PMK v Republic (Criminal Appeal 193 of 2017)
[2023] KEHC 19832 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL 193 OF 2017

CM KARIUKI, J

JULY 6, 2023

BETWEEN

PMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from the judgment of the Learned Trial Magistrate, Hon J Wanjala, CM, in Nyahururu Chief Magistrate's Sexual Offence Case No 32 of 2015.)

RULING

1. This revision arises from the judgment of the Learned Trial Magistrate, Hon J Wanjala, CM, in Nyahururu Chief Magistrate's Sexual Offence Case No 32 of 2015, in which she convicted and sentenced the Appellant to 20 years imprisonment for the crime of attempted rape contrary to Section 4 of the *Sexual Offences Act* No 3 of 2006.

2. PMK, the appellant, prays that: -

    i. This Honorable court be pleased to make orders for the inclusion of the two years spent in remand to his sentence.

    ii. It is within the rule of law to consider the same.

    iii. He has been in prison for five (5) years, and thus, pray that this Honorable court grants him a second chance in life.

    iv. That this Honorable court gives him a non-custodial sentence or reduces the sentence proportionately to the period already served.

    v. This Honorable court makes any other orders that may deem fit in the interest of justice.

3. The application was based on the grounds contained in the supporting affidavit sworn by the appellant deponing as follows: -

   i. That the appellant was charged with the offense of attempted rape contrary to section 4 as read with section 11 (1) of the *Sexual Offences Act* No 3 of 2006, sentenced to serve 20 years.

   ii. That the appellant appealed *vide* HCCRA 193 of 2017, which he withdrew and substituted for sentence review that he was allowed by the Hon judge during the appeal hearing on January 18, 2023.

   iii. The appellant humbly requests this honourable court be pleased to make orders to include the two years spent in remand and reduce it from his sentence.

   iv. That he is a well-rehabilitated person since he has undergone several vocational pieces of training and attained grades (III), (II), and (I) in tailoring and dressmaking hence renders him a remorseful person in society.

   v. That the appellant promises not to commit any crime again and is ready to be the best example, ready to work hard to restore the lost faith and trust in society.

Respondent's Submissions

4. The Respondent opposed the application herein because the court should consider that the complainant in the lower court file was an older woman aged 88 years and that based on the applicant's own evidence and defense exhibit 1a treatment card, he was HIV positive.

5. It was contended that the 20 years imprisonment was proper and lawful given the nature and circumstances of the offense and urged the court not to interfere with the same. They stated that the applicant did not deserve a non-custodial sentence, for he intended to infect the old lady with HIV deliberately.

6. The respondent urged the court to peruse the record, and if the appellant is found to have spent two years in remand as he stated, then the court can exercise its discretion and incorporate the same.

Analysis and Determination

7. Having considered the application by the appellant as well as his supporting affidavit and the response by the respondent, the main issue for determination is whether the appellant has established a case for revision.

8. This court's revision jurisdiction is stipulated in sections 362 through 366 of the *Criminal Procedure Code*. Section 362 of the *Criminal Procedure Code* specifically establishes that: -

> " The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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."

9. For this revision, the powers of this court are provided for under section 364 of the *Criminal Procedure Code*, which 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 its 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 sections 354, 357, and 358, and may enhance the sentence;
>
> b. in the case of any order other than an acquittal order, alter or reverse the order.
>
> (2) No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his defence.
>
> It was provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence that it was required to pass under the written law creating the offence concerned.
>
> (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict greater punishment for the offence which, in the opinion of the High Court, the accused has committed than might have been inflicted by the court which imposed the sentence.
>
> (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
>
> (5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

10. Furthermore, the court, in exercising its revisionary jurisdiction, is by its supervisory role over subordinate courts as contemplated in Article 165(6) and (7) of the *Constitution*, which provides that: -

> "165
>
> (6) The High Court has supervisory jurisdiction over the subordinate courts and any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body, or authority referred to in clause (6). It may make any order or give any direction appropriate to ensure the fair administration of justice."

11. In the case of *Joseph Nduvi Mbuvi v Republic* [2019], eKLR Odunga J (as he then was) held that: -

> "In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other

words, parties should not argue an appeal under the guise of a revision. For this reason, whether or not to hear the parties or their advocates is discretionary, save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in *Public Prosecutor v. Muhari Bin Mohd Jani And Another* [1996] 4 LRC 728 at 734, 735: -

> "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 the revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" 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 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 to be fairly exercised according to the exigencies of each case".

12. In addition, in *Prosecutor v. Stephen Lesinko* [2018] eKLR, the court outlined the principles which will guide a court when examining the issues about 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 the 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 a lesser offence.

13. The Appellant was charged with the offense of attempted contrary to section 4 of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on 15th October 2015, the Appellant in Laikipia West Sub-County within Laikipia County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of EWW.

14. Consequently, the trial magistrate found the accused guilty and sentenced him to 20 years imprisonment. I have thoroughly examined the trial proceedings and am satisfied with the court's findings' correctness, legality, or propriety and the sentence passed.

15. Nevertheless, before this court is an application for review to alter and reduce the finding on the sentence of 20 years meted to the Appellant; he also prayed that this honourable court be pleased to make orders to include the two years spent in remand to his sentence and that he be given a non-custodial sentence. The Appellant contended that he was remorseful and is well-rehabilitated since he has undergone several vocational trainings while in prison.

16. The *Criminal Procedure Bench Book*, page 116, provides that:

> " The sentences imposed should be geared towards achieving the following objectives set out in the sentencing policy guidelines (paragraph 4.1):
>
> i. Retribution.

ii. Deterrence.

iii. Rehabilitation.

iv. Restorative justice.

v. Incapacitating the offender.

vi. Denouncing the offense on behalf of the community".

Paragraph 24 of the *Criminal Bench Book* states that: -

> " Generally, a maximum sentence should not be imposed on a first offender unless there are aggravating circumstances."

17. In the instant case, the 20-year imprisonment the trial magistrate met is fair, just, and indeed lenient. I find that there was no miscarriage of justice occasioned by the same, and the sentence is lawful. Further, I reiterate that there were no glaring acts or omissions to warrant this court to exercise its revisionary jurisdiction as was held in Joseph Nduvi Mbuvi v. Republic [supra]

18. In addition, I find that there were aggravating circumstances in this case. The victim of the offense was an old fragile 88-year-old older woman in crutches. The appellant took advantage of an elderly and vulnerable woman with exceptional insensitivity. The only reason the Appellant could not penetrate her was her old age. He also stole from her and left her with multiple bruises. I also agree with the Respondent's contention that according to his admission, the appellant admitted that he was HIV positive and, therefore, he could have knowingly and unlawfully transmitted this disease to the complainant had he successfully attempted to rape her. Therefore, I agree with the respondent's assertion that, in view of the nature and circumstances of the offense, the sentence was appropriate.

19. That aside, the Appellant went ahead and attacked another woman, PW2, after he had just attempted to rape his first victim. How he attacked PW2 made her believe that he also wanted to rape her, and if her neighbour did not interfere with his depravity, he could have been successful in his attack. Moreover, despite his assertion, I am not convinced as to the appellant's remorsefulness. I find that there are no compelling reasons to depart from the trial magistrate's sentence based on this case's circumstances.

20. That being the case, the Appellant also prayed this honourable court to be pleased to make orders to include the two years spent in remand and reduce it from his sentence. According to 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."

21. Accordingly, the law requires courts to consider the convict's period spent in custody.

22. Moreover, in *Ahmad 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 consider the period they had spent in custody before being sentenced. Although the learned judge stated that he had considered 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."

23. Additionally, in *Bethwel Wilson Kibor v. Republic* [2009] eKLR, the Court of Appeal expressed itself as follows: -

> " By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody before such sentence, the sentence shall consider the period spent in custody. Ombija J, who sentenced the Appellant, did not specifically state that he had considered the nine years that the Appellant had been in custody. The Appellant told us that as of 22nd September 2009, he had been in custody for ten years and one month. We think that all these incidents should have been considered in assessing the sentence. Given the preceding, 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."

24. I have noted that the Appellant was arrested on 16th October 2015 and remanded in custody until he was convicted and eventually sentenced. According to *The Judiciary Sentencing Policy Guidelines*: -

> " The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to consider the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts 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 an offender should serve, the court must consider the period in which the offender was held in custody during the trial."

25. Therefore, this prayer under Section 333(2) has merit and is now allowed. The Appellant will therefore serve twenty years' imprisonment from the date of arrest, i.e., 16th October 2015.

26. For all the above reasons, the discretion of the trial magistrate in sentencing was properly exercised, and it took into account relevant matters before her. I find no reason to interfere with the sentence of 20 years imprisonment. The Appellant will therefore serve twenty years' imprisonment from the date of arrest, 16th October 2015.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 6TH DAY OF JULY 2023.

.....

CHARLES KARIUKI

JUDGE