



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. E012 OF 2021

(CONSOLIDATED WITH HCCRA. E010 AND E011 OF 2021)

(CORAM: F.M. GIKONYO J.)

(From the sentence of Hon. A.N. Sisenda (R.M) in Narok SOA No. 65 of 2019 on 15th June 2021)

JULIUS ASHIRA.....1ST APPELLANT

TOLIMO ESHO.....2ND APPELLANT

MOSES KANKIRIAM.....3RD APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Time spent in custody

1. The appellants have fastened a legal quarrel; that contrary to Section 333(2) of the Criminal Procedure Code, time spent in custody prior to conviction was not taken account of in the 10 years' sentence imposed on them by the trial court. They now seek in their applications dated 25/06/2021, that time spent in custody be taken into account and their sentences be reduced accordingly.
2. The charge the appellants faced was committing gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.
3. Being dissatisfied with the said sentence the appellants preferred an appeal as set out in their grounds of appeal in their mitigation of appeal.
4. The appellants have now come to this court on appeal through three appeals No. E010, E011 and E012 of 2021, which were consolidated and heard together.
5. Ms. Torosi for the prosecution opposed the applications on the ground that the 2nd appellant was released on bond during trial and for the 1st and 3rd appellants the court took into account time spent in custody. She contended that the appellants were sentenced to 10 years and therefore, maximum sentence was not imposed. Further she argued that SOA does not envisage probation. In her opinion, the appellants should go to the court of appeal for redress. She urged this court to dismiss the applications.
6. In a rejoinder the 3rd appellant, insisted that this court should reduce the sentence by the time he was in remand.
7. The 1st appellant prayed that this court reduces his sentence because he is young.
8. The 2nd appellant confirmed that he was on bond.

ANALYSIS AND DETERMINATION

Court's duty

9. As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I should however bear in mind that I neither saw nor heard the witnesses. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.**

10. I have carefully considered the written and oral submissions of the respective parties and the record of appeal. The appellants submitted to the effect that they have only one prayer before this court that they wish to pursue, to wit; time spent in custody to be taken into account in the sentence. Accordingly, the single issue left for this court to consider is:

i. Whether the time spent in custody was taken into account by the trial court in passing sentence?

11. I am acutely aware that Section 333(2) of the Criminal Procedure Code is a matter of fair trial which serves to prevent a situation where a person may serve sentence which is not proportional to, or more severe than the sentence prescribed. See the explanation of this object in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) as follows:

“The provision 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 detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

12. Whereas, the section does not state how the time spent in custody should be taken account of in the sentence, merely stating you have taken such period into account is not enough (**Ahamad Abolfathi Mohammed & Ano vs. R [2018] eKLR, and Bethwel Wilson Kibor vs. R [2009]**). It is suggested that the court must be seen to have given real-time effect of Section 333(2) of the Criminal Procedure Code in sentencing. Some posit that this may be achieved by stating clearly when the sentence commences to capture the time spent in custody especially where the accused remained in custody since arrest. In other cases, it is suggested that courts should clearly state that the sentence includes the time spent in custody. There could be other suggestions, except, care should be taken in all instances not to impose sentence which in light of time spent in custody would over-shoot the sentence prescribed, or be tantamount to the maximum sentence prescribed unless the circumstances of the case is such that maximum sentence is justified.

13. Nonetheless, is there a violation of section 333(2) of the CPC herein?

Applying the test

14. I have perused the records of the trial court and it is clear that the appellants herein were convicted of the offence of gang rape contrary to section 10 of SOA in Narok SOA Case No. 65 of 2019. They were sentenced to serve 10 years' imprisonment. The trial court (Hon. A.N. Sisenda (R.M)) stated as follows: -

“I have perused the pre-sentence reports and noted the contents. I have also considered the offence that the 3 accused persons have been charged with, and the sentiments of the local area administration. I have also considered that the accused persons have been in custody since 11/10/2019 when they were arraigned in court. I proceed to sentence each accused person to serve 10 years imprisonment. The same is to take effect from the date of sentence which is today. Right of appeal in 14 days. Surety for accused 3 is hereby discharged.”

15. The trial magistrate was alive to the fact that the accused persons were in custody since 11.10.2019- a fact she categorically stated she had taken into account. In passing sentence, the trial magistrate exercised discretion despite the minimum sentence of 15 years' imprisonment which may be enhanced to life sentence as prescribed in section 10 of the Sexual Offences Act. See the section below, that:

10. Gang rape

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life

16. This offence is serious and grave, and is the epitome of sexual debauchery which society intends to punish, deter or hopefully stamp out of society as signified in the severe sentences prescribed in section 10 of the SOA. In the circumstances of this case, the sentence as passed was not only lenient, but also took account of the time spent in custody under section 333(2) of the CPC. I therefore do not find any merit in the appeals. Consequently, the consolidated appeals is dismissed. It is so ordered. The applicants are at liberty to exercise their right of appeal to, and may seek remedy from the Court of Appeal.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26TH DAY OF APRIL, 2022

F.M. GIKONYO

JUDGE

In the presence of:

- 1. Mr. Karanja for Respondent**
- 2. All the appellants**
- 3. Mr. Kasaso -Court Assistant**