Wambugu v Republic (Criminal Revision E017 of 2022)
[2023] KEHC 20128 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E017 OF 2022

FN MUCHEMI, J

JULY 13, 2023

BETWEEN

ANTHONY WACHIRA WAMBUGU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

1. In this application dated 20/1/2022 the applicant seeks to have his sentence reviewed under Section 333(2) of the *Criminal Procedure Code* for the period he spent in custody to be considered in his sentence.

2. The applicant was convicted by Karatina Principal Magistrate in Criminal Case (SO) No E006 of 2021 with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006 and was sentenced to serve fifteen (15) years imprisonment.

3. The applicant herein seeks for review on sentencing and prays the court invokes section 333(2) of the C*riminal Procedure Code* and reduce his sentence. He states that he was arrested on February 22, 2021 and convicted on 18th January, 2022 and that the period of ten (10) months ought to have been taken into consideration by the trial court while imposing sentence.

4. Parties disposed of the application by way of written submissions.

The Respondent's Submissions

5. The respondent submits that the trial court recognized the offence as a serious one when sentencing the applicant. The respondent further submits that although the applicant was a first offender, the trial court did not lose sight of the seriousness of the offences and the impact of the crime on the victim.

As such, the respondent states that the applicant deserves a punitive and deterrent sentence owing to the seriousness and circumstances of the offence.

6. It is further submitted that the applicant does not deserve any leniency as he was charged jointly with three others for the offence of gang rape, who preyed on a defenceless woman who knew them very well. The respondent further submits that the record shows that the four men were hell bent on teaching the victim a lesson. The respondent states that it was a very deliberate and planned act committed by four men against one defenceless woman whom they raped in turns. The respondent submits that the victim went through a traumatic experience and that the trauma will stick with her for years to come.

7. The respondent further submits that though the trial court never recorded the time spent in remand was considered, the trial court was guided by the aggravating factors in the case. The respondent further submits that the trial court was also guided by a pre-sentencing report and a victim impact statement filed in court prior to sentencing. As such, the respondent argues that the applicant was charged with a serious and aggravated offence and the sentence is thus commensurate to the charge. The respondent further states that the applicant is serving a legal sentence and the sentence is within the provisions of Section 10 of the *Sexual Offences Act* No 3 of 2006. The respondent further submits that the applicant has not demonstrated that the sentence is unlawful by showing that the trial court did not consider a relevant factor or that it took into account an irrelevant factor or that the sentence is excessive and harsh. The respondent further submits that the trial court was fully aware that the time spent in remand constituted as part of the sentence.

8. The respondent states that the applicant is not entitled to a review of the sentence as his sentence is commensurate to the charges. In any event, the respondent states that the applicant is not serving an excessive sentence even if the time spent in remand has not been taken into account as required under Section 333(2) of the *Criminal Procedure Code*. As such, the respondent prays that this honourable court dismisses this application.

The Law

9. 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."

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

11. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Ahamad Abolfathi Mohammed & Another v 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."

12. The same court in *Bethwel Wilson Kibor v Republic* [2009]eKLR 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."

13. 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."

14. 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.

15. The respondent opposed this application on grounds that the offence the applicant was convicted of was serious and deserved the deterrent sentence imposed. In my view, the respondent did not submit on the provisions of Section 333(2) which formed the subject of this application. Instead, the respondent's submissions were on the subject of review of sentence on revision under Section 362 of the *Criminal Procedure Code*. The correct position is that the applicant was not aggrieved by the sentence of fifteen (15) years imprisonment but only by the fact that the time he spent in custody was not taken into consideration in imposing sentence.

16. The applicant was arrested on February 22, 2021 and convicted on January 18, 2022. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing. Notably, as submitted by the respondent, the applicant has not contested the sentence, he only seeks to have the duration he spent in custody be taken into account which is his legal right. I have perused the court record and noted that during sentencing, the trial court took into account the pre-sentence report and the victim impact assessment. The trial court then sentenced the applicant to fifteen years imprisonment in line with Section 10 of the *Sexual Offences Act*. It is however evident that the trial court was silent on the issue of the duration the applicant spent in remand.

17. I find that this application is merited and it is hereby allowed. The applicant shall serve fifteen years imprisonment commencing from the date of arrest February 22, 2021.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 13TH DAY OF JULY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 13th day of July 2023