



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 34 OF 2019

PATRICK MWENDA MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein instituted the instant appeal vide the petition filed in this court on 2.12.2019 and wherein he challenged both the conviction and sentence by the trial court and wherein he raised seven (7) grounds.
2. However, in the course of hearing of the appeal, the appellant abandoned the grounds thereon and proceeded to challenge the sentence imposed by the trial court. He filed amended grounds of appeal and wherein he challenged the sentence of the trial court to the effect that the same was harsh and excessive and that the court failed to consider that the appellant was a first offender, the court failed to consider the appellant's mitigation that he is a single parent and that the purpose of a sentence is not only for torment.
3. The appellant filed his submissions in support of the appeal and wherein he submitted that the sentence imposed by the trial court (twenty years' imprisonment) was harsh and excessive and the same ought to be substituted with a more lenient sentence. He further submitted that the sentence meted by the trial court would ruin his life as he was a widower who left his young family without a guardian. He invited the court to invoke the case of **Evans Wanjala Wanyonyi –vs- Republic (2019)eKLR** and urged this court to substitute the sentence with a more lenient sentence. He further prays that the court do invoke the provisions of Section 333(2) of the Criminal Procedure Code and the case of **Ahmed Abolfathi Mohammed & Aother –vs- Republic (2019) eKLR** and in doing so take into consideration the period he spent in custody before being sentenced.
4. When the appeal came up for hearing, Ms. Mati for the state made oral submissions and wherein she opposed the appeal on the sentence on the basis that the complainant was seven (7) years old and the sentence of twenty (20) years was justifiable. However, she conceded to the issue on taking into account the period the appellant spent in custody.
5. I have considered the appeal, the grounds thereof and the submissions by the parties herein. As I have noted, the appellant's appeal is basically on the sentence meted on him on the basis that the sentence was excessive and which averments the respondent opposed.
6. This being a first appeal, it is the obligation of the court to reconsider and re-evaluate the evidence afresh and come to its own conclusion on it (see **Okeno –vs- Republic [1972] E A 32**). However, since the appellant appealed against the sentence only, this court's power is limited and it cannot interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. This is because sentencing is a matter that rests in the discretion of the trial court. (See **Bernard Kimani Gacheru vs. Republic [2002] eKLR**).
7. I have perused the trial court's record and I note that the appellant was afforded an opportunity to mitigate and the trial court noted that the appellant herein is indeed a father but who ought to be protective to his children. The court further noted that the legislators enacted the law with strict penalties for the offence being life sentence. The court proceeded to sentence the accused to twenty (20) years. Indeed, Section 8(1) as read together with Section 8(2) which sections the appellant herein was charged under, provides for life sentence in cases where the victim of defilement is aged eleven years and below.
8. In my view, the sentence was not excessive. It is clear that the court indeed must have considered the appellant's mitigation and in doing so found that the sentence it imposed was the most appropriate. The appellant did not prove that the same was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

9. In relation to the period spent in custody, definitely this is an issue which this court can deal on appeal. Where the trial fails to take into account the time spent in custody while sentencing, as the same can only be a case where the trial court acted on a wrong principle. This is since the law is clear under Section 333(2) of the Criminal Procedure Code that the same ought to be taken into consideration while sentencing. This section has been reiterated by the Court of Appeal in **Ahmad Abolfathi Mohammed & Another (supra)** where the court held that; -

“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. 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.”

10. In the case of **Michael Nthenge Kisina v Republic [2021] eKLR** D.K Kimei J quoted with approval the Supreme court of Uganda in the case of **Bukenya v Uganda (Criminal Appeal No. 17 of 2010) [2012] UGSC 3** (29 January 2013) where it was stated that; -

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement.

The duty to consider the period spent in custody is also contained in the Judiciary Sentencing Policy Guidelines (under clause 7.10 and 7.11) where it is provided that:

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

11. It is clear therefore, that, the time the accused spent in custody needs to be taken into consideration while sentencing. In the instant case, the accused was arrested on 28.09.2017 and sentenced on 21.11.2019. The trial court’s record indicates that he was admitted to bail on 29.09.2017 but there is no evidence that he was released on bond/bail. As such, he spent two (2) years and about two (2) months in custody. I have perused the sentencing proceedings by the trial court and I note that the court did not take into account the said period. As such, the court erred in failing to take that period into account while sentencing the appellant.

12. I say so having noted that the sentence which the law provided was a mandatory life imprisonment and the court might have taken the period spent in custody into consideration in coming up with the twenty (20) years. However, failure to note the same in the sentencing proceedings can only be taken to mean that the same was not taken into account. The record having been silent on the same, the only presumption which can be made is that the period was not considered.

13. As such the appeal succeeds on account of failure on the part of the learned magistrate to take into account that period. The period of 2 years and 2 months to be taken into account while computing the sentence of 20 years.

14. It is so ordered.

Delivered, dated and signed at Embu this 28th day of September, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent