



**Ondieki v Republic (Criminal Revision E116 of 2023)  
[2024] KEHC 9482 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9482 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL REVISION E116 OF 2023**

**WA OKWANY, J**

**JULY 25, 2024**

**BETWEEN**

**BENARD OMBOGA ONDIEKI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein was, on 27<sup>th</sup> July 2023, convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the [Sexual Offences Act](#) and sentenced to serve thirty (30) years imprisonment.
2. He brought the present Application under Articles 25 (c) and 50 (2) (p) of the [Constitution](#), and Section 333 (2) of the [Criminal Procedure Code](#). The gist of the Application is the prayer for revision of sentence so as to include the period of 5 years and 8 months that he spent in remand custody while awaiting his trial.
3. The Application is supported by the Applicant’s affidavit wherein he avers that he was arrested on 16<sup>th</sup> December 2017 after which the trial was conducted that resulted in his conviction and sentence on 27<sup>th</sup> July 2023 for 30 years. He relied on the decision in the case of [Ahmad Abolfathi Mohammed and Another vs. Republic](#) (2018) eKLR where the court discussed the import of Section 333(2) of the [Criminal Procedure Code](#).
4. Articles 50 and 165 of the [Constitution](#) stipulate as follows on the rights of an accused person and the jurisdiction of this court respectively: -  
Article 50  
(2) Every accused person has the right to a fair trial, which includes the right-  
(q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.



Article 165

- (1) 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.

5. Sections 362 and 364 of the *Criminal Procedure Code*, on the other hand, provide 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.
- (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 defence:

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.

6. This Court is therefore called upon to satisfy itself on the correctness, legality and appropriateness of the sentence meted by the trial court. It is an established principle that sentencing is at the discretion of the trial court and that an appellate court will ordinarily not interfere with such discretion unless it is satisfied that the trial court misdirected itself. In *S vs. Malgas* 2001 (1) SACR 469 (SCA) it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then



substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

7. Similarly, in *Mokela vs. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

8. The predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

9. The Court of Appeal, on its part, in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

10. Similarly, in *Prosecutor vs. Stephen Lesinko* [2018] eKLR, the court outlined the principles that the court must consider, on Revision, as follows: -

- “a. Where the decision is grossly erroneous;
- b. Where there is no compliance with the provisions of the law;
- c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- d. Where the material evidence on the parties is not considered; and
- e. Where the juridical discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.”



11. In this case, the Applicant was sentenced to serve 30 years' imprisonment. A perusal of the trial court's record reveals that the court only considered the Applicant's mitigation and the circumstances of the case in arriving at the sentence.
12. The law requires a court to consider the period that the accused spent in custody while awaiting the conclusion of his trial during sentencing. Section 333(2) of the *Criminal Procedure Code* provides:-
  - (2) Subject to the provisions of Section 38 of the *Penal Code*, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.
13. In *Bethwel Wilson Kibor vs. Republic* [2009] eKLR the Court 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.”
14. The *Judiciary Sentencing Policy Guidelines* also state thus: -

The proviso to 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 an 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.
15. Guided by the above cited provisions and case law, I find that the trial court was required to factor in the time that the Applicant spent in custody while awaiting his trial during sentencing. The trial record reveals that the Applicant was arrested on 16<sup>th</sup> December 2017 and convicted on 27<sup>th</sup> July 2023.
16. I note that the trial court did not consider the period the Applicant spent in custody while sentencing him thereby subjecting him to an excessive punishment.
17. I therefore find merit in the instant Application and I allow it and order that the 30-years' imprisonment sentence shall begin to run from the date of the Applicant's arrest being 16<sup>th</sup> December 2017.
18. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**W. A. OKWANY**



**JUDGE**

