



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO E017 OF 2020

HEZRON OGOLA ODHIAMBO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant herein was tried and convicted of the offence of rape contrary to Section 3 (1) (a) and (c) of the Sexual Offences Act on count 1 and the offence of causing malicious damage to property contrary to Section 339 (1) as read with Section 339(2) (a) of the Penal Code Cap 63 (Laws of Kenya) on count 2 in **Maseno PMCC No 481 of 2014**. On 6th March 2015, he was sentenced to serve ten (10) years imprisonment on count 1 and six (6) months imprisonment on count 2 with both sentences running consecutively.
2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court **Kisumu Criminal Appeal No. 39 of 2015** in which Majanja J. reviewed his sentence to run concurrently rather than consecutively.
3. On 3rd November 2020, he filed an application for review of the sentence. In his affidavit in support of his said application, he stated that the period he spent in remand custody was not considered by the trial court as provided under Section 333(2) of the Criminal Procedure Code. In this regard, he referred the court to the case of **Ahmed Abolfathi Mohamed & Another vs Republic [2018] eKLR** where the Court of Appeal reiterated that where a convicted person had spent time in custody, that period had to be taken into account while computing his sentence.
4. He contended that he had undergone various reformation programs such as sanitation and hygiene, disinfection and fumigation, Covid-19 infection and prevention control, health education and Rodi Kenya. He added that he had portrayed tremendous progress in discipline and character which would enable him integrate well back into society and avoid indulging in crime.
5. He asserted that he was a first offender and was remorseful and that the lengthy incarceration has led to his health deterioration and his family burdened of taking care of his two (2) school going children.
6. The State opposed the Applicant's application for review of sentence pursuant to Section 333(2) of the Criminal Procedure Code for the reason that his sentence was reviewed by Majanja J in **Kisumu Criminal Appeal No 39 of 2015** (supra) where the Learned Judge considered all the relevant factors in line with the Sentencing Policy Guidelines, 2016. It urged this court to maintain the sentence that was meted against the Applicant herein.
7. In his Judgment, Majanja J rendered himself as follows:-

“On the issue of the sentence imposed by the subordinate court, the general principle is that an appellate court can only interfere with the sentence if it is manifestly harsh or excessive or that the magistrate took into account irrelevant factors or failed to take into account relevant factors (see Macharia v Republic [2003] KLR 115). In this case, the trial magistrate erred in imposing consecutive sentences when the offences arose out of the same facts or transaction (see Sentencing Policy Guidelines, 2016 para. 7.13).

I therefore set aside the consecutive sentence and substitute the same with 10 year imprisonment on Count 1 and 6 months imprisonment on Count 2 both sentences to run concurrently.”

8. Having said so, this court noted that the Learned Judge did not pronounce himself on the provisions of Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). In the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR**, the Court of Appeal reiterated that where a convicted person had spent time in custody, that period had to be taken into account while computing his sentence.

9. Notably, these proceedings were instituted as a miscellaneous application instead of a petition. This court heard and determined the same bearing in mind the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to technicalities.

DISPOSITION

10. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was brought pursuant to the provisions of Section 333(2) of the Criminal Procedure Code that was filed on 3rd November 2020 was merited and the same be and is hereby allowed.

11. Although the court hereby upholds the conviction and sentence of the Applicant for the offence of rape and causing malicious damage to property, it hereby orders that the period the Applicant spent in custody, if at all, shall be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code.

12. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF JULY 2021.

J. KAMAU

JUDGE