Ayora v Republic (Criminal Revision E102 of 2023)
[2024] KEHC 3206 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3206 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL REVISION E102 OF 2023

WA OKWANY, J

MARCH 14, 2024

BETWEEN

BENARD AYORA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the original Conviction and Sentence in the Chief Magistrate's Court at Nyamira, Criminal Case No. 702 of 2019 by Hon. M. Nyigei, Principal Magistrate on 3rd August 2021)

RULING

1. This Applicant filed the instant application under Section 333(2) of the *Criminal Procedure Code* (CPC) seeking orders that the court considers the time he spent in remand custody as part of the sentence served in Criminal Case No. 702 of 2019 at Nyamira Chief Magistrates' Court.

2. The Application is supported by the Applicant's affidavit in which he avers that the period spent in custody was never considered by the trial court during sentencing.

3. The facts of the case were that the Applicant was charged and convicted in Nyamira CM's Court Criminal Case No. 702 of 2019 of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. He was sentenced to serve 10 years' imprisonment.

4. Mr. Chirchir, learned counsel for the Respondent submitted that the Court should exercise its discretion in accordance with the provisions of Section 333 (2) of the *Criminal Procedure Code*.

5. The rights of an accused person are provided for under Article 50 of the *Constitution* as follows: -

   (2) Every accused person has the right to a fair trial, which included the right-

      (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.

6. Article 165 vests the High Court with powers of review as follows: -

> 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. Sections 362 and 364 of the *Criminal Procedure Code* further gives effect to Article 165 of the *Constitution* and outlines the manner in which the High Court should exercise its powers as follows: -

> 362. Power of the High Court to Call for Records
>
> 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.
>
> 364. Powers of the High Court on Revision
>
> 1. In the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –
>
> (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (b) In the case of any other order other than an order of acquittal, alter or reverse the order.
>
> 2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defense:
>
> Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
>
> 3. Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed that might have been inflicted by the court which imposed the sentence.
>
> 4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
>
> 5. When an appeal lies from a finding a sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

8. The above legal framework empowers this Court to determine whether the sentence passed by the trial court is appropriate, legal and correct.

9. It is trite that sentencing is a preserve of the trial court and that a court of superior jurisdiction will only interfere with the exercise of that discretion if the sentence is manifestly excessive or grossly inadequate or where the trial court overlooked some material factor or acted on wrong principles

10. In *Wagude vs. R* (1983) KLR 569 the Court of Appeal stated thus: -

> " The Court may interfere with the sentence only if it shown that it was manifestly excessive. In this instance two years' Imprisonment for stealing by a person employed in the public service was not manifestly excessive."

11. The Applicant's prayer is premised under section 333 (2) of the *Criminal Procedure Code* which states as follows: -

> 333. Warrant in case of sentence of imprisonment
>
> (2) 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 same principles were applied in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR as follows: -

> " 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. 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."

13. I have considered the sentence meted by the trial court. Section 296 (2) of the *Penal Code* provides that the punishment for an accused person convicted of the offence of robbery with violence is death. It is to be noted that the mandatory nature of death sentences was declared unconstitutional by the recent court decisions. This means that courts may mete out more lenient sentences depending on the circumstances of the case and upon considering the convict's mitigation. It was on this basis that the Applicant, who stated that he had been a law-abiding citizen and the sole bread winner of his family was sentenced to serve 10 years' imprisonment.

14. I have considered the provisions of Section 333 (2) of the *Criminal Procedure Code* and the fact that the Applicant remained in custody during the entire period of his trial which commenced on 17th June 2019 and was concluded on 26th August 2021. I note that the period that the Applicant spent in custody while awaiting his trial was not considered by the trial magistrate during sentencing.

15. I find that it was necessary for the trial court to consider the period that the Applicant spent in custody after his re-arrest in computing the final sentence. Consequently I find that the instant application is merited ant I therefore allow it and direct that the period the Applicant spent in custody while awaiting trial be included when computing the sentence of 10 years' imprisonment in accordance with Section 333(2) of the *Criminal Procedure Code*.

16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 14TH DAY OF MARCH 2024.

W. A. OKWANY

JUDGE