Mbogo v Republic (Criminal Appeal 13 of 2021)
[2023] KEHC 3682 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 13 OF 2021

SC CHIRCHIR, J

APRIL 25, 2023

BETWEEN

PETER MANI MBOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the sentence in the Judgment of Hon, Ochanda (RM)on Muranga Criminal Cae No. 47 of 2018 at the chief Magistrate's Court at Muranga)

JUDGMENT

1. The Appellant was charged with the offence of being in possession of Cannabis contrary to section 3(1) as read with section 3(2) (a) of the *Narcotic drugs and Psychotropic Substance Control Act* No. 4 of 1994. It was alleged that on the 7th day of January 2018 at around 20.00 hrs at Gaitheri village, Gathukiini location in Murang'a county he was found in possession of six(6) rolls of bhang which was not in its medical form.

   He was found guilty of the charge and sentenced to 7 years in prison. This appeal is against the sentence only.

Petition of Appeal

2. I have paraphrased the grounds of appeal as follows:

   a). That the lower court erred in failing to take into account the period that the appellant had spent in custody prior to conviction.

   b). That he is remorseful and the sentence should be substituted with a non- custodial one.

Appellant's Submissions

3. The appellant submits that he was arrested on January 8, 2018 and sentenced on 5/3/2020; and that all this time, he was in custody. That the trial court ought to have factored in this period in compliance with section 333(2) of the *Criminal Procedure Code*.

4. The appellant further submits that he has owned up to the crime; that he is remorseful; he has reformed since his incarceration and that he deserves a more lenient sentence.

5. He further urges the court to review the sentence on the basis of section 362 of the *Criminal Procedure Code.*

Respondent's Submissions

6. On the provisions of section 333(2) of the *Criminal Procedure Code*, the respondent admits that the trial court ought to have factored in the period spent in custody by the appellant.

7. On the sentence of 7 years, the respondent points out that the offence should have earned the appellant 10 years but the court gave him a lesser sentence of 7 years and that the court did not act on any wrong principle to warrant any interference by this court.

Determination

8. I have read the record of appeal, considered the grounds of appeal, the respective parties' submissions and the Authorities relied on.

9. There are only two issues for determination:

   a). Whether the trial court complied with section 333(2) of the *Criminal Procedure Code* and if it did not, whether it erred.

   b). Whether the Appellant deserves a review based on section 362 of the *Criminal Procedure Code*.

Whether the trial court complied with section 333(2) of the Criminal Procedure Code

10. Section 333(2) of the *Criminal Procedure Code* provides as follows:

> " Subject to the provisions of section 38 of the *Penal Code,* 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 the 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 in custody. "

11. The High Court in Abdul Aziz Odour & Ano vs Republic(2019) Eklr while citing with approval the case of *Abolfathi Mohammed and Anor vs. Republic* (Criminal Appeal No. 135/2016{unreported}) held that "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 appellant had spent in custody, he ordered that their sentence shall take effect from the date of their conviction at the trial court. With respect, there is no evidence that the court took into account the period already spent by the Appellant 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 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."

12. Paragraph 7.10 of the Sentencing Policy Guidelines provides that "The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed."

13. Thus the requirement to factor in the period spent by an accused person is well established. Failure to do so as pointed out in the Sentencing Guidelines would result in excessive punishment not commensurate to the crime. While sentencing the appellant herein, the lower court record is silent on whether the Trial Magistrate took into consideration the period that the appellant had spent in custody. Failure to state so meant that the trial court did not into account this period. This was clearly an error. I also note that this error was committed despite the fact that theappellant, in his mitigation, reminded the court to consider the period served.

Whether the 7 years sentence was excessive and whether this court should exercise its discretion under section 362 of the Civil Procedure Code.

14. Sentencing is an act of discretion and an Appellate court will only interfere if the trial court took into account wrong principles or overlooked some material factors or took into account irrelevant factors, or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle. (See *Wilson Waitegei vs. Republic* [2021]eKLR) cited by the respondent.)

15. In sentencing the appellant, the trial took note of the appellant's 2 previous convictions in respect of the same offence.

    Taking into account the fact that the appellant is a repeat offender, I do not consider the sentence meted out as being too excessive. The appellants complain in this regard is without merit and the same is dismissed.

16. In conclusion, the appellant's appeal partly succeeds. The sentence to take into account the period spent in custody. The appellant sentence of to 7 years is hereby confirmed to run from January 8, 2018.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 25TH DAY OF APRIL 2023.

S. CHIRCHIR

JUDGE

In the presence of:

Susan- Court Assistant

Appellant- present

Ms . Muriu for the Respondent.