Nkonge v Republic (Criminal Appeal E172 of 2022)
[2024] KEHC 11077 (KLR) (12 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11077 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E172 OF 2022

JM OMIDO, J

SEPTEMBER 12, 2024

BETWEEN

JEREMIAH NKONGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement, conviction and sentence of Hon. P.M. Wechuli, Senior Resident Magistrate delivered on 5th July, 2022 in Tigania MCCR Case No.E027 of 2022)

JUDGMENT

1. The Appellant Jeremiah Nkonge was charged before the trial court with the offence of grievous harm contrary to Section 234 of the Penal Code, Cap 63 Laws of Kenya.

2. As is instructive from the charge sheet, the particulars of the offence were that on 7th September, 2021 at Andune village, Athwana Location in Tigania Central Subcounty within Meru County, the Appellant unlawfully did grievous harm to one Raphael Mwiti Matau (hereinafter referred to as "the Complainant").

3. The Appellant denied the charge following which a trial was held in which the prosecution called four witnesses.

4. The record of the trial court bears it that the Appellant was placed on his defence upon closure of the prosecution case. The court then explained to the Appellant the provision of Section 211 of the Criminal Procedure Code in its terms and the available modes of tendering his defence and the Appellant opted to give a sworn testimony. He did not call any witness.

5. Upon conclusion of the trial, the Appellant was convicted and sentenced to serve 9 years imprisonment.

6. At the time of the hearing of this appeal, the Appellant informed the court that he would pursue the same only on the issue of sentence. He would not pursue his appeal on conviction.

7. The grounds presented on sentence are as follows:

   a. That the learned trial Magistrate erred in both law and fact by failing to note that the period spent in custody (pre-trial) under Section 333(2) (sic) was not considered.

   b. The learned trial Magistrate failed to consider the mitigation of the Appellant.

8. Having considered the grounds raised in the present appeal and his filed submissions, it is clear that the Appellant's appeal, as I have stated above, is only against the sentence.

9. The two arguments that the Appellant proffers is that the sentence that was imposed by the trial court contravened Section 333(2) of the Penal Code as the period that he spent in custody prior to his conviction and sentence was not considered by the trial court and that the trial court did not consider his mitigation.

10. As the present appeal is only in respect of the sentence, it is important for me to state that the circumstances under which an appellate court will interfere with the sentence of a trial court are limited.

11. The case that guides me in this regard is S. vs Malgas 2001 (1) SACR 469 (SCA in which the court observed as follows:

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

12. On the same issue, in the case of Ogolla s/o Owuor v Republic [1954] EACA 270 the East Africa Court of Appeal stated as follows:

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

13. There is also the Court of Appeal case of Benard Kimani Gacheru v R [2002] eKLR in which it was held 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."

14. The two questions for determination are whether the Appellant's sentence violated Section 333(2) of the Penal Code and whether the trial court erred by not considering the Appellant's submissions.

15. On the first point taken by the Appellant in his submissions, the attack on the sentence imposed by the trial court is that the learned trial Magistrate, when passing the sentence, ought to have considered the period that the Appellant had remained in custody, which the trial court failed to do.

16. A perusal of the lower court record informs me that the Appellant was first presented before the court for plea on 21st January, 2022. He remained in custody until 5th July, 2022 when he was sentenced to 9 years imprisonment for the offence of grievous harm.

17. The penalty for the offence of grievous harm is to be found under Section 234 of the Penal Code. Let us read it:

    234. Grievous harm

    Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

18. The Appellant complains that when sentencing him, the trial court went afoul of Section 333(2) of the Criminal Procedure Code, which provides as follows:

    333(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.

19. The above provision, (subject to Section 38 of the Penal Code), impels the sentencing court to mandatorily consider the period that an accused person has spent in custody when imposing a sentence. Section 38 of the Penal Code deals with situations where a sentence is passed on an escaped convict and is therefore not applicable to the present case.

20. In sentencing the Appellant, the trial court rendered itself as follows:

> " I have noted the mitigation by the accused. I have also placed in mind the time the accused has spent in custody. However, the offence is serious and the complainant grievously injured. The accused in sentenced to serve 9 years imprisonment. Right of appeal 14 days."

21. The Judiciary Sentencing Policy Guidelines provide 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."

22. Undoubtedly, from the proceedings on sentence, the learned although the trial Magistrate stated that he had considered the period that the Appellant had been in custody prior to his sentence, he did not state the effect that such consideration had in the ultimate sentence that he imposed. "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.

23. In other words, the learned trial Magistrate ought to have specified that the ultimate sentence that was imposed was a period net of the time that the Appellant had spent in custody. It was not, in my view, sufficient for the court to state that it had considered that period without specifically reducing the sentence by the proportionate period spent in custody. Failing to specify as such is in my view a material misdirection that paves way for this court to interfere with the sentence imposed by the learned trial Magistrate.

24. How have superior courts dealt with this issue, when faced with the same?

25. In the case of Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR 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."

26. 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."

27. I am therefore guided that as the trial court did not specifically state that the period that the Appellant spent in custody was considered and the manner in which it was considered when sentencing him, the court infracted Section 333(2) of the Criminal Procedure Code.

28. On the second point taken by the Appellant that the trial court did not consider his mitigation, I will refer to the lower court's proceedings taken on 5th July, 2022, thus:

Accused:

"I have 5 children in school. I have a loan with the government of Ksh.80,000/-. I have been in custody from 20th January, 2021"

Court:

I have noted the mitigation by the accused. I have also placed in mind the time the accused has spent in custody. However, the offence is serious and the complainant grievously injured. The accused in sentenced to serve 9 years imprisonment. Right of appeal 14 days."

29. From the proceedings above, the only mitigation offered by the Appellant, which the court clearly considered, was that he had 5 children in school and had a loan. It is clear from the lower court record that his mitigation was considered before the imposition of the sentence. The ground that his mitigation was not considered therefore has no merit, in the circumstances.

30. Being of the foregoing inclination, I allow the appeal on sentence, only to the extent that I order that the sentence of 9 years imposed by the trial court shall run from 21st January, 2022, being the date that the Appellant was first presented before the court for plea and was thereafter detained in custody and not 5th July, 2022 as ordered by the trial court.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 12TH DAY OF SEPTEMBER, 2024.

JOE M. OMIDO

JUDGE

Appellant: Present, virtually.

Prosecution Counsel: Ms. Rotich.

Court Assistant: Mr. Kinoti.