Ondieki v Republic (Criminal Revision E114 of 2023)
[2024] KEHC 8459 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8459 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL REVISION E114 OF 2023

WA OKWANY, J

JULY 4, 2024

BETWEEN

ROBERT ONDIEKI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the Judgment and Sentence at the Chief's Magistrate's Court at Nyamira in Sexual Offences No. 5 of 2020 by Hon. C.W. Waswa, Resident Magistrate on 23rd March 2021)

RULING

1. The Applicant was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 12th day of January 2020 at Nyageita village, Nyambiri sub-location, Bomwagamo location, Nyamira North sub-county, within Nyamira County, unlawfully and intentionally caused his penis to vagina of D.O. (particulars withheld), a child 14 years old.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offence Act* No. of 2006. The particulars were that on the 12th day of January 2020 at Nyageita village, Nyambiri sub-location, Bomwagamo location, Nyamira North sub-county, within Nyamira County, unlawfully and intentionally touched the breasts of D.O. (particulars withheld), a child aged 14 years with his penis.

3. The trial court convicted him of the main charge and sentenced him to serve 10 years imprisonment.

4. The Applicant now seeks a revision of his sentence through the instant Application wherein he listed grounds as follows: -

    1. That the Petitioner's right to fair trial have been violated by the fact that the time spent in remand was not taken into account as required under Section

333 (2) of the Criminal Procedure Code and therefore in violation of Articles 50 (2) of the Constitution}}.

2. That he did not appeal to the High Court for he did not have grounds of appeal and therefore he has approached this Court under Article 23 of the *Constitution* as read with Article 165.

3. That he relied on Article 165 (3) of the *Constitution* and states that this Court has powers to address the questions where fundamental freedoms have been violated.

4. That due to his decision not to appeal against the decision of the court, he has had no other opportunity to have the times spent in remand taken into account but only in Article 165 of the *Constitution*.

5. That the Applicant is serving excessive sentence by the fact that the time spent in custody has not been taken into account as required under Section 333(2) of the Criminal Procedure Code and therefore violating Article 29 (d) (f) of the *Constitution*.

6. That the Petitioner has not been subjected to equal protection and equal benefit of the law by the fact that the time spent in remand was not factored in his sentence therefore violating Article 27(1) (2) and (4) of the *Constitution*.

5. The Application was supported by the Applicant's affidavit. I have considered the above grounds and found that the issue for determination is whether the Application for review is merited.

6. The main prayer in this Application is resentencing and a consideration of the period served in remand custody.

7. Article 50 of the *Constitution* of Kenya provides for the rights of an accused person 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. (emphasis mine)

8. Article 165 also provides for the High Court's supervisory jurisdiction thus: -

(6) 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.

9. The *Criminal Procedure Code* grants this court Revisionary powers under Section 362 and Section 364of the 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 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 order, or which otherwise comes to its knowledge, the High Court may –

(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 had 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.

10. It is an established principle that courts must consider the period spent by an accused person in pre-trial custody. This principle is provided for under Section 333(2) of the *Criminal Procedure Code* which states as hereunder: -

1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

11. The *Judiciary Sentencing Policy Guidelines* (2016) also state as follows:-

> " 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."

12. The Court of Appeal restated this principle in the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR 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. 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."

13. The proviso under Section 333(2) not only ensures that an accused person is punished only to the extent necessary in light of the facts of the case and the gravity of the offence, but also upholds the rule of law and constitutional dictates which protect citizens from arbitrary arrest and denial of their freedom.

14. I have considered the facts of the present case and I note that the Applicant was arrested on 12th January 2020 and was sentenced on 13th May 2021. The Applicant remained in remand custody throughout his trial. I note that the trial court did not factor in the period that the Applicant spent in the pre-trial custody during sentencing. I find that, in the circumstances of this case, the application for review of sentence is merited. I find guidance from the case of *Ogolla s/o Owuor v R* [1954] EACA 270 where the Court stated thus:-

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

15. In conclusion, I find that the present application is merited and I therefore allow it and direct that that the period that the Applicant spent in remand custody while awaiting his trial be deducted from his 10-year sentence which period shall be computed from the date of his arrest being 12th January 2020.

16. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 4TH DAY OF JULY 2024.

W.A. OKWANY

JUDGE