Louse v Republic (Criminal Miscellaneous Application E059 of 2023)
[2023] KEHC 24039 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24039 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL MISCELLANEOUS APPLICATION E059 OF 2023

RN NYAKUNDI, J

OCTOBER 25, 2023

BETWEEN

GODFREY LOUSE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being a review from original conviction and sentence in Lodwar Senior Principal Magistrates Court sexual offences Case No. 34 of 2019, Hon. M K Muchiri RM on 2nd August, 2020)

RULING

Coram: Before Justice R. Nyakundi

Mr. Yusuf for the State

1. The applicant was convicted with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the *sexual offences Act* No. 3 of 2006. The particulars of the offence are that on December, 2018 at around 9:00PM in Turkana central sub-county within Turkana County the accused person intentionally caused his penis to penetrate the VVL, a child aged 16 years old. The applicant was convicted of the said charge and a sentence of 6 years was imposed.

2. The applicant seeks review of the sentence pursuant to Section 333(2) of the *Criminal Procedure code*. The applicant prays that the court considers the provisions of section 333(2) of the *CPC* and take into account the time he has been in custody.

Analysis and Determination

3. I have considered the application and the court's mandate is to determine the application of section 333(2) of the *Criminal procedure code*. The section provides as follows:

> (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.

4. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

5. In the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR where 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 June 19, 2012."

6. It follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.

> More significantly, making the same point in *R v Saw and others* ([2009] 2 All EWR 1138, 1142), Lord Judge CJ observed that the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating

features'. In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice. By the same token, therefore, it will, in our view, generally be wrong in principle to use the statutory maximum as the starting point in the search for the appropriate sentence. But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143 (1) of the United Kingdom criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused".

7. Naturally, the full argument by the applicant in this case centers on the period spent in remand custody. Though obviously varying in significance from case to case the guidelines in the court provide a special order to be made by the court involving purely that period when the applicant was awaiting trial while in remand custody. Needless to say that prisoners in Kenya seems to be over using the court process in terms of the provisions under section 333(2) of the *code*. Pre-trial detention looked at from the legal lens of the *constitution* it does well infringe fundamental rights enshrined in it and international law instrument. As such Pre-trial detention for lengthy periods of time may contravene the right to liberty in article 29, right to human dignity in article 28 right to fundamental rights and freedom that is from torture and cruel, inhuman or degrading treatment. Being in prison as a suspect compromises the ability to enjoy these rights. If one was in formal or informal employment there are risks to cope with on economic and social rights. Excessive and arbitrary pre-trial period spent in remand custody is an overlooked area in which human rights abuse can be occasioned. There is need during sentencing for trial courts to consider this basic paradigm under section 333(2) of the *criminal procedure code* taken for granted over the years to give credit to the prisoner or convict whenever they issue at stake is to impose a custodial sentence. Greater effort must be met to ensure that pre-trial detention period is not wished away in the sentencing proceedings. From broad discretion perspective the supreme court of Uganda in *Rwabugande Moses v Uganda*; [2017] UGSC 8 delved into the issue as follows;

> " it is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.
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> We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the sentence. Article 23 (8) of *constitution* (*supra*) makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict, fact that the convict is a first offender, remorsefulness of the convict and others which

are discretional mitigating factors which the court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors and the courts determination of the sentence cannot be quantified with precision".

8. Similarly, in *Ogalo s/o Owoura v R* [1954] EACA 270 the East African court of appeal held that;

> The Principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v R* [1950] 18 EACA 147, "it is evident that the judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that that the sentence is manifestly excessive in view of the circumstances of the case."

9. This is a kind of reference and not a substantial appeal. My jurisdiction is confined to considering whether the learned trial magistrate exercised his unfettered discretion under section 333(2) of the *CPC* or that he was plainly wrong in arriving at the final verdict on sentence. Although the learned trial magistrate was satisfied that there were other factors which weighed more heavily than the issue of the period spent in remand custody he ought to have given reasons for that departure on the express provisions of the law. On my part I have a basis for interfering with the learned magistrate's exercise of discretion to proceed and review the imposed custodial sentence commencement date to read with effect from the 17th of June, 2019.

   It is so ordered.

DATED AND SIGNED AT LODWAR THIS 25TH DAY OF OCTOBER, 2023

In the presence of;

The Applicant

Mr. Yusuf for the DPP

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R. NYAKUNDI

JUDGE