



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION 246 OF 2018

IN THE MATTER OF SECTIONS 133 AND 363 OF

THE CRIMINAL PROCEDURE CODE AND ALL

THE OTHER PROVISIONS OF THE LAW

GEOFFREY MOMANYI MAUSA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Geoffrey Momanyi Mausa filed a Notice of Motion on 22nd August 2018 supported by an affidavit sworn on the 8th March 2018.

He sought prayers inter alia that duration he spent in remand custody prior to his being sentenced in Molo Chief Magistrate's Criminal Case Number 66 of 2015 to fifteen (15) years imprisonment be considered and deducted from that sentence. That the court do issue any other order deemed fit in the interests of justice.

In the affidavit in support of the Notice of motion he deponed that he was convicted and sentenced to fifteen (15) years imprisonment for the offence of defilement Contrary to **Section 8(1) as read with 8(4) of the Sexual Offences Act**. That during the trial he spent one (1) year and eight (8) months in remand custody which the trial court did not take into account while sentencing him.

The record confirmed that the applicant was arrested on 21st January 2014 and the sentence was pronounced on 20th March 2015.

The applicant also argued that his remaining sentence be reduced to ten (10) years. He was effectively seeking a re sentence.

I sought a Pre-sentence report from the Probation and After Care Services.

The state through Ms. Wambui Prosecuting Counsel argued against that prayer on the ground that the applicant was seeking an appeal against sentence through the back door.

On the 29th May 2020, having received a letter from GK Prison Nakuru confirming the period of time the applicant had spent in custody, prior to sentencing, I directed that his fifteen (15) years imprisonment term to commence from the date he was first remanded in custody i.e. 20th January 2014.

Later on the original lower court record was availed.

I have perused the same. I have considered the applicant's application, supporting affidavit and, the arguments for the state.

It is evident that the applicant was not truthful in his affidavit.

The trial court took into consideration the period he spent in custody when meting out his sentence.

The learned trial magistrate stated:

'The accused was charged on 21st January 2014. He has continuously stayed in remand to date. The accused has therefore

stayed in remand for 14 months. I will therefore sentence the accused to 15 years imprisonment but will reduce it by the 14 months already served...accused will therefore be sentenced to 13 years and 10 months in prison. Right of Appeal 14 days'

It is clearly evident that the trial court took into consideration the period the applicant had spent in custody. It is just as well that the order I gave was the same as that made by the trial court. There was however an error on the first date the applicant entered remand prison. It was 21st January 2014 not 20th January 2014. The order will be reviewed accordingly.

Regarding the resentence, the applicant must be relying on the case of **Dismas Kilwake** which applied the **Muruatetu** principles to sentences under the Sexual Offences Act. That case was an appeal. It is my understanding that minimum sentences awarded in sexual offences by trial courts may be considered in that light within an appeal.

In any event this applicant brought this application only for the purposes of applying **Section 133 and 363 of the Criminal Procedure Code** to his case. The issue of resentence cannot be dealt with on the general prayer made for orders 'in the interests of justice'.

Hence the application is denied save for the setting aside of the order made by this court on 29th May 2020 as it was superfluous in the light of the trial court's ruling on sentence.

Dated this 8th Day of January, 2021.

Mumbua T. Matheka

Judge

Signed and Delivered virtually on 13th January, 2021.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Martin

Court Prosecutor: Ms Malimu

Applicant: Present in Nakuru GK Main