



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 287 OF 2019

JOSPAT NDUNGU.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. In an undated application filed by way of a chamber summons on 29th October 2019, the applicant, *Josphat Ndungu* approached this court seeking review of the sentence imposed on him by the trial court in Kibera Chief Magistrate's Court Criminal Case No. 72 of 2015.
2. In the lower court, the applicant was charged jointly with two others with the offence of gang rape contrary to *Section 10 of the Sexual Offences Act No. 3 of 2006*. They were also charged in an alternative count with the offence of committing an indecent act with an adult contrary to *Section 11 (A) of the Sexual Offences Act*.
3. In addition, the applicant and his co-accused faced another count in which they were charged with the offence of assault causing actual bodily harm contrary to *Section 251 of the Penal Code*. They denied the charges in each count.
4. After a full trial, they were all convicted in count 1 and count 2 and they were sentenced to serve 10 years' imprisonment for the offence of gang rape and two years' imprisonment for the offence of causing actual bodily harm. The sentences were ordered to run concurrently.
5. In the instant application, the applicant beseeches this court to review his sentence by taking into account the period he had spent in custody during the trial which in his view was not considered by the trial court when passing sentence.
6. At the hearing, the application was prosecuted by way of oral submissions. In his submissions, the applicant re-iterated that he was not challenging the legality of his sentence but that all he was seeking was to have the time he spent in custody during the trial considered as part of his sentence.
7. The application is contested by the state. In her submissions in opposition to the application, learned prosecuting counsel, *Ms Chege*, asserted that gang rape is a very serious offence and given the sentence meted out on the applicant, it is apparent that the learned trial magistrate considered the period the applicant had spent in custody prior to the date sentence was pronounced. She invited me to dismiss the application for lack of merit.
8. From the foregoing, it is clear that the applicant seeks sentence review on grounds that the learned trial magistrate erred when, in passing sentence, she failed to take into account the period he had spent in custody during the trial as required by *Section 333 (2) of the Criminal Procedure Code*. The application therefore invokes the revisional jurisdiction of this court.
9. The revisional jurisdiction of this court is donated by *Section 362* as read with *Section 364 of the Criminal Procedure Code*. *Section 362* states as follows:

“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.”

As can be deduced from a reading of the provision, the exercise of the court's revisional jurisdiction is limited to correction of any illegality, error or impropriety in orders or decisions made by the trial court or irregularity in criminal proceedings.

10. In this case, the application is premised on grounds that the trial court erred by contravening the provisions of *Section 333 (2) of the Criminal Procedure Code*. *Section 333 (2)* is in the following terms:

“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.”

11. When passing sentence, the learned trial magistrate stated as follows:

“I have considered all the above as well as the mitigation of each accused. I note that accused are 1st offenders and persons of a rather young age. The offence they committed was however heinous and injured the complainant for life. For this, accused deserve a punitive sentence. Each accused to serve ten (10) years imprisonment on count one. In count two, each accused to serve two (2) years imprisonment. The sentences run concurrently. ROA 14 days explained to accused.”

12. From the learned trial magistrate’s presentence notes, it is evident that though she took into account some relevant factors when exercising her discretion in sentencing including the fact that the applicant and his co-accused were first offenders; their plea in mitigation; the severity of the offence of gang rape and its impact on the victim, she did not make any reference to the period the applicant and his co-accused were in lawful custody during the trial. The applicant is therefore correct in his assertion that the trial court failed to consider the period he had spent in custody prior to the conclusion of his trial. A perusal of the trial court’s record shows that the applicant was in remand custody throughout the trial.

13. It is pertinent to note that *Section 333 (2) of the Criminal Procedure Code* is couched in mandatory terms. The provision obligates courts to factor in the period a convict had spent in lawful custody during the trial so that the sentence passed is reduced by the period the offender was in custody. This is a statutory requirement that applies to all sentencing courts irrespective of the seriousness or otherwise of the offence subject of conviction.

14. Having failed to take into account the period the applicant had spent in custody during the trial, the learned trial magistrate violated the proviso to *section 333 (2) of the Criminal Procedure Code*. This omission amounted to an error of law which if not corrected by this court may infringe on the applicant’s constitutional right to equal benefit and equal protection of the law which is guaranteed under *Article 27 (1) of the Constitution*.

15. Flowing from the foregoing, I find merit in the application and it is hereby allowed on terms that the applicant’s sentence shall take effect from the date of his arrest which is 1st December 2015.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2021.

C. W. GITHUA

JUDGE

In the presence of:

Ms Kimani holding brief for Ms Ndombi for the respondent

Applicant present

Ms Karwitha: Court Assistant