



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NUMBER 190 OF 2019

JOSPHAT KIBET KORIR.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. The application before me is the Notice of Motion filed on 29th November 2019 brought under **Section 363 and 364 of the Criminal Procedure Code and all other enabling provisions of the law**. The applicant seeks orders;

- *That his sentence in Molo Chief Magistrate's Criminal Case Number 1038 of 2014 be reviewed to non-custodial sentence.*
- *That the court to invoke Section 362, 363 and 364 (b) of the Criminal Procedure Code, provisions of the Probation of Offenders Act and review the balance of his sentence to a non-custodial sentence.*

2. The application is supported by the applicant's affidavit in support where he depones;

- That he was convicted and sentenced to fifteen (15) years imprisonment for defilement Contrary to Section 8(3) of the Sexual Offences Act.
- That his appeal to this court was found to have no merit in HCRA 63 of 2015 and was dismissed.
- That having been in custody for fifteen (15) years since he was arrested, meant that he had served considerable duration of his sentence, during which he had undergone various vocational trainings, and was utterly remorseful for the offence.

3. During the hearing of the application the applicant conceded that he had been partially successful on appeal and the original sentence of twenty (20) years imprisonment had been reduced to fifteen. He submitted that he had parents at home, a wife and a child who needed his support.

4. In opposing the application Ms Wambui for the state urged the court to maintain the applicant's sentence, keeping in mind, the objective of sentencing, the nature of the offence, the need for the applicant to remain in prison so as to reform. The fact that the lengthy sentence were indeed a reflection of how society views sexual offences. She urged the court to consider the manner in which the offence happened, the applicant was armed with a knife, and afterwards went into hiding. That the record would show that the applicant was armed with a knife.

5. Two issues for determination;

- (i) Whether the period the applicant stayed in remand custody was considered during the sentencing?*
- (ii) Whether the application for review has merit?*

6. On the first issue up until the **Dismas Kilwake** case, where the Court of Appeal held that there was no mandatoriness in the minimum sentence stated in the **Sexual Offences Act, Section 8**, courts always applied those sentences as mandatory minimum sentences in which the court would only enhance the sentence.

7. From the trial court's record, there was no consideration of the period the applicant had remained in custody. On appeal in **Josphat Kibet**

Korir v Republic [2017] eKLR, this court reduced the sentence from twenty (20) years to fifteen (15) years to comply with **Section 8(4) of the Sexual Offences Act**, and ordered that the fifteen (15) years imprisonment to run from the date of conviction by the lower trial court. Hence, again the period the applicant had spent in remand custody was not taken into consideration. He was arrested on 19th April, 2014 and brought to court on 22nd April, 2014 as per the charge sheet. He was sentenced on 29th March 2016. He was in custody for almost two (2) years before he began to serve his sentence. Clearly therefore this period was not taken into consideration by both the trial court and this court.

8. On the second issue, the applicant seeks review of his sentence, this is a remedy that comes under **Section 362, 363 and 364 of the Criminal Procedure Code**

“S.362. Power of High Court to call for records

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.

S.363. Subordinate court may call for records of inferior court

(1) A subordinate court of the first class may call for and examine the record

of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.

(2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court.

S.364. Powers of High Court on revision

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

9. This can only happen when this court is exercising its supervisory powers under **Section 362 or Article 165**. What orders to issue, I think the only remedy available to the applicant is the review on account of **Section 333 of the Criminal Procedure Code**, which states;

“S. 333. Warrant in case of sentence of imprisonment

(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 (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. The applicant was entitled to a consideration of the period he spent in custody prior to his sentence, and this ought to have been taken into consideration while sentencing him on appeal. That did not happen and I would consider that this court is empowered to correct that error, in totality, I find that having appealed against his conviction and sentence and this court having dealt with that issue the court has no jurisdiction under **Section 362, 363 and 364** to review its own orders. Hence that part of the application must fail.

11. With regard to the period spent in custody prior to sentence, I find that an error was made, and his sentence ought to run from 19th April, 2014.

12. Orders accordingly.

Dated and Signed and Delivered at Nakuru this 9th Day of July 2020.

Mumbua T. Matheka,

Judge