Kisuti v Republic (Criminal Revision E054 of 2023)
[2024] KEHC 1820 (KLR) (26 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1820 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION E054 OF 2023

FR OLEL, J

FEBRUARY 26, 2024

BETWEEN

BENARD MBITHI KISUTI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged In Machakos Cmcr Case No E456 of 2022, with the offence of causing grievous harm to one Daniel Kiokoby cutting him on his hands using a panga. After trial he was convicted and sentenced to serve 12 month imprisonment or to pay a fine of Kshs.30,000/=. The applicant filed this review application 0n 15th August 2023 and specifically sought that the time spent in remand (11 months), be factored in the sentence in line with section 333(2) of the *Criminal Procedure Act.*

2. The applicant chose to rely on his affidavit filed in support of his application and oral submissions made in court where he restated what was in his affidavit. The Applicant further did file written submissions, where he relied on the case of *Ahamad Abolifah Mohammed & Another v Republic* [2018] eKLR , *Bethwel Wilson Kibor v Republic* [2009] eKLR and the Judiciary sentencing policy all of which provided that it was just and proper for the trial court to consider the period spent in custody during time of sentence. Further in the said submissions, the Applicant did in the alternative plead with court to place him on probation, as provided for under section 4(2) of the *Probation of Offender Act*, Cap 64 and the citation of *Godfrey Muchanji Ojiambo v Republic* [2019] eKLR.

3. The respondent, through Prosecution counsel Mr. Mangare did not oppose this application and stated that the court in its discretion could determination the issues raised after considering the proceedings in the primary file.

B.Analysis of Law

4. I have considered the application as well as the response by the Prosecution counsel.

5. The powers of the High court in revision are contained in Section 362 through to 366 of the *Criminal Procedure Code* (cap.75). Section 362 specifically provides as follows: -

> " 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".

6. What the High Court can do under its revision jurisdiction is stated under Section 364 of the *Criminal Procedure Code* Cap 362, which states as follows: -

> " (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 section 354, 357 and 358, and may enhance sentence;.
>
> (b) in the case of any other order than an order of acquittal, alter or reverse the order.
>
> (2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

7. Section 333(2) of the *Criminal Procedure Code* provides that;

> " 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 into account of the period spent in custody"

8. The provisions of Judiciary sentencing policy Guidelines also state that;

> " The provision's 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 has been in custody during 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 the offender, the court must take into account the period in which the offender was held in custody during the trial."

9. The applicant has a legitimate expectation that during trial he is subject to equal treatment before law and is accorded a fair hearing, which includes his right to have all relevant provisions of the law to be applied in favorable where the circumstances allow. See *Ahmad Abolfathi Mohammed & Another v Republic* [2018] eKLR & *Bethwel Wilson Kibor v Republic* [2009] eKLR.

10. The applicant was arrested on 11.09.2022 and arraigned before court on the following day. He was granted bond of Kshs.30,000/=, but he did raise the same and spent time in custody until 07.08.2023, when he was sentenced to pay a fine of Kshs.30,000/= or to serve a term of 12 months imprisonment. The applicant during mitigation did bring it to the attention of the trial magistrate that he had been in custody during trial and asked for this period to be considered. Further he sought for lenience. The trial court did consider the same and handed down the sentence as aforestated.

9. The applicant's contention that the period in remand was not considered is therefore not correct. The offence of grievous harm carries a penalty of life imprisonment and I do find that the sentence proffered was appropriate considering that the Applicant had already spent eleven (11) months in remand. There is therefore no basis upon which I can exercise my discretion under section 333(2) of the *Criminal Procedure Code*, Cap 362 and/or the *Probation of Offenders Act*, Cap 64 to have the applicant's sentence reduced and/or to place him on probation for the reminder of his prison term.

10. This application therefore has no merit and the same is dismissed.

11. It is hereby so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF FEBRUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 26th day of February, 2024.

In the presence of;

Applicant present from Machakos Prison

Ms M Otulo for Respondent

Sam - Court Assistant