**David v Republic (Criminal Revision E050 of 2023)**
**[2024] KEHC 16674 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 16674 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAJIADO**

**CRIMINAL REVISION E050 OF 2023**

**JL TAMAR, J**

**SEPTEMBER 23, 2024**

**BETWEEN**

**JOHN MUTHAMA DAVID ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant by a Notice of Motion filed on 06th December September 2023 expressed to be brought under Article 47,48,51(1) & (3), 159 of the *constitution* and section 33(2) of the *criminal procedure code*, order 51 rule 1,3,4,10,11,13 and 16 of the *civil procedure rules* and all other enabling provisions of the law, sought for review of sentence arising from Original Criminal case number SO 24 of 2020 Ngong Law Court in which the applicant was convicted and sentenced to serve five (5) years imprisonment for the offence of attempted defilement contrary to section 9(1)(2) 0f the *sexual offences Act* no 3 of 2006, now Cap 63A. the particulars were that on 18th August 2020 at [particulars withheld] area in [particulars withheld] North Sub-county within Kajiado county, intentionally attempted to cause his penis to penetrate the vagina of Y.K.N a child aged 16 years.

2. The main ground upon which the application is premised is that the learned magistrate did not consider in imposing the sentence of 5 years, the 3 years period the applicant had spent in remand custody prior sentence. Additionally, the sentence by the learned magistrate did not address whether there was evidence to prove the preparatory steps allegedly taken to commit the offence.

3. It is not in dispute that the applicant was arrested on 19th August 2020 and arraigned in court 0n 24th August 2020 where tried, convicted and sentenced to serve 5 years imprisonment according to the committal warrants on 18th October 2022.

4. The learned state prosecutor opposed the application for review of the sentence primarily on the grounds that the sentence meted out by the court was lenient considering that under section 9(1)(2)

of the *sexual offences Act* the Mandatory minimum sentence prescribed is 10 years. The state further argues that the applicant has not properly invoked the revisionary jurisdiction of this court as the sentence imposed by the court was legal, proper and no illegalities, incorrectness or impropriety has been demonstrated.

**Issue for determination**

5. I have considered the application and the submissions by both the state and counsel for the applicant which I have found helpful.

6. The main issue for determination herein is whether the applicant has properly invoked the jurisdiction of this court as to be entitled to review of sentence under Section 333(2) of the *Criminal Procedure Code*.

7. The legal basis for the exercise of the revisionary jurisdiction of this court is in Article 165(6) which provides: -

> "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."

8. Section 333(2) of the *Criminal Procedure Code* provides: -

> "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."

9. As stated in the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, the court is required 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*.

10. The court proceeded to state that

> "....
>
> 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."

12. The same court in *Bethwel Wilson Kibor v 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."

13. According to The *Judiciary Sentencing Policy Guidelines*:

> " 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."

11. In the instant case, and notwithstanding the nature of the charges the applicants faced and the sentence imposed by the magistrate, it is clear that the court did not take into consideration the period the accused spent in custody before conviction and sentence. Failure to take into account the time spent by the accused person in custody before sentence is a matter that squarely falls with the revisionary jurisdiction of this court as the same touches on the legality of the sentence. The argument that the magistrate did not address herself as whether there was evidence to prove the preparatory steps allegedly taken to commit the offence is a matter for appeal and not to be considered under the revisionary powers of court.

12. The state contend that the sentence meted on the accused person is very lenient. I agree. The sentence meted out by the magistrate was lenient in view of the mandatory nature of minimum sentences in *sexual offences Act*. The Supreme Court of Kenya in *Republic v Joshua Gichuki Mwangi & others*, held that the mandatory minimum sentences in *sexual offences Act* are Constitutional. The magistrate therefore had no discretion but to met out the mandatory sentence of 10 years prescribed by the law. However, as the state had not appealed against the sentence, this court will not disturb it.

13. Consequently, the application dated 24th day of November 2023 and filed in court on 06th December is hereby disallowed. The sentence of 5 years imposed by the learned magistrate on 8th June 2023 stands.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KAJIADO THIS 23RD DAY OF SEPTEMBER 2024**

**JOHN.T. LOLWATAN**

**JUDGE**