Solomon v Republic (Criminal Review E163 of 2024)
[2025] KEHC 4620 (KLR) (11 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4620 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL REVIEW E163 OF 2024

LW GITARI, J

MARCH 11, 2025

BETWEEN

CHARLES SOLOMON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant has filed the application dated 7/5/2024 seeking an order that the time spent in custody prior to his conviction be considered as part of his sentence. He also seeks an order that a lenient sentence be imposed as he is remorseful and he is a 1st offender. The application is based on the grounds that he applicant was charged with an offence of defilement contrary to Section 8*1) (2) of the *Sexual Offences Act* No. 3 of 2006 in 1/11/2020.

2. He pleaded not guilty and after a full trial he was sentenced to serve ten (10) years imprisonment on 7/4/2021. The applicant contends that the learned Magistrate erred as she failed to consider the time spent in custody awaiting the trial.

3. I have considered the application. I note that the respondent has not opposed the application. Section 333(2) of the *Criminal Procedure Code* provides that:

> "Subject to the provisions of Section 38 of the *Penal Code* every sentence shall be deemed to commence from and to include the who day of, the date on which it was pronounced, except where otherwise provided in this code. Provided that what a 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."

4. The court of Appeal has discussed the meaning of "shall take account of the period spent in custody" in the case of R.N Ahamad Abolfathi Mohamed & Another (2018) eKLR, the court held:

> " The second is the failure to take into account in a meaningful way, the period that the appellant had spent in custody as required by Section 333(2) of the *Criminal Procedure Code*. 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 the 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 applicants 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 inform the date of conviction because that amounts to ignoring altogether the period already spent into custody. It must be remembered that the provision 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 meets 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 19/6/2022"

5. Similarly, the Court of Appeal in Bethwel Wilson Kibor -vs- Republic (2009) KLR expressed itself as follows:

> " By the proviso of Section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J. who sentenced the appellant did not specifically state that he had taken into account the nine years period that the appellant had been in custody. The appellant told us that as at 22/9/2009 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."
>
> In view of he foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

6. The Judiciary Sentencing Policy Guidelines states as follows:

> " 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 has 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 proportionate to the offence committed. In determining the period of imprisonment that shall be served by offender, the court must take into account the period in which the offender was held."

7. Learned Magistrate pronounced her considered Judgment, convicted he applicant and sentenced him to serve ten years imprisonment. The learned Magistrate did not consider the fact that the applicant was in custody throughout the trial process. By dint of Section 333(2) of the *Criminal Procedure Code*, the

learned Magistrate should have considered the period sentence spent in custody to reduce the sentence imposed proportionately with that period.

8. The learned Magistrate erred by failing to consider the period the applicant had spent in custody. The appellant had spent a period of one year and three months which was not considered at time of passing sentence. In line with the above cited authorities, the sentence should have been reduced by the period spent in custody.

9. I allow the application and order that the sentence imposed shall run from 7/1/2020 to take into account the time spent in custody.

DATED, SIGNED AND DELIVERED AT KITUI THIS 11TH DAY OF MARCH 2025

HON. LADY JUSTICE L. GITARI

JUDGE