Case Number:	Criminal Revision E017 of 2022
Date Delivered:	21 Apr 2022
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Cecilia Wathaiya Githua
Citation:	John Mwita Kerario v Republic[2022] eKLR
Advocates:	Ms Kalii for the applicant Ms Ntabo for the respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. E017 OF 2022

JOHN MWITA KERARIO.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. In his undated chamber summons, the applicant moved this court seeking review of the sentence imposed on him by the trial court in Kibera Chief Magistrate's Court Sexual Offence No. 16 of 2017 following his conviction for the offence of defilement contrary to *section 8 (1)* as read with *section 8 (2)* of the *Sexual Offences Act*.

2. In his application and supporting affidavit, the applicant averred that upon his conviction, he was sentenced to serve 10 years imprisonment. He prayed for reduction of his sentence by factoring in the period of two years he had allegedly spent in lawful custody during the trial. He also advanced some mitigating factors stating that he was a first offender with two school going children and a wife for whom he was the sole breadwinner; that he had acquired skills in prison by going through some reform based programmes.

3. At the hearing, the applicant and the respondent chose to prosecute the application by way of oral submissions. In his submissions, the applicant maintained his prayer for sentence review and expounded on the depositions in his supporting affidavit.

4. The application was not opposed by the respondent. Learned prosecuting counsel *Ms Kibathi* conceded that the record confirmed that when sentencing the applicant, the learned trial magistrate did not consider the time he had spent in lawful custody.

She did not have any objection to having the period the applicant had spent in custody computed as part of his sentence. In her view, the period in question was 1 year and 4 months and not 2 years as claimed by the applicant. She contended that the applicant was released on a cash bail of KShs.50,000 on 26th June 2018 and remained on bond till the date he was sentenced.

5. I have considered the application and the submissions made by both parties.

I find that the application invokes the revisional jurisdiction of this court which gives the court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court if the court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court was so satisfied, the law mandated it to make appropriate orders to correct the impugned order, decision or sentence and align it with the law. The above is the import of *Section 362* as read with *Section 364* of the *Criminal Procedure Code.*

6. In this case, the applicant has maintained that the trial court erred by failing to take into account the period he was in lawful custody during the trial when passing sentence against him.

I have looked at the trial court's record and I confirm that indeed, the learned trial magistrate did not indicate on the record that she had considered the time the applicant was in lawful custody during the trial.

7. The learned trial magistrate thus contravened the proviso to *Section 333 (2)* of the *Criminal Procedure Code* which is stated in mandatory terms. *Section 333 (2)* is in the following terms:

"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."

8. In view of the foregoing, it is clear that the applicant is entitled to revision of his sentence to factor in the period he had spent in lawful custody prior to his sentence.

9. The lower court's record shows that the applicant was arrested on 25th February 2017. He was remanded in custody till 18th January 2019 when he was released after depositing a cash bail of KShs.50,000. The submission by *Ms Kibathi* that he was released from custody on 26th June 2018 is therefore incorrect. The above means that the applicant was in lawful custody for a period of two years and four months prior to the date he was released on cash bail.

10. That said, it would be remiss of me if I did not observe that the applicant was convicted of the offence of defiling a minor aged 11 years old. *Section 8 (2)* of the *Sexual Offences Act* which is the relevant penal provision for the offence of defilement where the victim was 11 years and below prescribes a mandatory sentence of life imprisonment.

In this case, the applicant was sentenced to ten years imprisonment.

11. It is important to note that the sentence against the applicant was passed on 29th November 2018 at the time when courts interpreted the decision by the Supreme Court in ***Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR*** to mean that all mandatory sentences prescribed by the law including the *Sexual Offences Act* were unconstitutional to the extent that they deprived the trial court of its discretion to mete out an appropriate sentence against an offender after considering his or her plea in mitigation and the aggravating factors surrounding commission of the offence in question. Examples of cases where the *Muruatetu* decision was applied to sexual offences included the Court of Appeal decision in ***Christopher Ochieng V Republic, [2018] eKLR; Evans Wanjala Wanyonyi V Republic, [2019] eKLR; Dismas Wafula Kilwake V Republic, [2018] eKLR.*** The learned trial magistrate apparently exercised her discretion in sentencing in accordance with the jurisprudence then prevailing that trial courts retained discretion to mete out appropriate sentences even in cases where the law prescribed mandatory sentences.

12. That said, the Supreme Court has now changed the above position by clarifying in directions issued on 6th July 2021 in the second *Muruatetu* case. The court expressly stated that its decision in the first *Muruatetu* case applied only to the mandatory death sentence for the offence of murder prescribed under *section 204* of the *Penal Code* and not to any other sentence.

13. The above directions were issued about three years after sentence in this case was passed and in my view, they cannot be applied retrospectively. I believe this is the reason why the prosecution did not apply for enhancement of the applicant's sentence.

14. For the foregoing reasons, I find merit in the application and it is hereby allowed on terms that the period of 2 years and 4 months which the applicant spent in lawful custody during the trial shall be computed as part of his sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2022

C. W. GITHUA

JUDGE

In the presence of:

The applicant

Ms Karwitha: Court Assistant