Mukuhi v Republic (Criminal Revision E001 of 2024)
[2024] KEHC 13138 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13138 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION E001 OF 2024

FN MUCHEMI, J

OCTOBER 24, 2024

BETWEEN

ANTONY KARANJA MUKUHI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

1. This undated application was filed on 2nd January 2024 and it seeks for orders for review of sentence imposed on him reviewed in Thika Criminal case (Sexual Offence) Case No. 97 of 2018.

2. The applicant was charged before Thika Senior Principal Magistrate in the said case on two counts. Count I was the offence of rape contrary to Section 3(1)(a)(c)(3) of the *Sexual Offences Act* No. 3 of 2006 and Count II was the offence of stealing from a person contrary to Section 279(a) of the *Penal Code*. The applicant was convicted of the offence of rape and sentenced to twenty (20) years imprisonment.

3. The applicant states that the trial magistrate during sentencing failed to consider the time he spent in remand during the pendency of the suit. The applicant further states that he was arrested on 25th August 2018 and sentenced on 4th August 2022 which was a period of four (4) years. The applicant further states that he did not lodge an appeal to the High Court but decided to pursue revision on his sentence.

4. The respondent states that the applicant was charged with the offence of rape contrary to Section 3(1)(a)(c)(3) of the *Sexual Offences Act* and an alternative charge of committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act*. The applicant was charged with a second count of the offence of stealing from a person contrary to Section 279(a) of the *Penal Code*. The

respondent states that the applicant was acquitted in count 2 but was found guilty of the offence of rape and sentenced to twenty (20) years imprisonment.

5. The respondent further states that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence imposed by the trial court. The respondent further argues that the trial magistrate took into consideration the period the applicant spent in custody. Furthermore, the respondent states that the trial court was lenient on the applicant and did not impose the sentence to life imprisonment which is the maximum sentence provided by the law.

6. The respondent argues that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances. The respondent further argues that the applicant's affidavit is not commissioned by a commissioner for oaths hence defective as it was not made in compliance with the law.

The Applicant's Submissions

7. The applicant submits that the sentence meted against him is harsh and excessive and that the trial magistrate did not consider his mitigation but instead doubled the sentence from 10 years to 20 years imprisonment. It is further argued that the applicant aged 26 years and that he is a first offender. As such, the applicant urges this court to allow him to benefit from the least severe sentence. To support his argument, the applicant relies on Article 50(2)(q) of the *Constitution* and the case of R vs Otieno (1983).

8. The applicant further relied on the cases of *Sammy Musembi Mbugua & 4 Others vs Attorney General & Another* [2019] eKLR, *Vinter & Others vs the UK* Application No.s 66069 of 2009, 130 of 2010 and 3896 of 2010, *Mulamba Ali Mabanda* Criminal Appeal No. 12 of 2013 and *John Chidia Lwaina vs Republic* CA 29 of 2020. The applicant submits that he should be given a second chance to reintegrate to the society as he now understands the consequences for breaking the law and that he is a first offender. He has spent substantial number of years in prison and he has used that time productively to engage in various rehabilitation programmes.

9. The applicant further submits that he was remanded in prison for four (4) years since 25/8/2018 to 4/8/2022 when he was sentenced. The applicant further argues that the trial court did not take into consideration the time spent in custody but instead enhanced his sentence by ten (10) years which infringes his right to a fair trial and goes against the spirit of Section 333(2) of the *Criminal Procedure Code*. Relying on the cases of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR and *Bethwel Wilson Kibor vs Republic* [2009] eKLR, the applicant submits that the court ought to consider the time he spent in custody for his sentence to be ordered to run from the date of arrest.

The Respondent's Submissions

10. The respondent reiterates what the contents of its affidavit and submits that the trial court considered the mitigation of the applicant and the period the applicant spent during sentencing in line with Section 333(2) of the *Criminal Procedure Code*. The respondent argues further that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial court. The respondent further submits that the trial court was lenient on the applicant and did not sentence the applicant to life imprisonment. Thus, the sentence was proper and legal as it considered the aggravating and mitigating circumstances.

