Cheruiyot v Republic (Revision Case 28 of 2024)
[2024] KEHC 3910 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3910 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

REVISION CASE 28 OF 2024

HM NYAGA, J

APRIL 18, 2024

BETWEEN

BENARD KIBET CHERUIYOT .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The Applicant was charged with the offence of Grevious Harm Contrary to Section 234 of the *Penal Code*.
2. He was tried, convicted and sentenced to ten (10) years imprisonment, by the Chief Magistrate's Court, Molo.
3. The Applicant has now filed an application for revision. In a nutshell he states that;
    a. This court has jurisdiction to hear and determine the application under the powers conferred upon it by Article 165 of the *Constitution* and Sections 363 and 364 of the *Criminal Procedure Code* (CPC).
    b. That he pleaded guilty to the charges and he is remorseful for the offence committed.
    c. That he regrets the circumstances that led to the commission of the offence and given a second chance he promises to be a law abiding citizen.
    d. That the *Probation of Offenders Act* and *Community Service Orders Act* provide for alternative forms of sentencing geared towards helping an offender to have a positive change in behaviour other than custodial sentence.
4. The Applicant thus seeks that this court revises the custodial sentence and instead mete out a non-custodial sentence.

5. I gave directions for the lower court file to be availed and the parties to address me, as provided for under Section 365 of the *Criminal Procedure Code*.

6. The powers of this court on revision are to be found under Article 165 (6) of the Constitution, which provides that;

   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.

7. The *Criminal Procedure Code* (CPC) at Sections 362 and 364 also provide for Revision Orders by this court as follows;

   "

   " 362. Power of 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 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."

8. It must be stressed that the powers of this court on revision are meant to cure on error, irregularity or illegality in my order of the subordinate court or judicial body.

9. The said powers cannot and ought not to be used in place of the appellate jurisdiction of the court. If there is no illegality, irregularity error in the orders sought to be revised.

10. In the instant case, the Applicant was subjected to a full trial. He was convicted and sentenced.

11. I have carefully perused the judgment and the proceedings of the trial court. I do not see any error, illegality or irregularity in the sentence.

12. Under Section 234 of the *Penal Code*, any person convicted of the offence of grievous harm is liable to life imprisonment. The Applicant was sentenced to ten (10) years imprisonment, as per the discretion of the trial court. The exercise of such discretion is not unlawful or irregular.

13. Therefore, I find that there was no error or illegality in the sentence, to warrant orders on revision.

14. If the Applicant is aggrieved by the sentence, he ought to have appealed against it. He has not done so.

15. Consequently, I find that the application for revision of the sentence, meted out is wanting in merits and dismissed.

16. Perhaps the only issue that needs to be addressed was the failure of the trial magistrate to invoke the provisions of Section 333(2) of the *Criminal Procedure Code*. It provides 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.”

17. From the court record, the Applicant was arraigned before the court on 13/6/2022. He was in lawful remand custody throughout the trial. The court did not make any reference to the said period, as it should have.

18. The provisions of Section 333 (2) *Criminal Procedure Code* are couched in mandatory terms. The said section was the subject of the decision in *Ahamad Abolfathi Mohammed & Another vs 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.”

19. The same court in *Bethwel Wilson Kibor vs 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."

20. Therefore, in respect to the said section, I find that the trial court erred in not considering the time that the accused had been in remand custody.

21. Consequently, I revise the trial court's orders and order that the sentence be deemed to have commenced from 13th June, 2022, when the applicant was first remanded in lawful custody.

22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF APRIL, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

State counsel Okok

Court Assistant Philip

Applicant present