



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 03/2014

In the matter between:

MBUSO LIKHWA DLAMINI

APPELLANT

V

REX

RESPONDENT

Neutral Citation: *Mbuso Likhwa Dlamini v Rex (03/2014) [2014]*

SZSC 27 (30 May 2014)

Coram: MOORE JA, DR TWUM JA and DR ODOKI JA

Heard: 12 MAY 2014

Delivered: 30 MAY 2014

Summary

Criminal Appeal – Appeal against sentence – Appellant sentenced to 15 years imprisonment without an option of a fine on 12/02/2010 – Appeal against sentence dismissed and sentence confirmed by Supreme Court on 30/11/2011 without order to deduct period spent in custody – Another application for appeal filed on 29/11/2013 without leave condonation of late filing – Failure of trial judge to take into account period Appellant spent in custody before trial – Failure to do so amounts to misdirection in sentencing – Court orders that period Appellant spent in custody of twenty five months be deducted from his sentence – Appeal allowed.

JUDGMENT

DR B. J. ODOKI, JA

- [1] The Appellant was convicted of murder with extenuating circumstances and sentenced to fifteen (15) years imprisonment without an option of a fine. The trial judge in the court *a quo* did not order that the period the Appellant had spent in custody on remand be deducted from the sentence imposed.
- [2] The Appellant was convicted and sentenced on 16 February 2010. He lodged his application for appeal on 29 November 2013. The main ground of appeal is that the trial judge failed to order that the period of twenty five months he had spent in and remand, be deducted from the sentence.

[3] In his Heads of arguments, Counsel for the Respondent raised two objections to the appeal. The first is that the Appellant failed to comply with the mandatory provisions of Rule 8 (1) of the Court of Appeal Rule 1971, which provide:

“The Notice of Appeal shall be filed within four weeks of the date of the judgment appealed against:

Provided that if there was a written judgment such period shall run from the date of delivery of such written judgment”

[4] Counsel submitted that the Appellant filed his Notice of Appeal on 30 January 2014, two years after delivery of judgment. Counsel submitted further that the matter was not properly before the court as the Appellant had not obtained leave of the court to appeal out of time. He relied on Rule 8 (2) of the Court of Appeal Rules 1971 which provides:

“The Registrar shall not file any Notice of Appeal which is presented after the expiry of the period in paragraph (1) unless leave appeal has been previously been obtained”.

[5] Counsel raised a second objection that the Appellant’s appeal on sentence was finalized on 30 November 2011 under Criminal Appeal No. 18/2011, when the sentenced was confirmed.

[6] As the Appellant was unrepresented, the Court was prepared to condone the late filing of the appeal as it turned out that Counsel for the Respondent was conceding the main ground raised by the Appellant that the

period he spent on remand ought to have been deducted from his sentence of imprisonment.

[7] Sentencing is primary within the discern of the trial court, and an appellate court will not interfere with the sentence unless there was a material irregularly occasioning a miscarriage of justice. In so doing the trial judge must observe the general principles of sentencing. One of those principles is that the period an accused has spent in custody must be taken into account in sentencing the Appellant. The practice is for the court to determine the period the accused has spent in custody and order that it be deducted from the sentence imposed.

[8] In the present case the trial judge in the court *a quo* did not address himself to the issue of taking into consideration the period the Appellant had been in custody while awaiting trial. I am unable to accept the submission of Counsel for the Respondent that the learned judge must have taken into account when passing sentence the period he had spent in custody when he stated,

“The court will look at the personal circumstances of the accused as well as interest of society”

There is no specific mention of the period the Appellant had been in custody and its effect on the sentence. This was in my view a misdirection in sentencing the Appellant.

[9] Learned Counsel conceded that the trial court ought to have ordered the period the Appellant had spent in custody to be deducted from the sentence he imposed. I entirely agree with him and therefore find merit in the Appellant ground of appeal.

[10] However, Counsel for the respondent pointed out that this court dismissed the Appellant's appeal against sentence on 30 November 2011. I have had the benefit of reading the judgment of this court in Criminal Appeal No. 18/2011 where the court stated,

“[11] In the result the appeal is dismissed. The sentence of 15 years imprisonment is confirmed”.

[11] It is not clear whether the issue of the failure of the trial judge to take into account the period the Appellant had been on remand was argued in the first appeal. It is clear from the judgment of this court that this court did not address the issue.

[12] As the Respondent concedes the point that the period the Appellant spent in custody of twenty five months should be deducted from the sentence of fifteen years imposed on the Appellant, I am of the view that this court, in the exercise its inherent powers to do justice, should make the order sought by the Appellant.

[13] Accordingly, this appeal is allowed. It is ordered that the period of twenty five months the Appellant spent in custody while awaiting trial should be deducted from the sentence of fifteen years imprisonment.

DR B. J. ODOKI
JUSTICE OF APPEAL

I Agree

S. A. MOORE
JUSTICE OF APPEAL

I Agree

DR S. TWUM
JUSTICE OF APPEAL

For the Appellant: In Person

For the Respondent: Mr. Stanley Dlamini