REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL REVISION APPLICATIONS NO(S) 83, 199

AND 220 OF 2019, 85, 87, 88 OF 2020,

ZACHARY GITONGA NDERITU.....1ST APPLICANT

HOSEA KASIM.....2ND APPLICANT

DAVID KINUTHIA MBATIA.....3RD APPLICANT

KELVIN NJUGUNA MBATIA.....4TH APPLICANT

MICHAEL KAMAU SAMUEL.....5TH APPLICANT

LAWRENCE KURIA NJERU.....6TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The ruling herein relates to several applications as indicated above. However, they were consolidated and heard vide; High Court Criminal Revision Application No. 199 of 2019. The applications arise from the Chief Magistrate's Criminal Case No. 5543 of 2014, consolidated with Criminal Case No. 5605 of 2014.

2. The applicants were jointly charged with the offence(s) of; robbery with violence contrary to; section 296(2) of the Penal Code, (cap 63) of the Laws of Kenya, in count (1) and (3), and committing an indecent act with an adult contrary to; section 11(1) of the Sexual Offences Act, No. 3 of 2006, in count (2).

3. Pursuant to a plea of not guilty entered by each accused on all counts, the case proceeded to a full hearing and a judgment was delivered on 26th October, 2018; wherein, each of the applicants was acquitted on both counts (1) and (3) but convicted on the charge of indecent act with an adult. Subsequently, each applicant was sentenced to serve an imprisonment term of five (5) years.

4. As a result of the aforesaid, each applicant filed an application seeking for orders that; the court do revise the subject sentence by considering the period each was held in custody during the trial. That, pursuant to, section 333(2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, that period should have been considered.

5. The applicant(s) individually aver in their supporting affidavit(s) that, they were first offender(s), are remorseful and seeks for leniency. The applicants also aver that, some of them were newly married and that, each is the sole bread winner of his entire family that has school going children who need fatherly care.

6. However, the applications were opposed by the Respondent vide; grounds of opposition to the effect that;

a. The applications are made in bad faith to mislead the court on facts as the trial court did factor in time on the proceedings of 8th January, 2019;

b. The Respondent herein abandons the submissions dated 12th May, 2021 made in respect to; Kelvin Njuguna as the same contain

errors as to the facts in the lower court;

c. The court has the power to revise its own decisions where there are clear errors on facts.

7. It suffices to note at this stage that, as much as this ruling makes reference to; *High Court Criminal Revision No. 83 of 2019; Kelvin Njuguna Wainaina vs. Republic*; that matter was fully heard by this court and determined vide a ruling dated 21st June 2021. Therefore, it is not a subject of this ruling.

8. Be that as it were, each applicant relied entirely on the documents filed in court and did not file any submissions. The Respondent submitted orally reiterating that, the applications have no merit.

Having taken into account the material before the court, I find that the applicants have anchored their application on the provisions of; section 333(2) of the Criminal Procedure Code.

9. These provisions state that:

> "(2) 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.

10. In dealing with these provisions, the Court of Appeal held in the case of; ***Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR***, **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. Pursuant to these provisions, my understanding is that, first and foremost, the court envisaged under; section 333(2) of the Criminal Procedure Code, is the trial court pronouncing the sentence. It is not the appellate court, unless the sentence is imposed by the appellate court on appeal, which is not the case herein.

12. Furthermore, the appellate court will only deal with sentence imposed by the subordinate court pursuant to the provisions of; section 347 of the Criminal Procedure Code, which deals with appeal to the High Court from the lower court or under, section 362 of the Criminal Procedure Code, that empowers the High Court to call for and examine the record of the proceedings of the subordinate court.

13. The applicants have not appealed against the subject sentence(s) herein but have sought for revision under section 362 aforesaid. However, the parameters of these provisions require that, the impugned order or sentence must be examined to its corrections, legality and propriety.

14. I have considered the sentence herein and I find that, it is lawful and/or legal. The failure to consider the period spent in custody (if that is the case) does not fall within the parameters of section 362 and therefore, the applicant should have filed an appeal, if he was challenging the sentence.

15. Be that as it were, even considering the applications on merit, I find that each one of them, lacks merit in view of the proceedings of 8 th January, 2019, wherein the lower court, while pronouncing the sentence meted upon the applicant, thus expressed itself as here below stated: -

> "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)

16. In the given circumstances, I find that, the period each applicant spent in custody has already been taken into account. Therefore, the applications have no merit and I consequently dismiss each application accordingly. I order that the lower court file be returned to the trial court forthwith and this file be marked as closed.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 24TH DAY OF NOVEMBER, 2021

GRACE L NZIOKA

JUDGE

In the presence of:

Ms Akunja for the Respondent

All Accuseds present in person

Edwin Ombuna – Court Assistant