Wanjiru v Republic (Criminal Petition 143 of 2019) [2024] KEHC 16398 (KLR) (23 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16398 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 143 OF 2019

RN NYAKUNDI, J

DECEMBER 23, 2024

BETWEEN

GEORGE NJAHI WANJIRU .... PETITIONER

AND

REPUBLIC .... RESPONDENT

((Being Petition for Review of sentence in respect of High Court Criminal Petition No 143 of 2019 in light of MURUATETU CASE among other enabling Laws))

RULING

1. The Petitioner herein was charged, convicted and sentenced to serve life imprisonment for the offence of Defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 at CM's Court in Eldoret in Criminal Case No. 6271 of 2014.
2. The Petitioner being aggrieved filed an appeal to have the conviction quashed and the sentence set aside at the High Court in Eldoret in Criminal Appeal No. 173 of 2015 which appeal was dismissed and the life sentence affirmed.
3. The Petitioner being aggrieved filed a second appeal to have the conviction quashed and the sentence set aside at the Court of Appeal in Eldoret in Criminal Appeal No. 175 of 2017 which appeal was dismissed against conviction but the Appeal was allowed against the sentence to the extent of setting aside the sentence of life imprisonment and substituting thereto a sentence of 20 years' imprisonment.
4. What is pending before me for determination is a Petition for the review of sentence in respect of High Court Criminal Petition No. 143 of 2019 where the Petitioner has laid the following grounds of Appeal filed under section 350(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya as follows;
   a. That I am a first Offender.
   b. That, I have been in prison for a substantive period of time.

c. That I beg leave to thus Honourable court invoke section 333(2) of the CPC and consider the time spent in remand custody.

d. That I am remorseful, repentant, reformed and rehabilitated.

e. That may this Honourable Court be pleased to invoke the provisions of sentencing Policy Guidelines and exercise jurisdiction powers and discretion.

5. The Petition was disposed by way of written submissions.

Petitioner's written submissions

6. The Petitioner filed his submissions where he argued his case based on the Grounds on the face of the Petition as follows:

Ground one and two Argued Together

7. The Petitioner submitted that he is a first offender who has never been involved in any criminal activities in his life and that he has always blamed himself for the mess and that given a second chance, he can be a responsible person to himself and to the community. He also submitted that he has had to go through harsh prison's conditions and he is a changed person with optimism in life and pray for leniency and that he promises to be a law abiding citizen and a role model to many.

8. The Petitioner also submitted that he has stayed in prison for a substantive period of time and that he has learnt a lot from his incarceration. Further, he stated that the sentence meted upon him considering his young age, being a first offender and his resourcefulness is too harsh and that may this Honourable Court with its jurisdiction powers and discretion be lenient on him that he has served part of his sentence. He made reference to the case of John Gitonga Alias Kados Vs R (Meru High Court in Petition No. 53 of 2018)

9. The Petitioner moreover submitted that following the decision of the Supreme Court in Francis Karioko Muruatetu & Another Vs R (2017) eKLR the court of Appeal in Jared Koitainjiri Vs R (2019) eKLR held that mandatory minimum sentences were not tenable under *the Constitution* and the Court has discretion to impose an appropriate sentence based on the circumstances of the case. Based on the above jurisprudence, the Petitioner submitted that this Honourable Court to consider a lesser sentence owing the circumstances surrounding his case.

Ground three

10. The Petitioner submitted that it has been more than 6 years from the time when he was arrested to date and indeed during this period of imprisonment, he has learnt hard lessons in prison and he is sincerely remorseful, repentant and reformed from the incarceration he had to go through in prison. The Petitioner made reference to the case of Michael Kathewa Laichena & Another Vs R (2018) eKLR where the court held that;

> "The sentencing policy guidelines, 2016 ("The Guidelines") published by the Kenya judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact the death penalty would be declared unconstitutional, the

Court in the Muruatetu Case (Supra, para. 71), held considered mitigating factors that would be applicable in re-sentencing in a case of murder as follows; (a) age of the offender; (b) being a first offender;(c) whether the offender pleaded guilty;(d) character and record of the offender;(e) commission of the offence in response to gender-based violence;(f) remorsefulness of the offender;(g) the possibility of reform and social re-adaptation of the offender;(h) any other factor that the Court considers relevant."

Ground four

11. The Petitioner submitted that since sentencing is a process meant to salvage and rehabilitate the offender, it must be treated with compassion and understanding and as regards the same given that he has secured various spiritual certificates, Diplomas and vocational skills which include Government Trade Test Motor Vehicle Mechanic Grade (III) and Motor Vehicle Electrician Grade (III). It was the Petitioner's humble submission that that this Honourable Court be pleased to find out that he is completely transformed person and grant him a second chance in life.

Ground Five

12. The Petitioner submitted that this Court has got original jurisdiction powers and discretion contemplated under section 354 of the CPC cap 75 Laws of Kenya in reliance to Article 23(1), 159(2) a & b, 165(3) a, b & d (6)(7) and 258(1) of *the Constitution* of Kenya 2010 to deal with matters of this nature. He also submitted that the constitutionality of Article 2(3) provides that *the Constitution* shall not be challenged by any court or state organ and that the state shall promote and advance *the Constitution* in this regard if Article 27 of the same constitution forbids direct or indirect discrimination under Article 25(c) and 50(2) of *the Constitution* of Kenya 2010. The Petitioner moreover submitted that may the court be guided by Dismas Wafula Kilwake Vs R.

13. It was the Petitioner's closing submission that this Honourable Court be pleased to allow his petition and forthwith reduce his sentence by the period of the time spent under pre-trial custody as under section 333(2) of the CPC, Cap 75 Laws of Kenya and/or set in such orders as setting him free.

Analysis and Determination

14. On perusal of the Petition, 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.

15. 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."

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

17. 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."

18. 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."

19. 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."

20. 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…………

21. 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.

22. 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*

23. 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."

24. 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.

25. 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.

26. I take cognizant note that the Court of Appeal in its Judgement delivered on 28th June 2019 sated as follows, "[18] As sentencing is an exercise of judicial discretion the trial magistrate ought to have properly exercised his discretion. For this reason, we find that the learned judge erred in failing to address the appropriateness of the sentence of life imprisonment. Taking into account that the victim was an innocent child of 8 years and that the mitigation offered by the appellant did not provide any justification for the trial court exercising leniency, a prison term of 20 years' imprisonment rather than the sentence of life imprisonment would have been appropriate. The upshot of the above is that we dismiss the appeal against conviction, but allow the appeal against sentence to the extent of setting aside the sentence of life imprisonment and substituting thereto a sentence of 20 years' imprisonment."

27. 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.

28. 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.

29. 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.

30. 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).

31. From the above discussion there is certainly evidence to show that Section 333(2) of the CPC was not complied with by the trial court and subsequent superior court which reviewed the life imprisonment sentence and had it substituted to a determinable period of twenty years. In this respect, the committal warrant to prison be amended with a commencement date of 20th September 2014.

32. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 23RD DECEMBER, 2024

…………………………………………

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mugun for the state

The Petitioner