Munyasi v Republic (Criminal Appeal E023 of 2022)
[2023] KEHC 20508 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20508 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E023 OF 2022

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

ALEX WAFULA MUNYASI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein was convicted of the offence of rape contrary to section 3(1) (a) (b) (3) of the *Sexual Offences Act* No 3 of 2006 in Othaya PM's Court MSO. No E005 of 2021 and sentenced to ten years imprisonment.

2. Being dissatisfied with the said sentence, he filed a petition of appeal on June 6, 2022 challenging the said sentence. Despite him having raised six (6) grounds in the said petition, it is clear that his main ground is that the trial court erred in failing to consider the period the accused had spent in custody in compliance with section 333(2) of the *Criminal Procedure Code*. The other grounds seem to be an attempt of the appellant to mitigate. I will address the issue elsewhere in the course of the judgment.

3. The appeal was canvassed by way of written submissions. The appellant's submissions basically contained mitigations as can be seen from paragraphs 2 to 8. In paragraph 9 he submitted that this court ought to review the sentence imposed on him and in doing so take into consideration the period he spent in custody and invoked section 333(2) of the Penal Code. He also relied on the case of *Phillip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) at Nairobi & Edward Wachira Others v DPP Petition No 97 of 2021 and *Kenya Judiciary Sentencing Policy Guidelines*.

4. The respondent in opposition to the appeal submitted that the appellant had not justified the reasons why the sentence ought to be reviewed and that considering the aggravating factors in the said offence, he was not a candidate for resentencing. Further that, the sentence meted upon the appellant was

legal and commensurate to the charges facing him as provided under the relevant law. Further that the appellant was granted an opportunity to mitigate and the same was considered by the court. The respondent as thus prayed that the sentence ought not to be disturbed.

5. I have considered the appeal herein and the submissions by the parties. The appellant's appeal is against the sentence meted out to him by the trial court and basically on the grounds that the court did not consider the period he spent in custody.

6. As I have stated elsewhere, the appellant was charged with the offence of rape contrary to section 3(1)(a)(b) of the *Sexual Offences Act* of 2006. Section 3(3) provides for the sentence for the offence and which is imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. The sentence is clearly a minimum mandatory sentence.

7. The appellant was convicted on 12.08.2021 and sentenced on 26.08.2021. In sentencing the appellant herein, the trial court in meeting the mandatory minimum sentence noted and stated that ".....The sentence as imposed under section 3 of the *Sexual Offences Act* provides for a minimum sentence and in the view of the recent developments on the issue of constitutionality of the minimum sentences as rendered by the Supreme Court, I am guided that my hands are tied....."

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. The requirement to take into account the period spent in custody was reiterated by the Court of Appeal in *Bethwel Wilson Kibor Vs Republic* [2009]eKLR where the court 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."

(See also Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR and paragraphs 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines).

10. It is therefore clear that, the trial court ought to have taken into account the time the appellant had spent in custody. I have perused through the trial court's record and I note that the appellant was arraigned in court on May 10, 2021 and sentenced on August 26, 2021. The appellant remained in custody all through the trial as there is no evidence of his release on bond or bail despite him having been granted bond. The trial court did not take into account the said period as there is nowhere it has stated to have done so. I find the appeal successful to that extent.

11. I note that the appellant raised other grounds to the effect that he be given a non-custodial sentence as he has reformed and that he is an orphan amongst other issues. He advanced these reasons in his submissions. However in my view, the appellant appears to be mitigating before this court. This court does not have jurisdiction to take mitigation on appeal from lower courts. The appellant having mitigated before the trial court, the trial court took into account his mitigation but sentenced him as per the law. This court cannot interfere with the said sentence unless where the 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 harsh 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 states is shown to exist. (See *Bernard Kimani Gacheru Vs. Republic* [2002] eKLR).

12. Taking into consideration all the above, I find the appeal on the issue as to time spent in custody having not been taken into consideration merited. I order that the prisons authority in computing the sentence herein do take into account the three months and 16 days the appellant spent in custody while computing the sentence.

13. It's so ordered.

Delivered, dated and **signed** at **Nyeri** this **21st** day of **July, 2023.**

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State