Muhinde v Republic (Criminal Appeal 31 of 2023)
[2025] KEHC 4597 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4597 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 31 OF 2023

FN MUCHEMI, J

APRIL 3, 2025

BETWEEN

ANTHONY MUNYWA MUHINDE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the sentence imposed by Honourable E. Riany (SRM) in Thika CM, Criminal Sexual Offence Case No. 9 of 2018 on 28th February 2020)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the sentence of the Senior Resident Magistrate Thika where he was charged and convicted of the offence of promoting child sex tourism contrary to Section 14(a) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to 10 years imprisonment. The appellant relies on Section 333(2) of the criminal Procedure Code and submits that the trial court did not consider the period he spent in custody. The appellant submits that he was arrested on 19/01/2018 and convicted on 28/2/2020 which is 2 years, 1 month and 9 days spent in remand custody which was not factored during sentencing.

2. The appellant refers to the cases of *Ahamad Abolfathi Mohammed & Another v Republic* (2018) eKLR and *Bethwell Wilson Kibor v Republic* (2009) eKLR and submits that although the trial court held that it took into consideration the period spent in custody, the learned magistrate did not state when the meted sentence will commence nor did she deduct the period he spent in custody prior his conviction.

3. The appellant submits that during mitigation he stated that he has a wife and young children under his care and that he learnt a lot during the time he spent in custody. The appellant further submits that it is clear that he was a first offender and that should act as credit on his behalf.

4. The appellant relies on the case of *Martin Bahati Makokha & Another v Republic* (2018) eKLR and submits that the period he has spent in custody is sufficient for the crime he committed. The appellant further submits that he was arrested on 19/01/2018 and up to date it is 7 years and 8 days that he has been incarcerated. The appellant argues that since he is serving 10 years imprisonment after benefiting from one third of his sentence pursuant to Section 46 of the *Prisons Act*, he ought to serve 6 years and 8 months.

5. The learned prosecution counsel for the respondent opposes the appeal and submits that upon perusal of the trial court proceedings, on 28th February 2020 the prosecution indicated that the appellant was a first offender. The appellant stated that he has young children who are before the court and that the court consider the period he spent in custody. The court then held that his mitigation is considered and also the time spent in custody and sentenced his to serve ten years imprisonment.

6. The respondent submits that from the judgment of the trial court, the mitigation of the appellant was considered. Both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial court. The respondent argues that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances and the time spent in custody.

7. The respondent argues that the appellant has not placed such material before the court to vary his sentence. The appellant has neither stated that the sentence is manifestly harsh and excessive or argued or even suggested that the sentence passed was illegal or improper, or that the trial court acted on a wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceedings were irregular or in violation of his right or fundamental freedom. His were generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warrant upsetting the sentence imposed by the lower court. The respondent submits that the appellant is abusing court processes and hence the appeal should be dismissed as there is no material to impeach the sentence and thus the sentence ought to be upheld.

8. The main issue for determination is whether the sentence imposed on the appellant is justified.

The Law

9. This being an appeal against the sentence only, it is important to determine the circumstances under which an appellate court interferes with the sentence by the trial court. The principles guiding interference with sentencing by the appellate court were properly in my view, set out in *S. v Malgas* 2001 (1) SACR 469 (SCA) at para12 where it was held that:-

> " A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court....However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking" "startling" or "disturbingly inappropriate" similarly in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:-
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> > " It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does

not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

10. The predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor v Republic* [1954] EACA 270 pronounced itself on this issue as follows:-

> " The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors."

11. The Court of Appeal, on its part in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with 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."

12. Section 14 of the *Sexual Offences Act* states as follows:-

A person including a juristic person who-

a. Makes or organizes any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed; or

b. Prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child;

c. Introduces, organizes or facilitates contact with another person under the auspices of promoting tourism, in any manner, in order to promote conduct tat would constitute a sexual offence against a child,

Is guilty of an offence of promoting child sex tourism and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.

13. In the present case, the appellant has not argued or shown that the sentence is manifestly excessive or that the trial court overlooked some material factor, or took into account some wrong principle or acted on a wrong principle. Primarily, the appellant has not contested the sentence imposed on him. His only issue is that the period he spent in custody be taken into account under Section 333(2) of the *Criminal Procedure Code* which is his legal right.

14. Section 333(2) of the *Criminal Procedure Code* provides:-

> “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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

15. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

16. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Ahamad Abolfathi Mohammed & Another v Republic* [2018]eKLR where the Court of Appeal held that:-

> “The second is the failure by the court to take into account in a meaningful way, the period that the appellants 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 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. 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.”

17. The same court in *Bethwel Wilson Kibor v Republic* [2009]eKLR expressed itself as follows:-

> “By proviso to 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 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 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the 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.”

18. 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."

19. The applicant was arrested on 19th January 2018 and convicted on 28th February 2020. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing. I have perused the court record and noted that during sentencing, the magistrate indicated that she had taken into account the period spent in custody and the mitigation by the applicant and his co-accused Agnes Munyua the two were sentenced to serve ten years imprisonment.

20. Section 14 of the *Sexual Offences Act* under which the appellant is charged provides for a minimum sentence of not less than ten years imprisonment. The accused persons in that case were said to b first offenders. The Magistrate seemed to have given the accused persons the minimum sentence under the law. It was important that the court clearly pronounces itself on the period that was taken into consideration, if at all. Without such pronouncement, it would be correct to say that the period spent in custody was not taken into account. The appellant and his co-accused were arrested on 19th January 2018 and were sentenced on 28/02/2020. This is a period of two years (1) one month. I find that this ground of appeal has been established.

21. The appellant in his petition of appeal argued that the sentence imposed on him was manifestly harsh and excessive in the circumstance. Considering that Section 14 carries a minimum sentence of ten (10) years, I find no substance in this ground the sentence imposed was within the law.

22. Consequently, the appellant is sentenced to serve ten (10) years imprisonment to commence from the date of arrest the February 28, 2018.

23. The appeal stands allowed.

24. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF APRIL 2025.

F. MUCHEMI

JUDGE