Mariita v Republic (Criminal Miscellaneous Application E169 of 2021) [2023] KEHC 3922 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION E169 OF 2021

HM NYAGA, J

APRIL 27, 2023

BETWEEN

WYCLIFFE MOGENI MARIITA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. In an undated application, filed on August 4, 2021, the applicant sought the following orders;
    a. Thatmay the Hon. Court be pleased to certify this application as urgent and be heard on priority basis.
    b. That this court be pleased to grant orders for sentence review in Cr. Case Number 242 of 2011 at Nkubu Law Courts under Section 333(2).
    c. Such other orders as this court may deem just and expedient to grant in the circumstances.
2. The application is propped by the grounds set out in its face and is supported by the application undated affidavit filed on the same date.
3. The application is brought under the provisions of the law shown above. More specifically, the applicant comes under section 333 (2) of the *Criminal Procedure Code*.
4. At the hearing of the application, the applicant told the court that he was asking for re-sentencing.
5. The state counsel representing the ODPP pointed out that this was not the case. She also drew the attention of the court to the fact that the applicant had been out on bond prior to his conviction and sentence by the lower court.

6. In his submissions filed in court, the application referred to the court's power under section 353(2) of the *Criminal Procedure Code*, which I shall address shortly. The applicant also referred me to the following cases;

   a. *Oscar Juma Barasa v Republic* [2021] eKLR

   b. *Ogola S/o Owuor v Reginum* 1954 EACA

   c. *Ahamed Adolfathi Mohammed & another v Republic* Cr Appeal No 135 of 2016

   d. *Ezekiel Kipyegon Kipng'ok v Republic* Cr Case No 43 of 2018 (Nakuru)

7. In the course of hearing the application, the applicant did concede that he had filed an appeal against the conviction and sentence of the Chilef Magistrate's Court. However, he was unable to tender sufficient details of the appeal to enable the court trace the file. The lower court was availed. I am not sure if the failure by the applicant to provide details of his appeal is deliberate or is by genuine inability to do so.

8. There have been incidences of applicants making multiple applications to this court. The danger is that such applications, if not checked, can lead to an embarrassment of the court. It is not far fetched to visualize a situation where one file goes, for instance to Judge A and another to Judge B, and even Judge C. In that scenario, there is a likelihood of varying decisions from each court. That is not a desirable outcome at all.

9. I know that some applicants don't mind trying their luck in these courts, hoping to pull a fast one on the court and the prosecution.

10. Therefore, it is high time that the Judiciary and the Prisons Authorities kept updated records of all persons filing this kind of matters in court. The information ought to be readily available to enable the court flag any repetitive files.

11. The above notwithstanding I will not look at the application before me.

12. Section 333(2) of the *Criminal Procedure Code* provides as follows;

> (2) "Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) 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".

13. It has been stated that in invoking section 333(2) of the *Criminal Procedure Code*, the court is not required to embark on an arithmetic journey to calculate time to be spent in custody. In the case of *Bukenya v Uganda* (Criminal Appeal No 17 of 2010) [2012] UGSC 3 (29 January 2013) it was stated that;

> " Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done

mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement."

14. It is my understanding of the above decision that the court is only required to take account of the time spent in remand custody. This can be done by simply stating when the sentence will commence and the period to include the time spent in custody.

15. The provisions of section 333(2) of the *Criminal Procedure Code* was also the subject of the decision in *Ahamad Abolfathi Mohammed & another v 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 June 19, 2012."

16. What is clear from these cases is that any time that a convicted person has spent in lawful custody must be taken account of. In most cases, the court convicting the accused will direct that the sentence commences on the day the accused was remanded in custody.

17. In the matter before me, the applicant was charged on December 28, 2011. He was granted a bond of Kes 150,000/= with an alternative Cash Bail of Kes 70,000/=. He was subsequently released on bond on January 4, 2012, just days after taking plea. The applicant was out on bond throughout the trial, save for the one week before he was released.

18. In my opinion that period of one week is negligible when it comes to computation of the sentence imposed by the court.

19. I therefore find that there is no merit in the application and it is disallowed.

20. That said, the applicant still has the option of filing a proper application/petition for re-sentencing, if that is what he really wanted.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27 DAY OF APRIL 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Murunga for state

Applicant present