Machaki & another v Republic (Criminal Revision E126 of 2024)
[2024] KEHC 12838 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12838 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL REVISION E126 OF 2024

LM NJUGUNA, J

OCTOBER 23, 2024

BETWEEN

ANTONY NYAGA MACHAKI ..... 1ST APPLICANT

GEOFREY NGARI MACHAKI ..... 2ND APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicants have filed a notice of motion dated 05th July 2024 seeking the following orders:

    a. That this honourable court be pleased to issue orders that the sentence imposed on the applicants be given the rights in section 333(2) of the *Criminal Procedure Code* for consideration of the period spent in custody; and

    b. That this honourable court be pleased call for and examine the trial court records in Siakago MCSO no. 1 of 2017.

2. The applicants were jointly charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. Through this application, they state that they were held in custody for a period of 2 years before they were released on bond in 2018 while the case was ongoing. They urged the court to consider this period as part of the 10 years imprisonment sentence imposed upon each of them following conviction.

3. The application was canvassed by way of written submissions and though the respondent filed submissions, it did not file a response to the application.

4. It was the applicants' submission that the sentence should run from the date of their arrest and they relied on the provisions of section 333(2) of the *Criminal Procedure Code*. That they were arrested and held in custody from 01st January 2017 and they only secured bond in December 2018 but the case

was concluded on 18th August 2020. They relied on the cases of *Ahamad Abolfathi Mohammed & Another v. Republic* (2018) eKLR and *Bethwel Wilson Kibor v. Republic* (2009) eKLR. They argued that the Judiciary sentencing guidelines place an obligation on the trial courts to take into account time already spent in custody in order to avoid excessive sentences.

5. The respondent, in its submissions, stated that the trial court sentenced the applicants to an imprisonment term of 10 years yet the act prescribes a term of not less than 15 years which may be enhanced to life imprisonment. It was its argument that the sentence is unlawful and if the court ought to revise anything, it should enhance the sentence to a minimum of 15 years imprisonment and it relied on the case of *Republic v. Amos Mutiga Sariso* (2010) eKLR. That in light of section 333(2) of the *Criminal Procedure Code*, it is mandatory that the time spent in custody should be considered in meting out the sentence.

6. From the foregoing, the issue for determination is whether the application has merit.

7. The High Court's supervisory jurisdiction in criminal cases is established under Section 362 of the *Criminal Procedure Code* as follows:

> "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."

8. In the Malaysian case of *Public Prosecutor vs. Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was held:

> "The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

9. The applicants were sentenced to 10 years imprisonment having been convicted of the offence of gang rape. They seek revision of the sentence to include the period of 2 years spent in custody during the trial. The respondent submitted that the sentence meted out to the applicants should be reviewed upwards since the law prescribes a minimum sentence of 15 years for that offence. It did not contest the applicant's application that the provisions of section 333(2) of the *Criminal Procedure Code* were breached since the provision is couched in mandatory terms.

10. The purpose of the court exercising its revisionary power is to examine the correctness and propriety of the trial court's order. In this case, section 10 of the *Sexual Offences Act* prescribes a minimum sentence of 15 years imprisonment that may be enhanced to life. Minimum sentences prescribed in law are to be applied as they are and this position was emphasized by the Supreme Court in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR). I have perused the trial court's record and find that the circumstances

of the case warrant that the court imposes the minimum sentence prescribed. The trial court did not indicate whether or not it had considered the time spent in custody.

11. It is therefore my finding that the sentence imposed by the trial court is not correct in that it went below the minimum sentence provided for under the Act and at the same time, the learned magistrate failed to take into account the provision of Section 333(2) of the *CPC*.

12. Under normal circumstances, I would have enhanced the sentence to 15 years minimum sentence, but to be fair to the applicants I will exercise my discretion in not doing so.

13. In the same breath, I will not allow them to benefit from the law by going further below the minimum sentence.

14. I hereby find that the application has no merit and I do dismiss the same.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the 1st Applicant

..... for the 2nd Applicant

..... for the Respondent