



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL REVISION NO. E030 OF 2020

JAMES MUTUA WANZA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. **JAMES MUTUA WANZA**, the Applicant herein was charged with the offence of Attempted Defilement contrary to section **9(1)** as read with **9 (2)** of the **Sexual Offences Act No. 3 of 2006**. He also faced an alternative count of indecent act with a child contrary to section **11(1)** of the **Sexual Offences Act No. 3 of 2006**. He pleaded not guilty and the case proceeded to full hearing. He was convicted on the main count and ordered to serve 12 years' imprisonment.

2. The Applicant has filed the present application in which he seeks revision of sentence pursuant to the provisions of section **333(2)** of the **Criminal Procedure Code** seeking the court to review sentence by taking account of the time spent in custody as provided in section **333(2)** of the **Criminal Procedure Code** and **Article 50(2) of the Constitution of Kenya 2010**.

3. The application was canvassed by way of written submissions.

4. The Applicant's gravamen is that time spent in custody before sentencing was not considered which was in contravention of **Article 50(2)** of the **Constitution of Kenya** and section **333 (2) of the CPC**. This position was reiterated in his submission.

5. Mr. Mwangera for the Respondent in his submission submitted that the Applicant was released on bond. On the hearing date, **10th October, 2016** the Applicant failed to appear in court and he was re-arrested on **8th November, 2016** and subsequently stayed in custody till **27th April, 2018**. He further submitted that, the Applicant spent a total of **Five Hundred and Thirty-Five (535) days** in custody prior to his conviction and sentence. He urged this Honourable Court to factor in the days spent by the Applicant in custody.

6. The issue herein is in the nature of re-sentencing. Re-sentencing hearing; is neither a hearing *de novo* nor an appeal. It is a proceeding undertaken within the court's power to review sentence only. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding *inter alia*, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

7. In light of the application, the relevant law as well as the submissions by the parties, I see only one issue for determination;

a) Whether the application has merit in so far as it is founded on section 333 (2) of the CPC.

8. The application herein is for redress of denial or violation of a right and or fundamental freedom in the Bill of Rights. It is premised upon section **333(2)** of the Criminal Procedure Code and **Article 50(2)(p)** of the Constitution. The specific allegation made is that the sentencing Magistrate did not take account of the time he spent in custody prior to the sentencing, thus, violating or denying him the right to fair trial.

9. Section **333(2)** of the **Criminal Procedure Code** provides as hereunder:

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the

warrant, not being a sentence of death.

(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. A preliminary matter; Section 333(2) of the **Criminal Procedure Code** does not make a distinction between re-sentencing and original sentencing. It refers to *the sentencing judge or magistrate* and time spent in custody, *prior to such sentence...* For clarity, however, time spent in custody in section 333(2) of the **Criminal Procedure Code** includes the time spent in custody during trial as well as the period served in the original sentence, in case of resentencing or revision of sentence.

11. Be that as it may, the requirement in section 333(2) of the **Criminal Procedure Code** is inextricable to and concerns sentencing. And, sentencing is part of fair trial. Failure to take account of time spent in custody subjects a person to a more severe sentence which infringes the right to fair trial. The right to fair trial includes the right to less severe sentence. See **Article 50(2)(p)** of the Constitution, that: -

50(2) Every accused person has the right to a fair trial, which includes the right—

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;

12. In some situations, especially in resentencing, failure to give effect to section 333(2) of the **Criminal Procedure Code**, may result into embarrassing absurdity and imposition of illegal sentence.

13. **Article 23(1)** of the Constitution provides that;

‘The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.’

14. **Article 165(3)(b)** of the Constitution provides that:

Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

15. Accordingly, sentencing that denies a person the benefits under section 333(2) of the **Criminal Procedure Code**, finds a cause of action in the nature of a constitutional application for redress of a denial or a violation of a right or fundamental freedom in the Bill of Rights; therein lies court’s jurisdiction derived from **Article 23(1)** and **165(3)(b)** of the Constitution to entertain this application.

16. The foregoing recapitulation of the constitutional vitality in section 333(2) of the **Criminal Procedure Code** leads to two questions; (1) whether courts may choose to give or not to give effect to the requirements in the section; and (2) how the court should give such effect? The section does not state how the court should take account of the period spent in custody. However, the emerging jurisprudence show that courts are obliged to take into account the period spent in custody prior to the sentence. The Court of Appeal in **Ahamad Abolfathi Mohammed & Another Vs. Republic [2]** held 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...

17. More judicial pronouncements; The Court of Appeal in **Bethwel Wilson Kibor Vs. Republic** expressed itself as follows:

“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.”

18. 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.

19. According to section 137I (2) (a) of the CPC: -

(2) In passing a sentence, the court shall take into account—

(a) the period during which the accused person has been in custody;

20. It is now appropriate to state that the requirement in section 333(2) of the **Criminal Procedure Code** is not optional. Failure to comply with the section; (1) is injurious to the right of the accused to less severe sentence; (2) subjects the accused to a more severe sentence than the one prescribed; and (2) inadvertently condones deprivation of liberty contrary to law. The section must, therefore, be given real effect by setting commencement date of sentence in such way that it reflects the period spent in custody in the sentence imposed; lest the sentence should be amenable to impeachment in a constitutional application for redress for denial or violation of a right or fundamental freedom enshrined in the Bill of Rights.

21. The record herein consists of the Principal Magistrate's Court at Kithimani typed proceedings and Judgment. The following relevant dates are discernible from the record; the accused was released on bond and failed to appear in court on the date of the hearing, **10th October 2016**, and he was re-arrested on 8th November, 2016 and subsequently stayed in custody till **27th April, 2018**. The Applicant spent a total of **535 days** in custody.

22. The original sentence was 12 years' imprisonment and given the position of the law adumbrated above, the Applicant is entitled to a sentence less the **535 days** spent in custody as a matter of right. **Article 27(3)** of the Constitution requires that: -

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom

23. The Applicant was entitled to have the period that he had spent in remand considered or factored in the sentence. This was not done. The State conceded to the application. The record shows that he was in remand custody for **Five Hundred and Thirty-Five (535) days** which is **One (1) Year Five (5) Months and Nineteen (19) days**. The same will be deducted from the **12 years** meted on him. I find that the application has merit and is allowed. The sentence of **12 years** imposed by the trial court on **27th April, 2018** is hereby reviewed and set aside and substituted with a sentence of **Ten (10) years Five (5) months and Eleven (11) days** which shall commence from the date of conviction namely **17th April, 2018**.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE