



**Mbia v Republic (Criminal Revision 025 of 2024)
[2024] KEHC 16740 (KLR) (2 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION 025 OF 2024
NIO ADAGI, J
DECEMBER 2, 2024**

BETWEEN

BERNARD NZAU MBIA APPLICANT

AND

REPUBLIC RESPONDENT

*(Being a Revision against the Sentence of Hon. M. Opanga (PM)
dated and delivered on the 23/6/2023 in the original Kangundo
Chief Magistrate's Court Criminal Case S.O No. E030 of 2022)*

RULING

1. The Applicant herein was convicted for the offence of Rape contrary to Section 3(1) of the [Sexual Offences Act](#) No 3 of 2006. He was, upon conviction, sentenced to serve 5 years' imprisonment.
2. The Applicant has now filed an Application under Section 333 (2) of the [Criminal Procedure Code](#) seeking Revision of the sentence passed by the trial court.
3. The Respondent, on its part, urged the court to consider the law and the trial court's record in determining the merits of the application.
4. Article 165 of the [Constitution](#) grants this Court the powers to supervise subordinate courts and stipulates as follows: -
 - (6) 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.
 - (7) For the purposes of 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), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.



5. Sections 362 and 364 of the [Criminal Procedure Code](#) provide as follows: -

362. Power of High Court to call for records

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.

364. Powers of High Court on revision

(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 other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

6. In *Mbogo v Shah* (1968) EA 93 the East Africa Court of Appeal stated as follows on the circumstances under which an appellate court may interfere with the discretion of a subordinate court: -

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

7. Similarly, in *Prosecutor v Stephen Lesinko* [2018] eKLR, the court outlined the principles that must be considered by the court on revision 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 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 juridical discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

8. The above provisions and decisions show that this Court is vested with authority to call for the records from the subordinate courts so as to satisfy itself on the legality, propriety and correctness of those decisions.



9. Section 333 (2) of the Criminal Procedure Code provides thus:-
- (2) Subject to the provisions of Section 38 of the Penal Code (Cap. 63) 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.
10. The Judiciary Sentencing Policy Guidelines state as follows in respect to Section 333 (2) of the CPC:-
1. 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.
 2. 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 Bethwel Wilson Kibor v Republic [2009] eKLR it was held:-
- “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 22nd September, 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.”
12. I have perused the trial court’s record and specifically the proceedings on sentencing.
13. I find that the Applicant was arrested on 27/7/2022 and arraigned in court for plea on 29/7/2022. He pleaded not guilty and was admitted to a cash bail of Kshs 200,000/- which he could not raise and was remanded in custody. On 1/8/2022, the cash bail was reviewed to Kshs 20,000/= which the Applicant managed to pay on 26/6/2023 through Co-operative Bank of Kenya Limited vide voucher No 3458 and receipt No DBH-0001342.
14. The above establishes that from the time the Applicant was arrested on 27/7/2022 to 26/6/2023 when he managed to secure his release from remand custody was exactly eleven (11) months.
15. In passing sentence, the trial court stated as follows: -
- “Mitigation well noted. Noted also is the age of the accused person. That notwithstanding the victim in this case is the sister-in-law of the accused who is much older than the accused and frail. It would be an act of injustice to her if the action of the accused went unpunished. To balance the two, I will exercise my discretion and sentence the accused to serve 5 years imprisonment”
16. I find that the sentence meted was correct and proper. However, the trial court failed to interpret and apply the requirements under Section 333 (2) of the CPC during sentencing. Consequently, I find that



the instant application is merited and I will reduce the 5 years imprisonment period by eleven (11) months at the date of sentencing.

14. It is so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 2ND DECEMBER 2024.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS .2ND DECEMBER 2024.

In the presence of :

In person..... Applicant

Ms Agatha..... for Respondent

Millygrace.....Court Assistant

