Kamau v Republic (Criminal Appeal 15 of 2019)
[2022] KEHC 14735 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14735 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL 15 OF 2019

GL NZIOKA, J

OCTOBER 26, 2022

BETWEEN

DAVID NJOROGE KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant filed the subject appeal herein against sentence on May 14, 2019. It is premised on the provisions of; section 350(2) (v) of the *Criminal Procedure Code* and grounds of appeal as here below reproduced

    a. That, the sentence imposed is harsh and unjust considering the circumstances that prevailed.

    b. That, I have been in custody (remand) for a period of ..... years and pray that may these be include in my serving years.

    c. That, currently my health has markedly deteriorated due to several illnesses whereby I am asthmatic which needs a lot of medical care attention.

    d. That, I humbly bed the honourable court to have leniency on me and allow me to join back the society as I was the sole breadwinner in the family.

    e. That, I have undergone rehabilitation having undertaken vocational and theological training hence ready to abide by the rule of law in back in the society

    f. That, I humbly bed the Honourable court to consider me to leniency and reduce 20 years' imprisonment with a short term or non-custodial sentence whereby I will abide to any rules set by the honourable court.

    g. I wish to be present during the hearing of this appeal.

h. That, what is deposed herein is true and correct to the best of my knowledge, information and belief.

2. On May 20, 2022, and without the leave of the court, the appellant filed amended grounds of appeal, which states as follows; -

a. That, the learned trial magistrate erred in law and fact by failing to appreciate that the appellant's identification was not positively conducted and as such cannot safely sustain a conviction.

b. That, the learned trial magistrate erred in law and facts by failing to find that, the prosecution did not discharge its duty of proving its case against the appellant beyond contrary to the provision of section 107 of the *Evidence Act*.

c. That, the sentence imposed was not only extremely harsh but also excessive since it was applied in mandatory, terms without consideration of the fact of the case, antecedents of the accused person or the appellant's mitigation.

3. On the even date the appellant filed submission running into nine (9) pages basically dealing with the issues of; identification, proof beyond reasonable doubt and harsh and/or excessive sentence. He prays that, the conviction be quashed, sentence be set, and/or he be set at liberty forthwith.

4. The appeal was admitted on; September 28, 2022 to hearing. Thereafter, the court ordered the parties to dispose it of by filing of submissions within the stated timelines and the matter was set for mention on October 24, 2022, to confirm compliance.

5. On that particular date, the appellant informed the court that, he did not wish to pursue the appeal on conviction or sentence. That, all he wants, is the court to do is to consider the period he was in custody pursuant to section 333(2) of the *Criminal Procedure Code* and take it into the sentence meted out.

6. The respondent did not file any response or submission to the appeal, save to orally state that, since the appellant has made it clear that, he is not pursuing the appeal on conviction or sentence, and since he was in custody for two (2) years and eleven (11) months, the subject period should be considered in the sentence meted out.

7. Having considered the aforesaid, I find that, the simple task of the court is to consider whether the provisions of; section 333(2) were considered by the trial court or not. Before I address the same, I note that, the appellant was charged with the offence of; defilement contrary to; section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No 3 of 2006. He was further charged in the alternative count, with the offence of, indecent act with a child contrary to section 11 of the act. The particulars of each charge are as per the charge sheet.

8. He was convicted *vide* a judgment delivered on; May 2, 2019 and sentenced to serve twenty (20) years imprisonment. I note that prior to pronouncing the sentence, the learned trial magistrate stated that:

> " Mitigation considered and the fact that the accused is a first offender. offence is prevalent in Gilgil. Minimum sentence is 15 years' imprisonment. Bearing in mind the circumstances of the offence., I shall sentence the accused to serve 20 years' imprisonment.
>
> Right of Appeal 14 days"

9. It is evident from the aforesaid that, the learned trial magistrate did not take into account the period the appellant was in custody nor state from what date the sentence was to commence. The court record

show that, the appellant was arraigned in court on, July 8, 2016. He was in custody throughout the trial. Judgment was delivered on May 2, 2019 and a sentence of twenty (20) years meted out on the same day. Therefore, he was in custody for a period of two years and eight months.

10. The provisions of; section 333(2) of the *Criminal Procedure Code* states 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".

11. Furthermore, the Court of Appeal in; *Ahamad Abolfathi Mohammed & Another V Republic*, [2018] eKLR, stated that thus:

> " 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. .... 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."

12. In the given circumstances, I order that, the custodial sentence imposed upon the appellant be and is hereby ordered to commence from the July 8, 2016, when he was arraigned in court.

13. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF OCTOBER, 2022

GRACE L NZIOKA

JUDGE

In the presence of: -

Applicant in person

Ms Maingi for the Respondent

Ms Ogutu: Court Assistant