



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei J

CRIMINAL REVISION NO. E004 OF 2021

IN A MATTER PURSUANT TO ARTICLE 50(2P) OF THE CONSTITUTION AND SECTION 137 (i) (2(a) AND 326 OF THE CPC CAP 75 LAWS OF KENYA AND ALL THE ENABLING ARTICLES & SECTIONS OF THE LAW

(IN THE MATTER BEFORE SPMS MAVOKO IN CRIMINAL CASE NO. S.O 10/016 FOR THE OFFENCE OF RAPE C/SEC. 3(1) A ARW SEC. 3 OF S.O ACT NO3/2006 JUDGEMENT DATED 3/05/2019 BEFORE HON. J.A. AGOMNDA-SPM)

BETWEEN

THOMAS KOROSO MOGIRE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The application filed on 15th January, 2021 is seeking the court to review sentence by taking account of the time spent in custody as provided in section 333(2), section 362, 137I (2) of the **Criminal Procedure Code** and **Article 50(2)(p)** of the **Constitution of Kenya**.
2. The Applicant, **Thomas Koroso Mogire**, was convicted for the offence of rape contrary to section 3(1)(a) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve **10 years'** imprisonment by **Hon. J. A. Agonda** on **3rd May, 2019**.
3. The application was canvassed by way of oral 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)(p)** of the **Constitution of Kenya** and section **333 (2)** of the Criminal Procedure Code. This position was reiterated in his oral submission where he has urged the court to review the sentence and direct that the sentence do commence from the date of his arrest namely 7/11/2016.
5. Mr. Mwangera for the Respondent in his oral submissions submitted that the Applicant was arrested on 7th November, 2016 and spent time in custody till his sentence was meted out on 3rd May, 2019. He further submitted that the Applicant spent a total of **Nine Hundred (900)** days in custody prior to his conviction and sentence. He urged the court to factor in the days spent by the Applicant in custody.
6. I have considered the application and the oral submissions. The power of this court to grant orders sought is enshrined in Section **362** of the **Criminal Procedure Code** that provides thus:

“...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.”

7. In the case of **Bernard Kimani Gacheru Vs. Republic, Cr. App No. 188 OF 2000** The Court of Appeal stated thus:

“...It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or

that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

8. The trial court had the discretion of imposing sentence and it took into consideration the nature of the offence and mitigating factors stated by the Applicant prior to meting out the sentence.

9. The Applicant also complains that the period he was in custody during trial was not taken into account. Section 333(2) of the Criminal Procedure Code provides thus:

“...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. In the case of Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 Of 2016 (Unreported) the Court of Appeal held thus:

“By dint of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “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.”

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. The trial court in its sentence dated 3rd May, 2019 did take into account the period the Applicant spent in remand though it did not indicate when the sentence was to run but obviously from the date of conviction as the period spent in custody had already been factored into account. The Learned Justices of the Supreme court of Uganda In The Case Of Bukenya V Uganda (Criminal Appeal No. 17 Of 2010) [2012] UGSC 3 (29 January 2013) stated that;

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the court would give. But it must be considered and that consideration must be noted in the judgement.

14. The trial court was required to specifically state that it had considered the period the Applicant was in custody which was not the case herein. It is noted that the learned trial magistrate did not mention anything regarding the fact that the applicant had been in custody throughout the trial and did not indicate whether the sentence was to commence from the date of arrest or conviction. As it has been noted that the applicant was arrested on 7/11/2016 and remained in custody throughout then the provisions of section 333(2) of the Criminal Procedure Code ought to have been taken into account as they are couched in mandatory terms. The applicant is thus entitled to have those periods factored into his sentence. The sentence of ten years meted out on the applicant was lawful as the same was the minimum possible in law under section 3(3) of the Sexual Offences Act. Indeed, the applicant does not dispute the same save only that the period spent in custody be considered. I am satisfied that the request for revision of sentence is merited in the circumstances of this case.

15. In light of the foregoing, the application for a revision is merited and succeeds to the extent that the sentence of ten years imposed by the trial court shall commence from the date of arrest namely 7/11/2016.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 23RD DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE