Chirchir v Republic (Miscellaneous Criminal Application E006 of 2024) [2024] KEHC 12993 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12993 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E006 OF 2024

RN NYAKUNDI, J

OCTOBER 25, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 19, 20, 22, 25, 27, 28, 29, 50, 51, 159 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF APPLICATION AND ENFORCEMENT OF SECTIONS 333(2), 362 AND 364(1)(B) OF THE CRIMINAL PROCEDURE CODE IN RELATION TO SENTENCES THAT HAVE NOT FACTORED THE TIME SPENT IN CUSTODY

BETWEEN

MOSES BIWOTT CHIRCHIR ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Petitioner herein was charged and convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to serve death sentence at the High Court in Eldoret in Criminal Case No. 01 of 2009.

2. The Petitioner appealed to the Court of Appeal in Criminal Appeal No. 44 of 2017 against the conviction and sentence, which appeal succeeded narrowly on that point to the extent that the Appellant's sentence was reduced to 20 years.

3. What is pending before me for determination is an undated Notice of Motion where the Applicant is seeking the following orders:

    a. That, the prayers sought are on sentence only.

    b. That the petition be allowed, admitted, heard and determined in the soonest time possible.

c. That the petition is seeking enforcement of section 333(2), 362, 364(1) and 365 of the Criminal Procedure Code in relation to sentences that have not factored the time spent in custody in reliance on Article 27(1)(2)(4), 22, 28, 25(c), 50(1)(2) of *the Constitution* of Kenya.

d. That the Petitioner is seeking reduction of his sentence by the period he spent in remand custody but was not factored in the 20 years' sentence.

e. That may this Honorable Court be pleased to consider the provisions of the sentencing policy guidelines of 2016 and invoke the provisions of Article 165(3)(a)(b) and 258 of *the Constitution* of Kenya 2010 and reduce his sentence to reasonable term.

4. The Application is supported by the annexed affidavit dated 3rd January 2024 sworn by Moses Biwott Chirchir, the Petitioner herein where he avers as follows:

a. That I was convicted and sentenced to serve death sentence for the offence of murder contrary to section 303 as read with section 204 of the Penal Code.

b. That I appealed vide court of appeal no. 44 of 2017 where my sentence was reduced to 20 years.

c. That my legal application herein is for sentence review under Article 23(1) of *the Constitution* of Kenya for the consideration of time I spent in pre-trial custody.

d. That I spent 5 years and 7 months in pre-trial custody.

e. That I am requesting for sentence review to a lesser term or be admitted to probation due to health difficulties, currently paralyzed with stroke.

f. That, may this Honourable Court exercise section 333(2) of the CPC and allow my sentence to commence as mitigated.

g. That I am a first offender.

Analysis and Determination

5. On perusal of the application, the main issue for determination herein is whether the Petitioner is entitled to review of sentence under Section 333(2) of the Criminal Procedure Code.

6. Section 333(2) of the Criminal Procedure Code provides: -

> " 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 account of the period spent in custody."

7. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody.

8. The provisions of section 333(2) of the Criminal Procedure Code was the subject of the decision in Ahamad Abolfathi Mohammed & Another vs 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 19th June 2012."

9. The same court in Bethwel Wilson Kibor vs Republic [2009] eKLR expressed itself as follows: -

> " By provision to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into 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 10 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 provision 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. This Court associates itself with the decision of the High Court by Hon. G.V. Odunga in Vincent Sila Jona & 87 Others Vs Kenya Prison Service & 2 Others [2021] eKLR where a joint Petition was filed by 51 Petitioners whose sentences had not been taken into account the time spent in remand and in order to enhance fundamental rights and freedoms of Petitioners while upholding the intention of the sentencing Court declaration on compliance with section 333(2) CPC. The Court held as follows;

> A declaration that Trial Courts are enjoined by Section 333(2) of the Criminal Procedure Code, in imposing sentences, other than sentence of death to take into account the period spent in custody.

A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.

A declaration that section 333(2) CPC applies to the original sentence as well as sentence imposed during resentencing.....

12. The requirement to comply with section 333(2) CPC is mandatory in computation of the sentence to be served by the Convict upon establishing the nature of the sentence to be imposed. The requirement is also amplified by the Judiciary Sentencing Policy and thus an integral part of sentencing process to avoid excessive punishment that is not proportional to the offence committed.

13. In the Rwabugande Moses Vs Uganda (2017) UGSC 8 the Supreme Court of Uganda profoundly held as follows on a constitutional provision with similar provisions with our section 333(2) CPC as follows;

> 15. What is material in that decision is that spent in lawful custody prior to the trial and sentencing of the convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This court used the words to deduct and in an arithmetical way as a guide for the sentencing courts but those metaphors are not derived from *the constitution*
>
> 20. Where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict the sentence would not be interfered with by the appellate Court only because the sentencing judge or justice used different words in the judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower court would not be faulted when in effect the court has complied with the constitutional obligation in Article 23(8) of *the Constitution*

14. I am guided by the principles in the court of Appeal case of Bernard Kimani Gacheru vs Republic (2002) eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

15. It is common to describe the principles enunciated in Bernard case as connoting various factors of error if established by an appeal's court does vitiate the exercise of discretion by the trial court.

16. I can classify them as express errors which include error of principle, an error of law, or an error of fact or failing to take into account relevant matters. The other category of error is commonly referred to as "implied" error because even though an express error is not evident from a review of the process or the observation made at the time of sentence, the sentence imposed is "unreasonable or plainly unjust" with the consequence that error can be implied from the outcome.

17. The Petitioner herein was charged and convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to serve death sentence at the High Court in Eldoret in Criminal Case No. 01 of 2009.

18. The Petitioner appealed to the Court of Appeal in Criminal Appeal No. 44 of 2017 against the conviction and sentence, which appeal succeeded narrowly on that point to the extent that the Appellant's sentence was reduced to 20 years.

19. The court in sentencing the accused person was not clear on when the sentence would start running. 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 in 2014.

20. Therefore, in consonance with Section 333(2) Criminal Procedure Code; computation of the sentence ought to include the period the Applicant person was in custody during hearing and determination of the case before sentence was meted out.

21. The sentencing process and its outcomes are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revisionary jurisdiction pursuant to Article 165(6(& (7) of *the constitution* as read with Section362 &364 of the CPC.

22. The question for this court is to ensure that an accused person tried, convicted, and sentenced to a custodial sentence he or she ought to be accorded a fair trial and the sentenced so imposed to capture the spirit of the law under section 333(2) of the CPC. I don't think it will be an overreach for this court to state that the custodial sentence passed against a convict who has been in pre-trial remand without incorporating the above provisions may be considered illegal. What is material to the decision are the principles in Rwabugande case (supra).

23. From the above discussion there is certainly evidence to show that Section 333(2) of the CPC was not complied with. In this respect, the committal warrant to prison be amended with a commencement on the conviction date at this Honourable Court. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 25TH DAY OF OCTOBER, 2024

.....

R. NYAKUNDI

JUDGE

In the Presence of

Applicant

Mr. Mugun for the State