Oroba v Republic (Criminal Revision E101 of 2023)
[2023] KEHC 26756 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26756 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL REVISION E101 OF 2023

WA OKWANY, J

DECEMBER 21, 2023

BETWEEN

DUKE LIBETI OROBA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the original Conviction and Sentence in the Chief Magistrate's Court at Nyamira, Criminal Case No. CMCCR No. 760 of 2020 by Hon. W. C. Waswa, Senior Resident Magistrate on 8th November 2023)

RULING

1. The applicant herein was charged and convicted on two counts of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the *Penal Code*. The trial court tried and convicted the applicant who was ultimately sentenced as follows: -

   Count I - Compensate the complainant Wilkister Kwamboka Moriasi in the sum of kshs. 100,000/= or in default to serve 2 years' imprisonment.

   Count II- Compensate the complainant Dismas Bunduki in the sum of Kshs. 50,000 or in default to serve two years' imprisonment.

   The sentences shall run concurrently.

2. The applicant filed the application that is the subject of this ruling under section 333(2) of the *Criminal Procedure Code* (CPC) seeking a revision of his sentence by considering the period that he spent in remand custody while awaiting his trial.

3. The application is supported by the applicant's Affidavit wherein he avers that the period spent in remand was not considered during sentencing. He referred to the decision in the case of *Ahmed*

Abolfathi Mohammed & another v Republic (2018) eKLR and section 333 (2) of the *Criminal Procedure Code*. He urged the court to allow the application in light of his right to fair trial under article 25 of the *Constitution*.

4. The respondent did not oppose the application but urged this court to peruse the trial court's record with a view to establishing if the said court adhered to the requirements of section 333(2) of the CPC.

5. The rights of an accused person are enshrined under article 50 of the *Constitution of Kenya* which provides as follows: -

> (2) Every accused person has the right to a fair trial, which included the right-
>
> (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.

6. Article 165 of the *Constitution* further reinforces this court's jurisdiction to review decisions of subordinate courts. The said Article stipulates that:-

> 165
>
> 1. 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.

7. Section 362 and 364 of the *Criminal Procedure Code* stipulates as follows: -

> *Criminal Procedure Code*
>
> 362. Power of the High Court to Call for Records
>
> 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. Powers of the High Court on Revision
>
> 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 defense:
>
> 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 that 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 a 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.

8. This Court has now been called upon to examine the sentence imposed by the trial court and determine whether it was legal, correct and appropriate.

9. It is trite that sentence is a matter that rests at the discretion of the trial court. This was the position taken by the Court of Appeal in *Bernard Kimani Gacheru vs Republic* [2002] eKLR where the learned judges held thus: -

> 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.

10. An appellate court will only interfere with the sentence passed by a trial court where it is established that the sentence was manifestly harsh or inadequate, or where it was illegal or where the court failed to consider some relevant factor. In *Wagude v R* (1983) KLR 569 the Court of Appeal held thus: -

> " The Court may interfere with the sentence only if it shown that it was manifestly excessive. In this instance two years' Imprisonment for stealing by a person employed in the public service was not manifestly excessive."

(see also the decision of Lewis J. in *R vs Ratilal Amarshi Lakhani* [1958] EA 140, 141)

11. As I have already stated in this ruling, the applicant was charged and convicted for the offence of breaking into a building and committing a felony contrary to section 306 (a) of the *Penal Code*. The section stipulates as follows: -

306. Breaking into building and committing felony

Any person who—

a. breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body,

or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or

b. breaks out of the same having committed any felony therein,

is guilty of a felony and is liable to imprisonment for seven years.

12. I have considered the sentence imposed on the Applicant by the trial court and I find that it was legal and appropriate. I however note that the trial court did not consider the period that the Applicant spent in remand custody while awaiting his trial during sentencing as envisaged under section 333(2) of the *Criminal Procedure Code* which states thus:-

333. Warrant in case of sentence of imprisonment

(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.

(See also the *Judiciary Sentencing Policy Guidelines* paras. 7.10-7.11)

13. In the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR the Court of Appeal held as follows: -

> " By proviso to section 333(2) of *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. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

14. A perusal of the trial court record reveals that the applicant was arraigned in court on July 30, 2020 and remained in remand custody until March 14, 2022 when he was released on cash bail. His freedom was however short-lived as his bond was suspended on April 27, 2022 after which the trial proceeded while he remained in custody until December 13, 2023 when the case was finalised upon the delivery of the sentence.

15. I note that the trial court did not consider that the applicant spent more than 3 years in remand custody with a view to deducting the same from his sentence period as required by section 333 (2) of the *Criminal Procedure Code*.

16. I further note that the applicant has to-date served one year out of the two (2) years imprisonment term. It is instructive to note that had the trial court considered the period that the applicant spent in custody while awaiting his trial, then the said court would have found that the period spent in custody was adequate punishment for the offence in question.

17. In a nutshell, I find that the instant application is merited and I therefore allow it. I direct that the applicant be set at liberty forthwith unless he is otherwise lawfully held.

18. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF DECEMBER 2023.

W. A. OKWANY

JUDGE