11. The respondent submits that the applicant is misleading the court by alleging that the time spent in custody was not considered in line with Section 333(2) of the *Criminal Procedure Code* and that he

was remorseful. The trial magistrate took note of the time spent in custody and also the fact that the appellant was not remorseful for his actions.

12. The respondent relies on Article 50(2)(q) of the *Constitution*, Section 362 of the *Criminal Procedure Code* and argues that the applicant has not placed any material before the court to warrant review. The reasons advanced by the applicant is that he is now reformed and should get the benefit of reduced sentence. He has neither argued or even suggested that the sentence passed was illegal or improper, or that the trial court acted on wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceeding was irregular or in violation of his right or fundamental freedom. The applicant gave generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warrant upsetting the sentence imposed by the lower court.

13. The respondent submits that the argument that the applicant has reformed would provide relieve when the prison authority is considering remission, or in parole process where applicable in the penal service, or in the exercise of prerogative of mercy.

14. The respondent argues that the applicant is abusing the court process and submits that there is no material placed before this court to impeach the sentence or exercise of discretion by the trial court.

The Law

15. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) 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.

16. The applicant has come to this Honourable court by way of review provided for under Article 50 of the *Constitution*. It provides:-

(2) Every accused person has the right to a fair trial, which includes the right:-

(q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.

17. Section 362 of the *Criminal Procedure Code* provides:-

> The High Court may call 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.

18. Section 364(1) of the *Criminal Procedure Code* provides:-

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 his 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 section 354, 357 and 358, and may enhance 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.

19. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi vs Republic* [2019] eKLR:-

> "In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

20. Similarly Nyakundi J in *Prosecutor vs Stephen Lesinko* [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* 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 judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

21. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.

22. The applicant herein was convicted for two offences. The first offence was that of rape contrary to Section 3(1)(a)(c)(3) of the *Sexual Offences Act* No. 3 of 2006. The second offence was that of stealing from a person contrary to Section 279(a) of the *Penal Code*. The applicant was further convicted of an alternative charge of committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act* No. 3 of 2006. The applicant was found guilty of the offence of rape and sentenced to twenty (20) years imprisonment. He was acquitted of the other charges.

23. 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."

24. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

25. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018]eKLR where 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 applicant was arrested on 25th September 2018 and he remained in custody until 4th August 2022 when he was sentenced. Thus the applicant spent 3 years, 10 months and 10 days in custody. By virtue of Section 333(2) of the Criminal Procedure Code, this duration ought to have been considered during sentencing.

27. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicant and then exercised its discretion by finding that the case was one that was suitable for imposing maximum sentence as the offence committed attracts a minimum sentence of ten (10) years. The trial magistrate in sentencing the applicant considered that he had been in custody since September 2018 this fact was recorded. It was also considered that the applicant was remorseful.

28. In my considered view, the trial court took into consideration all the relevant factors in sentencing the accused. The law provides that the court may enhance the sentence of ten (10) years to life imprisonment. The magistrate sentenced the applicant to twenty (20) years imprisonment although there were aggravating circumstances. The applicant was a boda boda operator hired by the complainant to take her home as she left her place of duty at night. He breached his fiduciary duty of serving his customers and instead turned into a criminal thereby committing the act of rape on his customer. The magistrate took into account his breach of duty obligations in sentencing the applicant. The offence committed was of serious nature with lasting trauma on the victim and should not be taken lightly. A deterrent sentence had to be imposed to warn other would be offenders. The discretion of the court was exercised judiciously in my considered view.

29. I find no merit in this application and I hereby dismiss it accordingly.

30. It is hereby so ordered.

RULING DELIVERED VIRTUALY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF OCTOBER 2024.

F. MUCHEMI

JUDGE