REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

CRIMINAL REVISION NO. 83 OF 2019

KELVIN NJUGUNA WAINAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 2nd December 2014, the applicant was arraigned at the Chief Magistrate's Court at Makadara, jointly charged with five (5) others, vide Criminal Case No. 5545 of 2014, with the offences of; robbery with violence contrary to section 296(2) of the Penal Code (cap 63) Laws of Kenya, in two counts and committing an indecent act with an adult; contrary to section 11(a) of the Sexual Offences Act, number 3 of 2006. The particulars of each count are as per the charge sheet.

2. The applicant pleaded not guilty to all the three counts. The case proceeded to full hearing. At the conclusion thereof, the court rendered its decision vide a judgment dated; 26th October 2018. The applicant was acquitted on the two counts of robbery with violence, but convicted on the charge of; committing an indecent act with an adult and sentenced to serve five (5) years imprisonment. However, the applicant is aggrieved and seeks for review of the sentence.

3. By a chamber summons application dated, 14th March 2019, and supported by his own affidavit of the even date, he avers that, he had spent one (1) year in remand custody before conviction and sentence. That, the proceedings in the trial court were unnecessarily delayed without cogent reasons by prosecution.

4. That, he has decided to abandon his right of appeal and seek for review and "negotiated" sentence, pursuant to the provisions of section 333(2) of the Criminal Procedure Code, (Cap 75) Laws of Kenya (herein "the code").

5. Upon service of the application, the Respondent sought for and was granted three (3) days to respond to the application. However, no response was filed, instead, the Respondent filed submissions dated 12th May 2021. The learned State Counsel, Ms Maureen Akunja submitted that, the record shows the applicant was in custody throughout the trial. However, during sentencing on 8th January 2019, the trial court did not pronounce itself on the period the applicant was in custody.

6. That, as much as sentencing is the discretion of the court, there is Judicial Precedence and Guidelines put in place to guide sentencing and the trial court ought to have considered the time the applicant had spent in remand during trial.

7. I have considered the application in the light of the materials placed before the court. I find that, from the submissions by the Respondent, the application is not opposed. However, upon perusal of the court file, I find that, on the 8th January 2019, after each accused had tendered their respective mitigation, the trial court pronounced itself as follows;

> "*I have considered the pre-sentence report and the time the accused persons have spent in custody and their mitigation. Each accused will serve five years in jail. Right of appeal fourteen (14) days*" *(emphasis added)*

8. It is therefore clear from the above sentiments that, indeed, the trial court did consider the period the applicant was in custody during the trial. As such, the submissions by the Learned State Counsel; Ms Akunja are misplaced and/or erroneous.

9. Be that as it were, 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, 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. Further, in the case of; *Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR, the Court of Appeal held that, the court is obliged to take into account the period the Appellant has spent in custody before he or she are sentenced.*

The Court of Appeal stated that: -

"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. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. 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."

11. From the aforesaid provisions, it is mandatory that, the period a convict has been in custody be taken into account. However, I find that, although the Court of Appeal decision requires the court pronouncing the sentence to indicate when the sentence starts to run, the same provisions of; section 333(2) of Criminal Procedure Code clearly state that, the sentence runs from the date it was pronounced. Therefore, in my considered opinion, once the trial court indicates that, the period in custody is considered, then the sentence pronounced runs from the date thereof, or it is pronounced.

12. In that case, the period in custody will be deemed to be included in the sentence and/or deducted therefrom, so that, if (as herein) the applicant is sentenced to five (5) years imprisonment, and he was in custody for one (1) year, then it follows that, the trial court generally sentenced the applicant to six years' imprisonment, less the one (1) year.

13. As such, if this court were to reduce the sentence herein of five years, by one (1) year the appellant was in custody, then will mean the appellant period in custody of one (1) year, would have been considered twice and be against the law.

14. The upshot of the aforesaid is that, I find that, the application lacks merit and I dismiss it in its entirety.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 21ST DAY OF JUNE 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

No appearance for the applicant

Mr Mutuma for the Respondent

Applicant present in person

Edwin Ombuna – Court Assistant