Sikefu v Republic (Miscellaneous Application E001 of 2024)
[2025] KEHC 12237 (KLR) (29 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12237 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

MISCELLANEOUS APPLICATION E001 OF 2024

H NAMISI, J

AUGUST 29, 2025

BETWEEN

LAMECK NYABUTO SIKEFU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the original Conviction and Sentence in the Chief Magistrates' Court at Thika Criminal Case No. 1573 of 2020 by Hon. Atiang Mitullah, Senior Principal Magistrate on 16 February 2023)

RULING

1. The Applicant was accused of robbing Jane Muthoni Ndegwa of her mobile phone and hand bag on 1 September 2020 at Kenyatta Road in Juja Sub-county, Kiambu County. The Applicant was charged with the offence of robbery with violence and an alternative charge of handling stolen goods, contrary to section 322 (1) of the Penal Code. Upon hearing the prosecution's case, the trial court found that the prosecution had failed to prove the main charge beyond reasonable doubt, and subsequently, acquitted the Applicant on the charge of robbery with violence.

2. On the alternative charge, the trial court found that it was not disputed that the Applicant led Police Officers to his house on 18 September 2020, where various items were recovered, including the stolen bag. In his defence, the Applicant did not give any explanation as to how he came to be in possession of the items and in particular, the bag that was identified by the complainant. The Applicant was subsequently found guilty of the offence of handling stolen goods contrary to section 322(1) of the Penal Code.

3. In sentencing, the trial court noted as follows:

> " I have considered the mitigation by the accused person. The offence that the accused has been convicted of attracts a maximum sentence of 14 years in custody with hard labor. The above notwithstanding, I take note that accused has been in custody since September 2020. I have also noted that accused is remorseful for the offence committed. It therefore calls for leniency. To that end, I hereby sentence accused to serve (5) years in custody."

4. In his present Application, Notice of Motion dated 22 March 2023, the Applicant seeks a review of the sentence imposed by the trial court. In his Supporting Affidavit, the Applicant avers that the trial Court did not consider the time already spent in custody. He states that he is a father to two school-going children who reside in his rented house, who depend on him solely for their upkeep.

5. The Respondent opposed the Application, stating that that the Applicant has not argued or even suggested that the sentence passed is manifestly harsh or excessive, that it was illegal or improper or that the trial court acted on the wrong principles or omitted relevant factors. The Respondent contends that generalized reasons are not sufficient grounds for this Court to interfere with the discretion of the trial court in sentencing.

6. The Application was canvassed by way of written submissions.

Analysis & Determination

7. On perusal of the application and the submissions, the main issue for determination herein is whether the Applicant is entitled to review of sentence under Section 333(2) of the Criminal Procedure Code. Section 333(2) provides:

> " 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

8. This Court is, therefore, obligated to take into account the period the Applicant spent in custody. Addressing this issue in Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR, the Court of Appeal held that:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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. Similarly, in Bethwel Wilson Kibor vs Republic [2009] eKLR, the Court of Appeal stated:

> "By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into 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 10 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."

10. I have considered the record of the trial court. Although the trial Court stated that it considered the period when the Applicant was in custody, the same is not evident in the sentence. The sentence should be clear as to the date of commencement. This, therefore, is good ground to invoke this Court's jurisdiction to interfere with the discretion and the sentence meted out by the trial Court.

11. I, therefore, set aside the sentence by the trial court and substitute the same with a sentence of five (5) years in custody to be computed from 18 September 2020, being the date of arrest.

DATED AND DELIVERED AT THIKA THIS 29 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Applicant: Present at Kamiti Medium Prison

Respondent: Ms. Torosi

Court Assistant: Lucy Mwangi