Mwadori v Republic (Criminal Revision E052 of 2025)
[2025] KEHC 10234 (KLR) (11 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10234 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL REVISION E052 OF 2025

M THANDE, J

JULY 11, 2025

BETWEEN

PENDO ROMAN MWADORI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was convicted of the offence of stealing, contrary to section 268(1) as read with Section 275 of the *Penal Code*, in Kaloleni Criminal Case No. E219 of 2024. She sentenced to 3 years imprisonment.

2. In her Application brought under Section 364 of the *Criminal Procedure Code*, the Applicant seeks that her sentence be reviewed to a noncustodial sentence. She stated that she has undergone rehabilitation programs like catering and farming. She is also remorseful and promises to be a law abiding citizen for the rest of her life. She also prayed that the 5 months spent in remand pending trial be taken into account.

3. The Respondent did not file any response in spite of being given an opportunity to do so.

4. the *Constitution* has conferred upon this Court supervisory jurisdiction over subordinate courts. Article 165(6) and (7) provides as follows:

   (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

   (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

5. In exercise of its supervisory jurisdiction, this Court is empowered to call for the record of proceedings in such subordinate courts, and make and give appropriate orders and directions as it deems necessary to ensure the fair administration of justice.

6. To give effect to this provision with regard to criminal matters, the *Criminal Procedure Code* elaborates the purpose of calling for the record of proceedings in subordinate courts by this Court, which is to satisfy itself as to the correctness, legality or propriety of any finding or order. Section 362 of the *Criminal Procedure Code* (CPC) provides:

> The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

7. Where the Court finds after examining the record of proceedings before a subordinate court that the same are wanting in correctness or that there is illegality or impropriety of a finding, order or sentence, the Court may by dint of the revision powers conferred upon it by Section 364 of the CPC, enhance the sentence or alter or reverse the order except that of an acquittal. Section 364(5) of the CPC is explicit that when an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

8. Section 347 of the *Criminal Procedure Code* provides that a person convicted on a trial held by a subordinate court may appeal to the High Court. Our courts have repeatedly stated in many cases, that where a clear procedure for redress is prescribed by the *Constitution* or a statute, that procedure should be strictly followed. One such case is *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court of Appeal stated:

> In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

9. The Applicant has not demonstrated that the sentence imposed upon her is illegal. In the premises the orders sought cannot be granted by this Court sitting as a revision court. Flowing from the above stated provisions of the law and the authority cited, the Applicant's redress lies with the appellate court. It is in the exercise of its appellate jurisdiction that this Court can examine the record and look at the sentence complained about and make a decision thereon. The prayer for review of sentence is therefore rejected.

10. I now turn to the Applicant's prayer that the period she spent in remand pending trial be taken into account. to account.

11. Section 333(2) of the CPC provides as follows:

> 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.

12. The proviso to Section 333(2) of the CPC requires the court while sentencing, to take into account the period an accused person has spent in custody pending trial.

13. In the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, the Court of Appeal had this to say about the said proviso:

> The incident took place way back in 1999. The appellant was promptly arrested and taken to court. There were long adjournments due to transfers and/or changes of trial Judges resulting in long incarcerations of the appellant. 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.
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> 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.

14. Flowing from the above authority, it is clear that a trial court must take into account the period spent in custody pending trial, and state so, when imposing sentence.

15. The record shows that the Applicant was arrested on 8.7.24 but was unable to post bail. She was sentenced on 10.12.24. There is no mention by the trial court that the period that the Applicant had spent in custody pending trial, was taken into account when sentencing her. This is a serious omission on the part of the trial court, as it amounts to non-compliance with an express statutory provision. I accordingly find that the prayer is merited.

16. In light of the foregoing, the Court finds that the Application partially succeeds. The 3 year sentence imposed upon the Applicant shall run from 8.7.24, the date of her arrest.

DATED SIGNED AND DELIVERED IN MALINDI THIS 11TH DAY OF JULY 2025

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M. THANDE

JUDGE