



**Wesonga v Republic (Miscellaneous Criminal Application E030 of 2023)  
[2024] KEHC 16302 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16302 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL APPLICATION E030 OF 2023**

**AC BETT, J**

**DECEMBER 18, 2024**

**BETWEEN**

**NICHOLAS INGWE WESONGA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant, Nicholas Ingwe Wesonga was convicted of the offence of robbery with violence contrary to Section 296 of the *Penal Code*. He was sentenced to ten (10) years imprisonment without an option of a fine on 26<sup>th</sup> January 2022.
2. The Applicant had been arrested on 19<sup>th</sup> May 2020 and was placed in remand custody until 26<sup>th</sup> June 2020 when he was released on bond. In the circumstances, his confinement was one month.
3. On 26<sup>th</sup> May 2021, the Applicant was absent in court and a warrant of arrest was issued. He remained at large until 23<sup>rd</sup> September 2021 when he was brought under warrants of arrest and the court suspended his bond. Thereafter, the matter proceeded while the Applicant was in prison. In the end, the Applicant spent 7 ½ months in custody from the day his bond was cancelled to the day he was sentenced to imprisonment.
4. By a Notice of Motion dated 31<sup>st</sup> July 2023, the Applicant urged the court to consider the time he spent in custody from the day of his arrest in his sentence. In essence, this is an application under Section 333 (2) of the *Criminal Procedure Code*.
5. Section 333 (2) of the *Criminal Procedure Code* provides as follows:-

“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.”

6. In light of the aforesaid provisions, the court has the responsibility of taking into account the period that an accused person has spent in custody as it pronounces its sentence.
7. The Respondent stated that it was not opposed to the application.
8. The Applicant filed the application in person. He did not cite any provisions of the law, nor did he present a coherent application as such but the court could deduce his prayers.
9. The issues before this court is whether Section 333 (2) applies to an accused person who is remanded in custody after jumping bail and whether the Applicant’s application is merited.
10. This court has power under Article 165 (3) and (6) of the Constitution, to call for the records from the subordinate court and examine the same so as to satisfy itself as to the legality, propriety and correctness of the decision. Article 165 of the Constitution provides as follows:-

“(1) ...

(2) ...

(3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
  - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
  - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - (iv) a question relating to conflict of laws under Article 191; and



- (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) ...
- (5) ...
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

11. Pursuant to Section 362 and 364 of the [Criminal Procedure Code](#), this court has power as follows:-

“362. 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.”

364.

- (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.
  - (c) ...
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:  
 Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.



(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.”

12. I have carefully considered the Applicant’s prayers and perused the trial court’s records. This is a case where the Applicant spent only one month in custody before he was released on bond. The trial proceeded partially before the Applicant jumped bail and after several months, he was arrested and his bond cancelled. Hence the 7 ½ months that the Applicant subsequently spent in remand custody was as a result of his default.

13. Article 49 (1) (h) of the Constitution stipules as follows:-

“(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The Applicant had been granted bail by the trial court. He did not adhere to the terms of the bond and failed to attend court on several occasions leading to his arrest and cancellation of bond. He cannot lay the blame for his 7 ½ months stay in custody on anyone but himself.

14. In any event, I have perused the record of the trial court. The trial Magistrate definitely took the Applicant’s period in custody into consideration. He stated thus:-

“Sentencing

I have considered the mitigation and the nature of the offence herein. The mandatory sentence provided herein is death sentence unless otherwise.

In this case I note that the accused is a family man and the sole bread winner. He is also remorseful. He has been in custody from the time his bond was cancelled.

For the above reasons, this court will be lenient and the accused will serve ten (10) years with no option of fine.

14 days right of appeal explained.”

15. It is trite law that an appellate court should not interfere with the exercise of a trial court’s discretion on sentencing. This was held in the case of Bernard Kimani Gacheru v Republic, Cr. App. No. 188 of 2000 (Nakuru), cited by the Court of Appeal in I.P. Veronica Gitabi & Another v Republic [2017] eKLR where the court stated:-

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not



sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

16. It is patently clear that the trial court fully considered the period the Applicant stayed in custody as it made a decision on the appropriate sentence. The Applicant’s constitutional rights were not violated as the sentence was proper.
17. The upshot is that the application is dismissed for lack of merit.
18. Those are the orders of the court.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF DECEMBER 2024.**

**A. C. BETT**

**JUDGE**

In the presence of:

The Applicant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

