Mwiti v Republic (Criminal Appeal E065 of 2023)
[2024] KEHC 8308 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E065 OF 2023

LW GITARI, J

JUNE 27, 2024

BETWEEN

ANTONY MWITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal Against the conviction and sentence in Criminal Case No. E005/2021 in the Principal Magistrate Court at Nkubu.)

JUDGMENT

1. The appellant had filed this appeal arising from the conviction and sentence in Criminal Case No. E005/2021 in the Principal Magistrate Court at Nkubu. Based on five grounds the appellant was praying that the appeal be allowed, sentence be set aside, conviction be quashed, and he be set at liberty.
2. Subsequently the appellant filed amended grounds of appeal and raised one ground as follows:-
    1. That the learned trial magistrate erred in both law and facts by failing to note that the period spent in custody (Re-trial) (sic) under Section 333(2) *Criminal Procedure Code* was not considered.
3. The appellant submits that the time spent in custody be considered and be part of the sentence.
4. The respondent opposed the appeal and submitted that the learned trial magistrate had considered the time spent in custody awaiting trial when she passed the sentence as she stated that she had considered that the appellant was in custody for over two (2) years. She urged this court to dismiss the appeal.

5. I have considered the appeal. The only issue for determination is whether the time spent in custody was considered. Section 333(2) of the *Criminal Procedure Code* provides as follows:-

> " 333(2) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

6. The section provides that the period spent in custody awaiting trial must be taken into account at the time of passing sentence.

7. What constitutes taking into account under Section 333(2) (*supra*) has been elaborated explained by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another –v- Republic* (2018) eKLR.

The Court of Appeal stated:-

> " 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 had stated that he had taken into account the period the appellant's 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 in custody. "Taking into account." The period spent in custody must mean considering that period already spent in custody so that the sentence imposed 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 the period already spent in custody. It must be remembered that the proviso to Section 333 of the *Criminal Procedure Code* 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 start from the date of their arrest on 19/6/2021." Emphasis mine.

I am well guided by this decision which is also binding on this court and the courts below. It is clear that where an accused person is arrested and remains in custody throughout the entire trial, that period must be taken into account, not by word but by taking that period to reduce the sentence imposed.

8. In this case the record shows that the learned magistrate considered that the accused person had already spent over two years in custody. She fell into error as she did not reduce the sentence which she imposed by the period the appellant had spent in custody awaiting trial. In the circumstances I find that the ground of appeal must succeed.

Conclusion:

The appeal has merits and is allowed. The appellant was in custody from 4/1/2021 to 27/4/2023 a period of two (2) years, three (3) months and 24 days. The sentence of five (5) years in prison shall be reduced by two years, three months and twenty four (24) days.

9. The Deputy Registrar to serve the order on the Officer in- charge Meru Main Prison where the appellant is serving sentence for compliance.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JUNE 2024.

L.W. GITARI

JUDGE

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

27/6/2024