



**Mason v Republic (Criminal Revision E041 of 2022)
[2022] KEHC 10434 (KLR) (Crim) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E041 OF 2022
CW GITHUA, J
JULY 27, 2022**

BETWEEN

MORGAN RUMENDA MASON APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Morgan Rumenda Mason, approached this court through an undated chamber summons application filed on 14th March 2022. He seeks review of the sentence imposed on him by the Chief Magistrate's Court at Kibera in Sexual Offence Case No. 20 of 2017.
2. In that case, the applicant was charged and convicted of the offence rape contrary to Section 3 (1) (a) (b) (c) as read with Section 3 (3) of the *Sexual Offences Act*. The particulars of the offence were that on 5th February 2017 in Langata within Nairobi County, the applicant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of LSK (name withheld), without her consent.
3. Upon conviction, he was sentenced to serve ten (10) years imprisonment.
4. In his supporting affidavit, the applicant urged me to revise the sentence to factor in the period of three years and three months he had spent in custody during the trial. He averred that he was a father of two children and the sole bread winner of his family; that he had suffered enough in prison and was truly remorseful for the offence he committed and is now reformed given the prison rehabilitation programs he had undertaken in prison including counselling, entrepreneurship and other life skills which if released he can utilize to earn his livelihood.



5. I have considered the application as well as the prayer sought therein. The application invokes the revisional jurisdiction of this court provided for under Section 362 as read with Section 364 of the Criminal Procedure Code which gives this court power to call for and examine the record of proceedings of the lower court to satisfy itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed by the trial court and the regularity of the proceedings leading to the impugned order or decision.

6. In George Aladwa Omwera v Republic, [2016] eKLR, Wakiaga J held that:

“In exercising supervisory jurisdiction under Article 165 (6), the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.”

The above holds true to the exercise of this court’s revisional jurisdiction which is a subset of the court’s supervisory jurisdiction enshrined in Article 165 (6) of the Constitution.

7. In Veerappa Pillai v Raman & Raman Ltd, AIR 1952 SC 192 the Supreme Court of India spoke to the scope of the court’s revisional jurisdiction and its objective by stating as follows:

“The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made. ...”

8. This being an application for sentence review, it is important to note that as a general rule, sentencing is a matter that rests upon the discretion of the trial court. When exercising supervisory jurisdiction, the court can only interfere with a sentence passed by the trial court if it was satisfied that there was an illegality or error in the impugned sentence or that in passing the sentence, the trial court considered wrong legal principles or took into account extraneous factors. The court can also revise the sentence if in its view, the sentence was manifestly harsh and excessive given the circumstances of the case.

9. In the present case, my perusal of the trial court’s record reveals that the learned trial magistrate when sentencing the applicant considered his mitigation, his previous record and nature of the offence subject of his conviction. The record does not however show that the learned trial magistrate considered the time the applicant had spent in remand custody during the trial.

10. The Court of Appeal in Bethwel Wilson Kibor V Republic, [2009] eKLR in revising the sentence of the High Court noted that the trial judge had failed to take into account the time the appellant had spent in lawful custody as required by Section 333 (2) of the Criminal Procedure Code (CPC). The court held as follows:

“The appellant was promptly arrested and taken to court. There were long adjournments due to transfers and/or changes of trial Judges resulting in long incarcerations of the appellant. 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. We think that all these incidents ought to have been taken into account in assessing sentence.”

11. The trial court’s record shows that the applicant was arrested on 1st March 2017. The court granted him a bond of KShs.500,000 with one surety of a similar amount but there is no indication that he complied with the bond terms. He remained in custody till the date he was sentenced on 28th May 2020. This means that he was in lawful custody for approximately three years and three months before his conviction and sentence.
12. It is a mandatory requirement under Section 333 (2) of the CPC that the period spent in lawful custody prior to sentence should be taken into account when passing sentence. The provision states 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.”
13. Given the foregoing provision, the trial court erred when it failed to consider the time the applicant had spent in custody during the trial. The period ought to have been computed as part of his sentence.
14. In the circumstances, I find merit in the application and it is hereby allowed on terms that the sentence of ten years imprisonment by the trial court shall take effect from the date of the applicant’s arrest which is 1st March 2017.

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

