Olala v Republic (Criminal Revision E642 of 2023)
[2024] KEHC 4353 (KLR) (Crim) (22 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4353 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVISION E642 OF 2023

LN MUTENDE, J

APRIL 22, 2024

BETWEEN

BERNARD ODONGO OLALA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Bernard Odongo Olala, Applicant, was charged and convicted for the offences of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*; and, Assault causing actual bodily harm contrary to section 251 of the *Penal Code*. Following the conviction he was sentenced to serve ten (10) years and two(2) years imprisonment respectively, sentences that were to run concurrently.

2. Through an undated application, the applicant seeks review of the sentence and in particular consideration of the period he spent in remand custody.

3. The application is premised on grounds that the applicant was in pre-sentence detention for a period of five (5) years which the court failed to take into consideration as required by section 333(2) of the *Criminal Procedure Code*(CPC).

4. The Respondent through Ms. Ogweno, learned Senior Prosecution Counsel pointed out that the court did not make any reference to the period the applicant was in custody, hence no objection to the application.

5. Section 333(2) of the *CPC* provides that:

> (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.

6. That provision of the law applies in mandatory terms and it is the accused person's entitlement. The court is required to state that it considered the period spent in remand and it must further deduct that period from the sentence meted out. This was stated in the case of *Ahamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR where the Court of Appeal delivered itself thus:

> " 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..."

7. In the case of *Bukenya v Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013) the Court of Appeal stated that:

> " Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement"

8. In this case the trial court delivered itself thus:

> " ....I have considered the pre-sentence report herein. It is noted that the accused committed the offence against a young girl who was in primary school going at the time.
>
> It is also noted that the victim was staying with the accused. The accused had a duty to care and protect the victim. Instead the accused turned against the victim and defiled her.
>
> In the circumstances, I do hereby sentence the accused to serve"

9. It is apparent that the trial court did not pronounce itself on the duration the applicant spent in custody. The applicant was arrested on 11.7.2016, released on bond on 21.4.2020 and subsequently sentenced on 10.7.2023. This means that the applicant has been incarcerated for a cumulative period

of four (4)years, eight(8) months. As of today the remaining period to be served is five (5) years, four (4) months which will be subject to remission.

10. The upshot of the above is that the application has merit and is allowed.

11. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 22ND DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE