Mumo v Republic (Criminal Revision E252 of 2024)
[2025] KEHC 9823 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9823 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL REVISION E252 OF 2024

LW GITARI, J

JULY 3, 2025

BETWEEN

BONFACE ELIUD MUMO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant has filed an application dated 14/10/2024 which is mainly seeking an order for review of the sentence that was passed on 14/10/2028 at Kitui Chief Magistrate's Criminal Case No. 301/2015. In the case the appellant was jointly charged with three (3) others in court one with the offence of attempted murder contrary to Section 220(a) of the *Penal Code*. He faced a second count of preparation to commit a Felony contrary to Section 308(2) of the *Penal Code*.

2. The applicant was arraigned in court on 4/4/2015 when he was formally charged. He did not post bail and he therefore remained in custody from 4/4/2015 upto 15/3/2018 when the Judgment was delivered. The applicant was found guilty on the two counts and was convicted. The sentence was passed on 4/4/2018. The applicant has not filed an appeal and is seeking an order that the time spent in custody be considered as provided under Section 333(2) of the *Criminal Procedure Code*.

3. The issue for determination is whether the application has merits.

   Section 333(2) *Civil Procedure Code* Provides:

   > " 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."

4. The learned magistrate did not consider the time the applicant was in custody awaiting trial. Section 333(2) (Supra) is couched in mandatory terms and the learned trial magistrate should have complied with it to ensure that the applicant does not end up serving a longer than that which was imposed.

5. Furthermore, the *Judiciary Sentencing Policy Guidelines* (under Clauses 7.10 and 7.11) provides as follows:

> " The provision of 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 a n 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."

6. The court of Appeal has expressed itself on how the courts should apply the section. The court of Appeal in the case of *Ahamed Abolfathi Mohamed & Another v Republic* held as follows while addressing Section 333(2) of the *Criminal Procedure Code*:

> " Taking into account the period spent in custody must mean considering 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 spent in custody."

The court stated that, Section 333(2) of the *Criminal Procedure Code* mandates the trial court or Judge not only to state that he has taken into account the period it must go further and show that the period spent in custody reduced the sentence proportionately with the time spent in custody.

7. The second prayer is brought under Section 35(1) of he *Penal Code*. Section 220(a) of the *Penal Code* provides that a person convicted for attempted murder is liable to imprisonment for life. The learned magistrate handed the accused a sentence of twenty years imprisonment. On the other hand, under Section 308(2) of the *Penal Code*, a person convicted is liable to imprisonment with hard labour for five years, or if he has been convicted of a felony relating to property, to such imprisonment for ten year. The appellant was sentenced to serve three (3) years.

8. It is trite law that sentencing is a matter that lies in the discretion of the trial magistrate. In the case of *Wanjema v Republic* (1971) EA 493 the Court of Appeal laid down the general principles upon which the first appellate court may act on when dealing with an appeal on sentence. It was stated that an appellate court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case the sentence is harsh and excessive. The appellate court should also not lose sight of the fact that in sentencing the trial court exercised discretion and if the discretion is exercised judicially and not capriciously the appellate court should be slow to interfere with that discretion.

9. Th applicant has not challenged the exercise of discretion by the learned magistrate. There is no contention that the sentence was manifestly harsh or excessive, illegal or improper. It is not alleged that the sentence is wrong in principle, 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.

10. It was upon the applicant to advance grounds that would warrant this court to interfere with the sentence. It is my view that this has not been demonstrated. The sentences imposed on the appellant were lawful. The learned magistrate was informed by a probation officer's report. The matters raised by the applicant that he has reformed would provide relieve when the prison is considering remission or in the event of the exercise of prerogative of mercy. The applicant has only served three years out the sentence of twenty years. The offences for which he was convicted are serious and considering he sentence imposed, it is too soon to say that he has reformed. That cannot be entertained by this court. This limb of the application has no merit.

11. The only limb that succeeds in failure by the learned magistrate to take into account the period spent in custody.

    In this regard, I order that sentence imposed shall run from 14/4/2015 the date he was remanded in custody to await trial as provided under Section 333(2) of the *Criminal Procedure Code*. The prayer to serve a none custodial sentence under Section 35(1) of the *Penal Code* is rejected and is dismissed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 3RD DAY OF JULY 2025

HON. LADY JUSTICE L. GITARI

JUDGE