Ngigi v Republic (Criminal Revision E274 of 2021)
[2023] KEHC 21768 (KLR) (30 August 2023) (Revision)

Neutral citation: [2023] KEHC 21768 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL REVISION E274 OF 2021

PM MULWA, J

AUGUST 30, 2023

BETWEEN

KENNEDY MWANGI NGIGI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Application for review of the sentence in Ruiru Criminal Case (S.O.) No 17 of 2019.)

REVISION

1. Kennedy Mwangi Ngigi, the applicant herein has approached this court vide an undated Notice of Motion application filed on December 28, 2021 seeking review of the sentence in Ruiru Criminal Case (SO) No 17 of 2019. In that case the applicant was sentenced to five (5) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.

2. The applicant contends that the lower court while passing sentence did not consider his mitigation and that he was a first offender. And therefore, the said sentence was harsh and inappropriate. He submitted that the remaining portion of his prison sentence be substituted with a non-custodial sentence. The applicant further contends that the time he spent in remand was not considered as provided for under section 333(2) of the *Criminal Procedure Code*. He calls upon the court to exercise its revisionary powers under Section 362 of the *Criminal Procedure Code*.

3. The state did file a response to the application.

4. I have carefully considered the application as well as the probation officer's report filed. I have also perused the lower court's record in Ruiru SO No 17 of 2019 and confirmed that the applicant was arraigned in court for plea on September 30, 2019 having been arrested the previous day on September 29, 2019.

5. After the hearing of the case the learned trial magistrate convicted the applicant and while sentencing stated:

> " I have considered the mitigation, the fact that the accused is a first offender, the nature of the offence...and noted that the accused has been in remand since September 30, 2019...I hereby sentence the accused to five (5) years imprisonment."

6. The only issue to determine is whether the sentence herein should be revised.

7. This being an application involving the court's revisionary jurisdiction, it is important to set out the law that governs the exercise of the court's power of revision in criminal cases. That power is donated by Section 362 as read with Section 364 of the *Criminal Procedure Code*. Section 362 states as follows:

> " 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 orders recorded or passed and as to the regularity of any proceedings of any subordinate court".

And Section 364 reads as follows;

> " (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.
>
> (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."

8. From a reading of the above provisions, it is clear that the court can only revise or interfere with an order or sentence passed by the trial court if it was satisfied that there was an illegality, error, or irregularity in the proceedings that gave rise to the challenged order or sentence.

9. In this instance the trial court after conducting a full hearing the learned trial magistrate found that there was overwhelming evidence that the applicant had committed the offence of defilement against the victim, a child then aged 15 years. The applicant was found guilty, convicted and sentenced to the term of 5 years imprisonment.

10. The provisions of Section 8(3) of the *Sexual Offences Act* provide for the punishment for the offence and reads as follows;

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

11. I must state for the record that the trial court did not overlook any material factors when passing sentence and took into consideration the circumstances of the case and the fact that the applicant was a first-time offender. The plea for revision of the sentence on the ground that the sentence was harsh and inappropriate must therefore fail.

12. Section 333 (2) of the *Criminal Procedure Code* provide as follows:

> "(2) subject to the provision 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".

13. No doubt the law requires that courts consider the period the convict spent in custody.

14. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In *Ahamed Abolfathi Mohammed & Another vs Republic* (2018) eKLR the Court of Appeal stated 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".

15. Also, the Court of Appeal in *Bethwel Wilson Kibor v Republic* expressed itself as follows:

> "By proviso to Section 333 (2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody".

16. Finally, the Judiciary *Sentencing Policy Guidelines* state that:

> 7.10 "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 the trial. Failure to do so impacts on the overall period of the detention which may result in an excessive punishment that is not proportional to the offence committed.
>
> 7.11 In determining the period of imprisonment that should be served by an offender, the court must take into account the period which the offender was held in custody during the trial".

17. As hereinabove observed, the applicant was arraigned and took plea on September 30, 2019. A perusal of the lower court record shows that, other than the learned trial magistrate acknowledging that the

applicant had been in custody since September 30, 2019, she failed to take into account that period after passing the 5 years sentence.

18. The upshot is that the sentence review application only succeeds to the extent that the 5 years prison term imposed will run from the date the applicant was arrested, that is on September 29, 2019.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30TH DAY OF AUGUST, 2023

P.M. MULWA

JUDGE

In the presence of:

Duale - court assistant

Mr. Muriuki – for state/respondent

Applicant in person – *present*