Omollo v Republic (Criminal Appeal 92 of 2020)
[2025] KECA 1071 (KLR) (13 June 2025) (Judgment)

Neutral citation: [2025] KECA 1071 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 92 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

JUNE 13, 2025

BETWEEN

GEORGE OMOLLO ..... APPELLANT

AND

REPUBIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (D.S. Majanja, J.) dated 30th August 2016 in Criminal Appeal 120 of 2015)

JUDGMENT

1. The appellant, George Omollo was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on 30th January 2014 within Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of SO, a child aged 15 years. He was convicted and sentenced to 20 years imprisonment. His appeal to the High Court against both conviction and sentence was dismissed.

2. He is now before this Court in an appeal which is against sentence only. The main ground of appeal is that the learned Judge of the High Court erred in failing to consider, the time that he had spent in custody during the pendency of the trial.

3. At the plenary hearing, Ms. Ngire learned counsel appeared for the appellant while Mr. Okango learned prosecution counsel was present for the respondent. Ms Ngire indicated to the Court that although initially the appeal was on both conviction and sentence, the appellant did not wish to pursue the appeal on conviction but on sentence only limited to factoring in the sentence, the time the appellant spent in custody pending trial.

4. In response, Mr. Okango, learned Senior Principal Prosecution Counsel submitted that the appellant was properly convicted and lawfully sentenced and that the Court should not interfere with it. Regarding the plea that the time that the appellant spent in remand custody pending trial be taken into

account in computing sentence in terms of section 333 (2) of the *Criminal Procedure Code* "CPC", the respondent submitted that it is a legal requirement and he conceded the appeal limited to that aspect only. Mr. Okango, conceded to the invocation of section 333(2) of the *Criminal Procedure Code* and confirmed that the appellant was arrested on 10th April 2014 and while he was granted bond, he never executed the bond terms, and when he was convicted on 29th July 2015 he was in remand. Counsel urged the court to uphold the sentence of 20 years imprisonment save that it be held to start from when the appellant was arrested.

5. This being the second appeal, the Court's duty as was held in Karingo vs. Republic (1982) KLR 213 is as follows:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless they are based on no evidence. The test to be applied on the second appeal is whether there was any evidence on which the trial court could find as it did in (Reuben Karori S/O Karanja versus Republic (1956 17 EALA 146)."

6. Similarly, the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) held that:

> Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law.

7. Having considered the record in light of the impugned judgment and the rival submissions presented on sentence and the Courts' mandate, the sole issue for determination is whether the appellant is entitled to a review of sentence imposed pursuant to Section 333(2) of the CPC. That section provides inter alia:

> " 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."

8. Section 333 (2) of CPC requires that the period spent in custody be considered in sentencing. This Court in the case of Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi vs. Republic (Criminal Appeal 135 of 2016) [2018] KECA 743 (KLR) (Crim) (26 January 2018) (Judgment) stated that:

> " 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012.

9. The position is further espoused in the Judiciary Sentencing Policy Guidelines that:

> " 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."

10. The appellant was in custody from the date of his arrest on 10th April 2014 up to 29th July 2015 when he was convicted. By dint of section 333(2) of the CPC, the trial court was obliged to take into account the period that he had spent in custody before he was sentenced which it did not. The appellant is asking this Court to determine that the time of his sentence should start to run from 10th April 2014 when he was arrested.

11. The appellant's request has not been opposed by the respondent. In any case, it is consistent with the proviso to Section 333(2) of the *Criminal Procedure Code* which allows the consideration of the period spent in custody before his conviction and thus, the appellant's sentence of 20 years imprisonment shall commence on 10th April 2014, the date that he was arrested and remanded in custody. The appeal thus succeeds to that very limited extent only.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR