REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. 330 OF 2019

MACARIOUS LUGOSE LIGONO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant, *Macarious Lugose Ligono* approached this court vide a chamber summons dated 5th December 2019 seeking revision of sentence meted out against him in Kibera Chief Magistrate's Court Criminal Case No. 4045 of 2012.

2. In his application, the applicant contends that the sentence was unlawful as in his decision, the learned trial magistrate failed to take into account the period of one year four months which he had spent in custody prior to his conviction and sentence which was a violation of *Section 333 (2)* of the *Criminal Procedure Code*. He requested this court to order that the time spent in custody be deducted from the term of imprisonment ordered by the trial court. He also prayed that the court invokes the provision of *Section 35 (1)* of the *Penal Code* and order his release by reducing the sentence to the period already served.

3. At the hearing, both the applicant and the respondent represented by learned prosecuting counsel, *Ms Akunja* elected to prosecute the application by way of oral submissions.

In his submissions, the applicant reiterated the prayers in his application and added that he had learnt from his mistake and was now a reformed man; that the court should exercise leniency and reduce his sentence as prayed.

4. The application is contested by the respondent. Learned prosecuting counsel urged me to find that the application lacked merit considering that the applicant was convicted and sentenced to serve twenty years imprisonment for the offence of defiling a minor aged 9 years; that the punishment for the offence was life imprisonment and that the trial court, after considering the applicant's mitigation and time spent in custody decided to impose on the applicant the lenient sentence of twenty years imprisonment.

5. After considering the application, the oral submissions made by the parties and having perused the original record of the trial court, I find that the only issue arising for my determination is whether the applicant has demonstrated that he is deserving of the exercise of the court's revisionary jurisdiction in the manner sought in the application.

6. The revisionary jurisdiction of this court is wide in scope but it is limited to the parameters set out in *Section 362* of the *Criminal Procedure Code* which states as follows:

> ***"The High Court may 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 and as to the regularity of any proceedings of any such subordinate Court."***

In my view, *Section 362* should be read together with *Section 364* of the *Criminal Procedure Code* which specifies the orders the court can make, in its discretion, if it was satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the court to exercise any of the powers conferred on it as an appellate court by *Sections 354, 357* and *358* if what is impugned is a conviction and if it is any other order except an order of acquittal, the court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.

7. In this case, the applicant contends that the sentence passed by the trial court was erroneous as the learned trial magistrate failed to take into account the time he had spent in custody contrary to the dictates of *Section 333 (2)* of the *Criminal Procedure Code. Section 333 (2)* is in the following terms:

"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."

8. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In ***Ahamad Abolfathi Mohammed & Another V Republic, [2018] eKLR***, the Court of Appeal when dealing with an appeal in which the High Court was faulted for, *inter alia*, substituting the sentence imposed on the appellants by the trial court and ordering that it shall take effect from the date of conviction by the trial court stated 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 19th June 2012."

9. I have read the record of the trial court. It reveals that the applicant was convicted of the offence of defiling a child aged 9 years and was sentenced to serve 20 years' imprisonment. The record confirms the applicant's contention that in his pre-sentence notes, the learned trial magistrate did not indicate that he had taken into account the period the applicant had spent in custody during the trial and he did not order that the said period will form part of his sentence.

10. Although I wholly agree with the respondent's submission that the punishment prescribed for the offence of defilement where the victim is 11 years old and below is life imprisonment and the evidence in this case discloses that the victim was in that age bracket, it is important to note that the prosecution chose to charge the applicant with the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (3)* instead of *Section 8 (2)* of the *Sexual Offences Act* (the *Act*).

11. The record further shows that the charge was not amended throughout the trial despite the evidence adduced during the trial showing the age of the victim. The sentence imposed on the applicant conformed to the penal provision under which he was charged which prescribed a mandatory minimum sentence of 20 years' imprisonment.

12. In his mitigation, the applicant pleaded for leniency saying that he was a family man and that his family was suffering at home. The prosecution confirmed that he was a first offender. In passing sentence, the learned trial magistrate did not assign any reason for imposing the sentence of 20 years' imprisonment and he did not also indicate whether he had considered the period the applicant had spent in custody during the trial.

13. The argument by the respondent that the sentence that was applicable to the applicant was life imprisonment given the age of the victim and that the sentence of 20 years imprisonment was very lenient as to lead to an inference that the trial court must have taken into account the time he had spent in custody cannot hold for two main reasons: First, the penal provision under which the applicant was charged did not prescribe for a sentence of life imprisonment and secondly, in the absence of express indication by the learned trial magistrate that he had considered the period the applicant had spent in custody prior to the date of his sentence, there is really no basis for me to make a finding of fact to that effect. It must be remembered that the proviso to *Section 333 (2)* of the *Criminal Procedure Code* is coached in mandatory terms and must be strictly complied with for a sentence to be lawful.

14. My above finding finds support in the decision of the Court of Appeal in ***Bethwel Wilson Kibor V Republic, [2009] eKLR*** where the court revised the sentence imposed on the appellant by the High Court after finding that the High Court had failed to indicate that it had complied with the provisions of *Section 333 (2)* of the *Criminal Procedure Code*. In making its finding, the Court of Appeal stated as follows:

"By the 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. The appellant told us that as at 22nd September, 2009, he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

15. As the learned trial magistrate did not specifically state that he had considered the period the applicant had spent in custody prior to the date of his sentence and there is nothing on record from which that inference can be drawn, I agree with the applicant's contention that the learned trial magistrate did not consider the aforesaid period which ought to have formed part of his sentence. Failure to comply with the provisions of *Section 333 (2)* was an error of law which must be corrected by this court in the exercise of its revisionary jurisdiction.

16. The applicant claims that he had spent 1 year and 4 months in custody prior to his sentence. The court record shows that he was arrested on 31st August 2012 and he was convicted and sentenced on 16th January 2014. He remained in custody throughout the trial. He had therefore spent a period of one year, four months and 15 days in custody prior to the date he was sentenced.

17. For the reasons stated above, I find prayer 5 in the application merited. I accordingly order that the period computed above which the applicant had spent in custody prior to the date he was sentenced by the trial court shall form part of his sentence.

18. Regarding prayer six in which the applicant beseeched this court to invoke *Section 35 (1)* of the *Penal Code* and discharge him by reducing his sentence to the term already served, I am of the firm view that the applicant has not laid down any basis to warrant the exercise of the court's discretion in the manner sought. In the premises, prayer 6 is rejected.

19. In the end, the application partially succeeds to the extent specified above.

It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE THROUGH MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF APRIL 2021.

C. W. GITHUA

JUDGE

In the presence of:

Applicant in person

Ms Akunja for the respondent

Ms Karwitha: Court Assistant