Ikurut v Republic (Criminal Appeal E036 of 2023)
[2024] KEHC 285 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 285 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E036 OF 2023

RN NYAKUNDI, J

JANUARY 24, 2024

BETWEEN

SIMON IKURUT ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for re-sentencing in Cr. Case No. 218 of 2017)

RULING

Coram: Before Justice R. Nyakundi

Mr. Mugun for the State

1. The applicant was convicted with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the *sexual offences Act* No. 3 of 2006. The applicant was convicted of the said charge and a sentence of 10 years was imposed.

2. The applicant seeks review of the sentence on grounds that he is remorseful and reformed by virtue of the incarceration and that this court has unlimited original jurisdiction powers and discretion as contemplated in article 22(1), 23, 159(2) a & b, 165(3) (a), (b) & (d) (6), (7) and 258(1) of *the Constitution* of Kenya, 2010.

Analysis and Determination

3. Even though the Applicant appears to have reformed whilst in prison, it ought to be remembered that when he committed the offence, he broke the trust and responsibility that was bestowed on him by the community. When the offence is committed against a vulnerable member of the society, such as minors, the offender must appreciate that that calls for much greater effort on his part, to regain the trust of the society.

4. The punishment prescribed by the law for the offence of defilement with a child between the age of 16 and 18 years, is imprisonment for a term of not less than 15 years. I note that the accused person has already served 4 years imprisonment.

5. Ordinarily, had the trial not considered the applicant's mitigation the minimum sentence would be imposed.

6. In the case of *Francis Karioko Muruatetu & another vs Republic*, Criminal Petition No. 15 of 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

> " It is for this Court to ensure that all persons enjoy the rights to dignity.
>
> Failing to allow a Judge discretion to take into consideration the convict's mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity."

7. In the "*Muruatetu* Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

> " (a) age of the offender;
>
> (b) being a first offender;
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> (c) whether the offender pleaded guilty;
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> (d) character and record of the offender;
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> (e) commission of the offence in response to gender-based violence;
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> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;
>
> (h) any other factor that the Court considers relevant."

8. In the present case I have considered the aforementioned guidelines and I am satisfied that the court considered the applicant's mitigation in sentencing him to serve 10 years imprisonment.

9. Perhaps I should consider the application on account of section 333(2) of the *Criminal procedure code*. The section provides as follows:

> (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 Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

11. In the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR where 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 June 19, 2012."

12. It follows then that the court should state in its decision that it indeed factored the time spent by the applicant in custody in computing the appropriate sentence. As the legislature is presumed to have created a coherent, consistent and harmonious statutory scheme within the scope of the *Criminal Procedure Code* section 333 (2) should be interpreted in a manner that is consistent with the principle and purpose of sentencing set out in the court and other applicable instruments. In this case the court is called upon to apply the law as it is to evaluate how much credit is due to the applicant. In my view there is no rebuttal that the applicant circumstances do not justify enhanced credit under section 333 (2) of the CPC.

13. I share the same thoughts as the court in Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR that the trial court should have directed the applicant's sentence of imprisonment to run from the date of arrest.

14. Therefore, in compliance with section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the Accused person was in custody during hearing and determination of the case before sentence was meted out.

15. In my view the period of 10 years imprisonment be ordered to commence from the date of arrest as the pre-trial detention count for something under the law. Given that to be the position the committal warrants be amended accordingly as things stand a judge should not deny credit without good reason. To do so offends one's sense of fairness.

DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY, 2024

.....

R. NYAKUNDI

JUDGE