



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CRIMINAL REVISION NO. E032 OF 2020

JMM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. **JMM**, the Applicant herein was charged with the offence of incest by a male person contrary to section **20(1)** as read with section **20(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 subsequently convicted on the main count and ordered to serve 15 years' imprisonment.

2. The Applicant was aggrieved by that decision and lodged an appeal in the High Court vide Machakos **HCCRA No.117 of 2019** against the decision of the magistrates court. The High Court vide a judgement dated 15/10/2020 dismissed the appeal and upheld the conviction and sentence by the trial court.

3. 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 the sentence by taking account of the time spent in custody as provided in section **333(2)** of the **Criminal Procedure Code** and **Article 27(i)** of the Constitution of Kenya 2010.

4. The application was canvassed by way of oral submissions.

5. The Applicant's gravamen is that the time spent in remand custody before sentencing was not considered which was in contravention of **Article 27(1) (2) and (4) ,29(f) and 50(2) (p)** of the Constitution of Kenya and section **333 (2) of the CPC**. This position was reiterated in his submission.

6. Mr. Mwongera for the Respondent in his oral submission submitted that the Applicant took plea on **10th June, 2015** and that the bond was approved on **30th July, 2015**. He submitted that the Applicant was in custody for a period of fifty (**50**) days before being released and he later failed to appear in court on **13th October 2016** which prompted the issuance of a warrant of arrest. He further submitted that the Applicant was apprehended on **9th May, 2017** whereupon his bond was cancelled that his case proceeded while he remained in custody till **7th September, 2017** when his sentence was meted. He noted that the Applicant spent a total of **One Hundred and Seventy-One (171)** days in custody. He urged the court to subtract the same from the 15 years' sentence meted out on the Applicant.

7. 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.

8. In light of the application, the relevant law as well as the submissions by the parties, I see two issues for determination;

a) Whether this court has jurisdiction in this matter.

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

9. It has been authoritatively stated that jurisdiction is everything and without it the court cannot lawfully adjudicate over the dispute in issue. See the decision of **Nyarangi, J.A.** in the often-cited case of **The Owners Of Motor Vessel Lilian "S" Vs. Caltex Oil (Kenya) Ltd [1989]**

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. The Supreme Court of Kenya buttressed the essence of jurisdiction in **SAMUEL KAMAU MACHARIA & ANOTHER VS. KENYA COMMERCIAL BANK LTD & 2 OTHERS, APPLICATION NO. 2 OF 2011**, where it pronounced that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

11. 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, **Article 27, 29(f) and 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.

12. **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.

13. 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.

14. 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;

15. 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.

16. **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.’

17. **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;

18. 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.

19. On that basis, I find that this court has jurisdiction to determine the question whether the applicant’s right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as claimed. Whether the application succeeds is a different thing altogether.

20. 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...

21. 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.”

22. 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.

23. According to section 137L (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;

24. 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 a 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.

25. The record herein consists of the Machakos trial court typed proceedings and the High Court appeal proceedings and judgment. The following relevant dates are discernible from the record; the accused was arraigned in court on **10th June, 2015** and that bond was approved on **30th July, 2015** and had spent **50 days** in custody. Applicant was set to appear in court on **13th October, 2016** but he absconded prompting the issuance of his warrant of arrest. On **9th May, 2017** his bond was cancelled and the matter proceeded while he remained in custody till **7th September, 2017** when sentence was meted out. The Applicant spent a total of **171 days** in custody.

26. The original sentence was 15 years’ imprisonment. In light of all these factors, this court found the lower court’s sentence to be appropriate. Given the position of the law adumbrated above, the Applicant is entitled to a sentence less by the **171 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

27. 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 (5) months and Twenty-One (21) days**. The same will be deducted from the **15 years** meted on him. I find that the application has merit and is allowed. The sentence of **15 years** imposed by the trial court on **7th September, 2017** is hereby reviewed and set aside and substituted with a sentence of **10 years Seven (7) months and Eleven (11) days** which shall commence from the date of conviction namely **7th September, 2017**.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE