Maroro v Republic (Criminal Revision E036 of 2022)
[2022] KEHC 11249 (KLR) (Crim) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11249 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVISION E036 OF 2022

CW GITHUA, J

JULY 27, 2022

BETWEEN

SAMUEL ATEGA MARORO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant, Samuel Atega Maroro, approached this court through an undated chamber summons application filed on 14th March 2022 seeking review of the sentence imposed on him by the Kibera Chief Magistrate's Court in Sexual Offence Case No. 67 of 2018.

2. In that case, the applicant was charged with the offence defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars supporting the charge were that on 15th August 2018, at about 00:05 hours in Riruta within Nairobi County, he unlawfully and intentionally caused his penis to penetrate the vagina of IO, a child aged 11 years.

3. In the alternative, the Applicant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on 15th August 2018, at about 00:05 hours in Riruta within Nairobi County, he unlawfully and intentionally committed an indecent act by touching the vagina of IO, a child aged 11 years, with his penis.

4. After a full trial, he was convicted in the alternative charge and was sentenced to serve ten (10) years imprisonment.

5. In support of his application, the applicant urged me to revise and reduce his sentence or substitute it with a non custodial sentence on grounds that he was a father of two children and the sole bread winner for his family. He further contended that he was 39 years old and was a first offender; that he

was remorseful for his unlawful action and that given his experience when serving his sentence, he had learnt to be a law abiding citizen. He also prayed that the time he had spent in remand custody during the trial be deducted from his prison term.

6. I have considered the application. I find that it invokes the revisional jurisdiction of this court donated by Section 362 of the Criminal Procedure Code which empowers this court to 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 or the regularity of any proceedings before the trial court.

7. Section 362 above must be read together with Section 364 of the *Criminal Procedure Code* (CPC) which provides for inter alia, the orders the court may make in the event it was satisfied that an application for revision was merited.

8. This being an application for sentence review, it is important to point out at the outset that as a general rule, sentencing is a matter that rests on the discretion of the trial court. This court therefore, while exercising its supervisory jurisdiction which includes revisional jurisdiction, can only interfere with a sentence passed by the trial court if it was satisfied that it was illegal or patently unlawful in that in passing the sentence, the trial court applied the wrong legal principles or considered irrelevant factors or failed to consider relevant ones or otherwise abused its discretion.

9. I have called for and carefully examined the trial court's entire record. Having done so, I find that although the record clearly shows that the learned trial magistrate before passing sentence considered the applicant's plea in mitigation, she did not address her mind to the time he had spent in remand custody during the trial. The law at Section 333 (2) of the Criminal Procedure Code makes it mandatory for trial courts to take into account the period an accused person had spent in custody prior to the date of sentencing. That provision provides as follows:

> " 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."

10. The Judiciary Sentencing Policy Guidelines paragraph 7 further buttresses this legal position by stipulating as follows:

> " 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 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."

11. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another V Republic*, [2018] eKLR when considering the appellant's complaint that the time they had been in custody was not taken into account by the High Court stated as follows:

> " 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. .... "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 ...."

12. In not considering the time the applicant had been in remand custody during the trial and failing to factor it into the sentence passed, the learned trial magistrate contravened the proviso to Section 333 (2) of the Criminal Procedure Code. This was an error on the trial court's part given that the provision is couched in mandatory terms and ought to be complied with by all trial courts. It is an error which this court is duty bound to correct in the exercise of its revisional jurisdiction.

13. A perusal of the trial court's record reveals that though the applicant was granted a bond of KShs.300,000 with one surety of a similar amount, he was unable to comply with the said bond terms. Considering that he was arrested on 15th August 2018, it is apparent that he was in lawful custody for a period of one year and nine months prior to the date he was sentenced which ought to have been factored in his sentence.

14. With regard to the applicant's prayer that his sentence be reduced or substituted with a non custodial sentence, I do not find any legal basis upon which I can grant him the orders sought. I say so because Section 11 (1) of the *Sexual Offences Act* which creates the offence for which he was convicted prescribes a minimum sentence of ten years imprisonment and save for failure to comply with the requirements of Section 333 (2) of the Act, I find that the sentence imposed on the applicant was lawful as it was in accordance with the law.

15. For the foregoing reasons, I find the application partially successful. It is allowed on terms that the sentence imposed by the trial court shall take effect from the date of the applicant's arrest, which is, 15th August, 2018.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2022.

C. W. GITHUA

JUDGE

In the presence of:

Applicant present in person

Ms Oduor for the respondent

Ms Karwitha: Court Assistant