**Mamati v Republic (Criminal Appeal 220 of 2019)**
**[2024] KECA 328 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KECA 328 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 220 OF 2019**

**HM OKWENGU, JM MATIVO & JM NGUGI, JJA**

**MARCH 15, 2024**

**BETWEEN**

**BENARD SIMIYU MAMATI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal against the judgement of the High Court of Kenya at Bungoma (Ali-Aroni J. as she then was) dated 10th June 2019 in H.C Criminal Appeal No. 39 of 2014)***

## JUDGMENT

1. The appellant, Benard Simiyu Mamati, was charged with the offence of murder contrary to section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 18th November 2014 at Sinoko Village, within Kimilili District in Bungoma County, he murdered his brother, Jackson Wafula Mamati. The appellant pleaded not guilty to the charges and the matter proceeded to trial before the High Court at Bungoma. He was convicted in a Judgement delivered on 10th June 2019 and sentenced to serve 21 years in prison.

2. Aggrieved by the verdict, the appellant lodged the instant appeal challenging both conviction and sentence. However, during the hearing of this appeal on 12th March 2024, the appellant's counsel Mr. Bagada informed the Court that the appellant was only pursuing his appeal against the sentence.

3. Mr. Bagada, learned counsel for the appellant, maintained that the learned Judge did not comply with section 333(2) of the *Criminal Procedure Code* when imposing the sentence. Counsel argued that it was not clear whether the period the appellant spent in custody was taken into account when imposing the sentence or that the appellant was sentenced to 21 years to be computed from the date the appellant was arraigned in court. Counsel pointed out that at the time of sentencing, the appellant had already spent 7 years in remand.

4. It was Mr. Bagada's submission that the period spent in custody before sentence ought to be taken into account while computing the sentence and that the learned Judge erred in failing to take into account the more than 7 years the appellant stayed in remand before conviction and sentence. Counsel relied on this Court's dictum in *Ahmad Aboifathi Mohammed & another vs. Republic* [2018] eKLR, where this Court 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 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.

5. Lastly, Mr. Bagada argued that in passing the sentence, the trial Court did not consider the age of the appellant. Counsel urged the Court to consider appellant's current age approaching 70 years.

6. Mr. Oyiembo, learned counsel for the respondent, maintained that the court considered the appellant's mitigation and took into account the years the appellant was in custody in sentencing the appellant.

7. In sentencing the appellant, the learned Judge after considering the appellant's mitigation that he was remorseful, the sole bread winner of his seven children since his wife ran away and no one was looking after them, and that he had been in custody since 2014, expressed herself as follows:

> " SENTENCE
>
> I have considered mitigation. Causing death is a serious offence and calls for stiff sentence.
>
> Accused is sentenced to 21 years imprisonment having taken account of the years in custody."

8. The key issue for consideration is whether the learned judge, in computing the sentence, complied with section 333(2) of the *Criminal Procedure Code* which provides as follows :

> " 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. (emphasis court)."

9. The word "shall" used in the proviso to the above section is worth noting. While passing a sentence, trial Courts are obligated by the law to take into account the period the accused has been held in custody while computing the sentence period. This position is supported by the Judiciary Sentencing Policy Guidelines which regarding to section 333(2) states as follows:

> " 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. As the record shows, the learned judge stated: "accused is sentenced to 21 years imprisonment having taken account of the years in custody." The appellant's counsel strongly argued that the period the appellant spent in custody was not considered and as a result, the appellant is serving 21 years. We

do not agree with this reasoning. In our view, the judge considered the period the appellant spent in custody while arriving at the period of 21 years and stated so expressly.

11. Regarding the appellant's age, as was admitted by the appellant's counsel, the issue of age was not raised during the mitigation. We have, however, considered the arguments. We are aware that sentencing is an exercise of judicial discretion and an appellate Court will not lightly interfere with sentence uncles it is outrightly harsh or unlawful. We have also considered the nature and the severity of the offence, the principles of proportionality, deterrence and rehabilitation.

12. We note from the record that the appellant surrendered himself to the police on 23rd November 2014. He appeared in court on 10th December 2014. He was convicted on 10th June 2019. He was in custody for a period of 4 years, 6 months and 13 days.

13. We find that this is a proper case for us to interfere with the sentence imposed by the High Court. Accordingly, we reduce the sentence of 21 years to 15 years inclusive of the time taken in remand. The 15 year period shall therefore be computed from the date of the appellant's conviction, that is 10th June 2019.

**DATED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF FEBRUARY, 2024.**

**HANNAH OKWENGU**

**.....**

**JUDGE OF APPEAL**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

**JOEL NGUGI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**