



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION OF THE HIGH COURT

CRIMINAL REVISION NO. 328 OF 2019

BENARD KIBE MWANIKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By an application dated 5th December 2019, the applicant is seeking for orders that, the court be pleased to call for the lower court file and peruse the same for the purposes of invoking the provisions of section 362 and section 333(2) of the Criminal Procedure Code.
2. The application is premised on the provisions of; section 50 of the Constitution of Kenya and all the enabling provisions of the law. The same is further supported by an affidavit sworn by the applicant; in which he avers that, he was charged with the offence of; defilement contrary to section 8(1) (2) of the Sexual Offences Act number 3 of 2006, vide criminal case number; 1170 of 2013, at the Chief Magistrate's Court at Makadara.
3. The case was heard and determined, whereupon he was convicted on 7th March 2009 and sentenced to serve fifteen (15) years in jail. He avers that, the trial took unreasonably too long and/or delayed with "no cogent reason given by the prosecution". Further, the time he spent in prison was not taken into account when he was in imprisonment. Hence, the application for review of the sentence.
4. The Respondent filed submissions dated 18th May 2021, basically, in support of the application by the applicant, to the effect that, the period the appellant spent in custody be considered in view of the fact that, the applicant was in remand throughout the trial, and the trial court did not factor the same in the sentence meted.
5. I have considered the application in total and I find that, the applicant was arrested on 11th March 2013, and arraigned in court on 14th March 2013; charged with the offence of; defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act No. 3 of 2006, and an alternative count of; committing an indecent act with a child contrary to section 11 (a) of the Act
6. Upon taking a plea of not guilty, he was released on cash bail of Kshs 50,000 and later bond of Kshs 200,000 with one surety of like amount. From the copy of the committal warrant, the applicant did not meet the bond terms and remained in custody until the date of sentencing on 7th March 2019.
7. The court record further indicates that, before the applicant was sentenced, the court stated as follows;

"I have considered the circumstances of the offence and the mitigation and the apparent age of the victim. Accused is sentenced to serve fifteen (15) years in jail. Right of appeal fourteen (14) days"

8. It is therefore clear that, the learned Trial Magistrate did not consider the period the applicant was in custody as it is not indicated anywhere.
9. The provisions of section 333(2) of the Criminal Procedure Code states as follows: -

(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”.

10. **By dint of; the section 333(2) of the Criminal Procedure Code**, the Court of Appeal held **in the case of; Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR** that: -

“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.”

11. Similarly, clause 7.10 to and 7.12 of the Judiciary Sentencing Policy Guidelines states that: -

“7.10: 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.

7. 11: 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.

7.12: An offender convicted of a misdemeanor and had been in custody through-out the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely, under section 35 (1) of the Penal Code.

12. From the aforesaid, it follows that, unless there are exceptional circumstances, the period an accused person spent in custody should be considered while pronouncing the sentence.

13. In the instant matter, that period was not considered and indeed the Respondent supports the application. I therefore find that, it is in the interest of justice that, period of 14th March 2013 to 7th March 2019, being about six (6) years be taken into account. In that case I set aside the sentence herein and substitute with an order that, the custodial sentence meted out by the trial court shall be reduced from fifteen (15) years to nine (9) years imprisonment from the date of conviction and sentence.

It is so ordered.

DATED DELIVERED VIRTUALLY AND SIGNED ON THIS 9TH DAY OF JUNE 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant present in person

No appearance for the applicant

Mr Kiragu for the Respondent

Edwin Ombuna – Court Assistant