Mburu v Republic (Criminal Revision Application E134 of 2024)
[2025] KEHC 145 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 145 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION APPLICATION E134 OF 2024

RC RUTTO, J

JANUARY 17, 2025

ARISING FROM ORIGINAL CRIMINAL CASE NO. E900 OF 2023 AT GATUNDU

BETWEEN

PHILIP NJOROGE MBURU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being sentence review arising from original Criminal Case No. E900 of 2023 at Gatundu)

RULING

1. The Applicant herein was charged with two counts of cheating contrary to section 315 of the Penal Code. He initially pleaded not guilty but later on changed his plea to that of guilty on both counts and a plea of guilt was duly entered. The trial court upon considering the pre-sentence report, sentenced the applicant to serve 3 years imprisonment.

2. The Applicant filed the present application seeking revision of sentence pursuant to the provisions of section 333(2) of the *Criminal Procedure Code* by taking into account the time spent in custody. The applicant also seeks orders that the sentence be reviewed and replaced with a fine in lieu of an imprisonment term of 3 years, or reduce the sentence to the period already served behind bars.

3. The respondent conceded to the application and submitted itself to this Court's ruling.

4. Section 333(2) of the Criminal Procedure Code provides as hereunder: -

> "(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."

5. By virtue of the provisions of section 333(2) of the CPC, courts are obliged to take into account the period a person sentenced, spent in custody prior to the sentence. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another Vs. Republic Criminal Appeal No 135 of 2016*(unreported) 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."

6. Also, the Court of Appeal in *Bethwel Wilson Kibor vs. Republic* (2009) eKLR held that: -

> " By 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..."

7. According to The Judiciary Sentencing Policy Guidelines: -

> " 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."

8. Further, according to section 137L (2) (a) of the *CPC*: -

(2) In passing a sentence, the court shall take into account—

(a) the period during which the accused person has been in custody;

9. It therefore follows that the requirement in section 333(2) of the Criminal Procedure Code to consider time spent in custody during trial, is mandatory. As held in JMM v Republic [2021] eKLR, the failure

to comply with the requirement compromises the right of the accused to less severe sentence; subjects the accused to a more severe sentence than the one prescribed; and inadvertently condones deprivation of liberty contrary to law. It is thus paramount that a sentence must, when meted out, outrightly and emphatically state its commencement date in such a way that it reflects the period spent in custody in the sentence imposed.

10. I have considered the record before Court and note that the applicant had been in custody from the date of arrest being 23/10/2023 to 18/3/2024 when the sentence was pronounced. The trial court when sentencing the applicant did not specifically state that he had taken into account the period spent in custody. The State, and rightfully so, conceded to the application on this ground. Consequently, I do find that the applicant is entitled to have the period spent in remand considered or factored in, in the computation of his sentence period.

11. The applicant also seeks that this court reviews his sentence and considers giving him an option of a fine in lieu of three years imprisonment term. In the alternative he seeks a lenient sentence preferably a non-custodial sentence for the remaining period of the sentence subject to the probation report.

12. It is common ground that the applicant was charged with the offence of cheating contrary to section 315 of the *Penal Code*. This section provides as follows;

> " Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years."

12. A reading and straightforward interpretation of this section indicates that a conviction for the offence of cheating invites a three-year imprisonment as its only penalty. There is no provision for an alternative sentence of a fine, or an indication of both sentence and fine. The question then is whether the applicant was sentenced to a sentence outside the law.

13. The applicant was sentenced to serve 3 years imprisonment. He contends that the sentence was excessive and urges the court to reconsider the sentence. It is trite law that sentencing is an exercise of discretion and an appellate court will not interfere with that exercise of discretion unless it is shown that the same was exercised whimsically.

14. In this instance, I find that the trial court exercised a judicial discretion as guided by the law when it sentenced the applicant to the three-year period prescribed in law. The trial court acted in accordance with the law. Consequently, I do not find that the sentence excessively harsh. The sentence was properly meted out. The alternative sentence of a fine was never available for consideration by the trial court as it is not provided for in law. Hence this court cannot be urge to substitute a legal sentence with a non-existence sentence. Hence the plea for an alternative of a sentence of paying a fine is with no merit.

15. Lastly, the trial court considered a pre-sentence report before pronouncing its sentence. As earlier stated, there is no assertion that or submission that in consideration of the report, the trial court erred so as to invoke this court's appellate jurisdiction to reconsider the same. Consequently, I find no merit in the plea for substitution of the 3 years imprisonment sentence with a non-custodial sentence.

16. In the end, I find that the application is merited only to the extent that the period spent in custody during trial be considered in the computation of the 3 years imprisonment in line with section 333(2) of the CPC. Save for that, the application fails on all other grounds.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant: