Kazungu v Republic (Criminal Appeal 8 of 2020)
[2024] KECA 635 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 635 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 8 OF 2020

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 7, 2024

BETWEEN

FURAHA CHARO KAZUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 3rd December 2019 in High Court Criminal Appeal No. 26 of 2019)

JUDGMENT

1. The appellant, Furaha Charo Kazungu, was tried in Malindi Chief Magistrate's Court Criminal Case No. 705 of 2015 and convicted for the offence of Sexual Assault contrary to section 51) (a) (i) (2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that, on the 10th day of October 2015 within Kilifi County, the appellant unlawfully used his finger to penetrate the anus of HSH, the complainant herein.

2. The case against the appellant was that the complainant had gone to the farm to collect some vegetables. While in the process of doing so, the appellant accosted him and inserted his fingers in his anus. For the purposes of this decision, we need not delve deeper into the details of the evidence adduced before the trial court. After hearing the prosecution's as well as the defence case, the learned trial magistrate (Hon. S. R. Wewa) found the case against the appellant proved beyond reasonable doubt and convicted him accordingly. After considering the mitigating circumstances, the learned trial magistrate sentenced the appellant to 10 years imprisonment. In his mitigation, the appellant informed the court that he had been in remand for four years.

3. Aggrieved by that decision, the appellant preferred an appeal to the High Court in Malindi High Court Criminal Appeal No. 26 of 2019. After hearing the appeal, the learned Judge (Nyakundi, J.) found

no merit in the appeal and dismissed it in its entirety on 3rd December 2019. From that decision, the appellant filed the instant appeal.

4. When the appeal was called out for virtual hearing before us on 14th February 2024, the appellant was present from Kilifi Prison while the respondent was represented by learned counsel, Mr. Mwangi Kamanu. Although the respondent had filed its written submissions dated 23rd October 2023, the appellant informed us that he had not done so and was ready to address us orally on his appeal. The appellant then informed us that he was not contesting his conviction, but was only concerned that the 4 years he spent in custody pending the hearing was not factored in his sentence.

5. Mr Kamanu informed us that he was not opposed to the period spent by the appellant in custody before his conviction being taken into account in computing his sentence.

6. Section 333 of the *Criminal Procedure Code* provides that:

> 1. A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

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.

7. The foregoing provision makes it clear that the period during which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. Unless the trial court, in sentencing the accused states and sets out the effect of that period on the sentences meted, the legal implication of the proviso to section 333(2) of the *Criminal Procedure Code* is that the period spent in custody forms part of the eventual sentence.

8. As this Court in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR expressed itself on the provision aforesaid:

> "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. The same provision was likewise dealt with by the Court Bethwel Wilson Kibor v Republic [2009] eKLR where it was held that:

> " By proviso to section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take 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 ten 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. According to The Judiciary Sentencing Policy Guidelines:

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.

11. In this case, since neither the trial court nor the High Court expressly excluded the period which the appellant had spent in custody before sentencing, it must be presumed that the said period is to be taken into account in computing the appellant's sentence.

12. Pursuant to the proviso to section 333(2) of the *Criminal Procedure Code*, we hereby direct that the 4 years spent

by the appellant in custody pending his trial be taken into account in computing his sentence.

13. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

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