Chege v Republic (Miscellaneous Criminal Application E105 of 2021) [2023] KEHC 1901 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1901 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION E105 OF 2021

HK CHEMITEI, J

MARCH 8, 2023

BETWEEN

JOSEPH CHEGE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant herein, was charged before Nakuru Chief Magistrate Criminal Case No 3226 of 2014 with the offence of Rape contrary to section 3(1) (a) (b) (c) of the *Sexual Offences Act* No 3 of 2006. He in the alternative faced the charge of Indecent Act with an Adult contrary to section (ii) of the *Sexual Offences Act* No 3 of 2006. After full hearing the applicant was convicted of the main charge and was sentenced to 15 years' imprisonment.

2. The applicant preferred an appeal and the sentence was reduced to 10 years in Nakuru Criminal Appeal No 74 of 2017.

3. The applicant has now filed the instant application dated September 10, 2021 which is supported by his affidavit sworn on even date. He deposed that he was charged on November 7, 2014 and released on bond on February 9, 2015. That the said period he was in remand and was not considered during sentencing. He deposed further that his bond was cancelled on May 31, 2017 and he remained in custody until August 23, 2017 when judgment was delivered. Similarly, that the period was not taken into account during sentencing.

4. He went on to depose that it was on that basis that he seeks this honourable court to consider the aforementioned period which amounted to 180 days he spent in custody pending bond approval. That it was in the interest of justice that the instant application be allowed as prayed since the period mentioned above will considerably reduce his days in prison sentence.

Analysis and Determination

5. Having perused the application and the affidavit in support, the only issue for determination by this court is whether the period when the applicant was in custody ought to be taken into account as part of the time served.

6. Section 333(2) of the *Criminal Procedure Code* provides 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.

7. In view of above provision of the law, it is clear that the mandatory period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. This is for the simple reason that the period served by an accused while in custody remains a restriction to his freedom legally and there is no reason in the normal cause of events why it should not be reckoned during sentencing.

8. Nonetheless every case is unique and every court ought to exercise its discretion in this area although the above cited provisions of the law assumes that the said period is always considered.

9. In *Bethwel Wilson Kibor vs Republic* [2009] eKLR expressed itself as follows:

   > " By proviso to section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take 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 September 22, 2009 he had been in custody for ten 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."

10. 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 this matter it is apparent from the charge sheet that the applicant was arrested on November 6, 2014 and from the lower court records I note that the applicant was released on bond on February 9, 2015. However, the bond was cancelled on May 31, 2017 and he was sentenced on August 23, 2017. In sentencing the applicant, there was no mention of the period the applicant was in custody.

12. This court on December 4, 2018 however reduced the period to 10 years from 15 years. There was no mention of the period the applicant spent in custody. The court went on to state that;

> " In the circumstances and considering that the appellant is a first offender who is remorseful the sentence is reduced to ten (10) years imprisonment."

13. The court did not mention the contested period. My assumption is that the court must have taken into consideration the same when it reduced the period to 10 years.

14. The only rider however is that the court in my view computed the period of the sentence from August 23, 2017 when he was sentenced.

15. By asking this court to consider the period in my view is technically asking the court to review the ten years' period the appellant has been handed. It is not possible as the application before this court is not for review. At any rate the applicant would have appealed against the orders of December 4, 2018.

16. In the premises and for the above reasons I do not find the application meritorious save to state for avoidance of doubt that the ten years' period shall run from August 23, 2017.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 8TH DAY OF MARCH 2023.

H. K. CHEMITEI.

JUDGE