Isigoli v Republic (Petition 54 of 2021) [2023] KEHC 18132 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 54 OF 2021

OA SEWE, J

MAY 25, 2023

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 23(1) AND 165(3) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 19, 20, 24 AND 27 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE

BETWEEN

KENNEDY HAMISI ISIGOLI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The petitioner herein was charged in Mombasa Chief Magistrate's Court in Criminal Case No 2557 of 2011 with two counts of robbery with violence contrary to Section 296 (2) of the *Penal Code*, Chapter 63 of the Laws of Kenya. The particulars of the 1st Count were that on August 12, 2011 at Mamba Drive, Nyali Area in Kisauni District within Coast Province, being armed with a dangerous weapon, namely a knife robbed Hangin Sarah of her one digital camera make Nikon, cash Kshs 632/=, one blue towel, a pair of gloves, one bottle of water, one packet of tissue, a brown bag and a mobile phone make Nokia all valued at Kshs 43,032/=.

2. In respect of the 2nd Count, the particulars were that on the same date, time and place, the petitioner robbed Ducros Margaux of one digital camera make Samsung, one MP3 audio, one USB key, one

kanga, one bikini, one sun cream, one visa credit card, one necklace, one purse, one bag and Kshs 12,080/= in cash, all valued at Kshs 53,968/=.

3. The charge sheet was later amended to include a 3rd Count of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars were that on August 12, 2011 at Reef Hotel in Nyali Area of Kisauni District within Coast Province, the petitioner assaulted Stanslous Mwakai causing him actual bodily harm.

4. Although he denied the charges, the petitioner was tried and found guilty in all three Counts. He was accordingly convicted thereof and sentenced to death in Count I on August 15, 2014. The sentences in respect of Count II and Count III were, in the circumstances, held in abeyance.

5. Being aggrieved by his conviction and sentence, the petitioner filed an appeal to the High Court *vide* Mombasa High Court Criminal Appeal No 148 of 2014: *Kennedy Hamisi Isigoli v Republic*. The appeal was heard and dismissed by Hon A Ongeri, J. on January 11, 2017. Undeterred, the petitioner filed a second appeal to the Court of Appeal *vide* Mombasa Criminal Appeal No 38 of 2018: *Kennedy Hamisi Isigoli v Republic*. The second appeal was similarly heard and determined; and while it failed on his conviction the petitioner's sentence was reduced from a death sentence to 20 years' imprisonment for Counts I and II. He was further sentenced to 2 years' imprisonment in respect of Count III. The sentences were to run concurrently from the date of conviction by the trial court.

6. Thereafter, the petitioner filed the instant Petition seeking that his imprisonment be calculated from the date when he was arrested and charged; namely August 15, 2011. His Petition was accordingly filed pursuant to Section 333(2) of the *Criminal Procedure Code* and the assertion that he spent three (3) years in remand from his date of arrest up to August 15, 2014 when he was convicted and sentenced. The petitioner relied entirely on his Supporting Affidavit and prayed that his Petition be allowed.

7. On behalf of the respondent, Ms Anyumba, learned Counsel for the State, had no objection to the Petition herein.

8. I have carefully considered the Petition, which is fairly straightforward. It raises the single issue of whether the petitioner has made out a good case to warrant reconsideration of his sentence for purposes of Section 333(2) of the *Criminal Procedure Code*. That provisions states:

> 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.

9. For purposes of uniformity therefore the *Judiciary Sentencing Policy Guidelines* (under Clauses 7.10 and 7.11) explain that: -

> 7.10 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.

7 In determining the period of imprisonment that should be served by an
11 offender, the court must take into account the period in which the offender was held in custody during the trial."

10 . It is plain therefore that failure to factor in the pre-sentence detention period, as complained of herein, would amount to a violation of an inmate's fundamental right; and therefore that the Court has the jurisdiction to offer redress as appropriate. This was aptly discussed by Hon Odunga, J (as he then was) in *Jona & 87 others v Kenya Prison Service & 2 others* (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) thus:

> A holistic consideration of the above provisions clearly show that this court has the power to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation is the denial or threat of denial of freedom without a just cause such as where the sentence that a person risks serving is in excess of the sentence lawfully prescribed one by failing to comply with section 333(2) of the *Criminal Procedure Code*."

11 . As to what is entailed in taking into account the period an accused person had remained in custody in sentencing under Section 333(2) of the *Criminal Procedure Code*, the Court of Appeal expressed itself in *Ahmad Abolfathi Mohammed & Another Criminal* [2018] eKLR thus:

> ...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(s) 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..."

12 . In the instant matter the sentence imposed by the lower court did not lend itself to a consideration of Section 333(2) of the *Criminal Procedure Code*, granted that what was imposed was the death penalty. Indeed, even the sentence in respect of Count 3 which was for a fixed term of imprisonment had to be held in abeyance for that purpose. Hence, the imprisonment of the petitioner was imposed by the Court of Appeal and therefore the question to pose is whether the Court has the jurisdiction to further intervene in the matter.

13 . I have looked at the decision of the Court of Appeal in the petitioner's Criminal Appeal No 38 of 2018. Here is what the Court of Appeal had to say: -

> ... On the issue of sentence, we are in agreement that the appellant should
> 28. benefit from the Supreme Court's finding in *Francis Karioko Muruatetu Vs*

R [2017] eKLR which decreed the mandatory aspect of the death sentence unconstitutional. In mitigation on behalf of the appellant, Mr Wamotsa submitted that appellant was a first offender; is remorseful; did not injure the complainants; was assaulted by members of public during his arrest and has undergone rehabilitation while in prison and is now of good character. He entreated the Court to reduce the sentence to the term already served.

29. On his part however, Mr Isaboke urged us to retain the maximum sentence saying robbers who have the temerity to commit robberies in broad daylight deserve no mercy. He also decried the impact of such actions on tourism in the country. We have considered these sentiments carefully and come to a conclusion that we should set aside the death sentence which we hereby do. We substitute therefor a sentence of 20 years imprisonment on counts 1 and 2. On count 3 we sentence the appellant to 2 years imprisonment. Sentences to run concurrently from the date of conviction by the trial court..."

14 . It is therefore manifest that this was a deliberate decision on the part of the Court of Appeal that presupposes that the Court took into account the proviso to Section 333(2) of the *Criminal Procedure Code*, and therefore there is no room for further intervention by this Court. I find succour in the position taken in *Jona & 87 others v Kenya Prison Service & 2 others* (*supra*) that:

> ...Where the appellate court considered the appeal and disallowed the same without interfering with the sentence, it is clear that the decision on sentencing remains that of the trial court and if that sentence was imposed in contravention of the provisions of section 333(2) of the Criminal Procedure Code, nothing bars this court in the exercise of its constitutional mandate pursuant to article 165 of the *Constitution* from redressing the situation. Accordingly, notwithstanding a dismissal of an appeal, a person sentenced in disregard of section 333(2) aforesaid is not thereby disentitled from invoking this court's supervisory jurisdiction to consider whether or not the sentence imposed was lawful. While it may be argued that in so doing this court would be interfering with the decision of the appellate court which in effect affirmed the decision of the trial court, in my respectful view that would not be the position where an appeal is simply dismissed without the sentence being reviewed..."

15 . The foregoing being my view, I find no merit in the Petition. It is accordingly dismissed and file marked as closed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MAY 2023

OLGA SEWE

JUDGE