – v- Shershowsky (1912) CCA 28TLR 263)."

14. The statutory sentence under **Section 8(2)** of the Sexual Offences Act is life imprisonment but the applicant was sentenced to serve twelve (12) years imprisonment after the court exercised its discretion that it had then, following the jurisprudence that emanated from the decision of ***Francis Karioko Muruatetu vs Republic (2017) eKLR***; where courts were of the view that they had discretion in sentencing offenders in such matters. However, following the decision of ***Francis Karioko Muruatetu Vs. Republic & Another (2021) eKLR*** the mandate to exercise the discretion was only in respect to murder cases. The court having had the discretion then, this court would not interfere with the sentence by the lower court.

15. The upshot of the above is that the application lacks merit, accordingly, it is dismissed.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY

AT NAIROBI THIS 21ST DAY OF MARCH, 2022.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Ms. Ntabo for ODPP

Applicant

Court Assistant – Mutai