Kinyua v Republic (Petition 33 of 2021) [2023] KEHC 21625 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 33 OF 2021

OA SEWE, J

AUGUST 4, 2023

BETWEEN

EPHANTUS KINYUA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1 The petitioner, Ephantus Kinyua, filed this Petition on February 3, 2021 seeking that the Court be pleased to revise his sentence by taking into account the period served by him in remand pending his trial. He relied on his own affidavit sworn on December 30, 2020 in which he deposed that:

(a) He was convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*, Chapter 63 of the Laws of Kenya;

(b) His sentence was later reduced to 14 years on appeal vide Mombasa High Court Criminal Appeal No 66 of 2018.

(c) He is remorseful and regrets the crime; and has reformed and is ready to live as a law abiding citizen.

2 Upon the filing of the Petition, directions were given for the lower court and the appeal files to be availed. It took a while for the lower court file to be availed whereupon the Petition was fixed for hearing on May 25, 2023. Although the appeal file was not availed, a copy of the judgment delivered in Mombasa High Court Criminal Appeal No 65 of 2016 as consolidated with Mombasa High Court Criminal Appeal No 66 of 2016 is on the lower court file.

3 A perusal of the lower court record confirms that the petitioner, jointly with another, was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* and arraigned before the lower court on March 24, 2014. The offence was alleged to have occurred on March 20, 2014 at Shonda Area in Likoni District, within Mombasa County, and the particulars were that, jointly with

others not before the court while armed with dangerous weapons namely pangas, the petitioner robbed Said Bakari Athman of a Haojin red motor cycle Registration No KMDF 984V valued at Kshs 96,000/= and that immediately after the time of the robbery, used actual violence on Said Bakari Athman thereby occasioning him actual bodily harm.

4 Although the petitioner denied the charge, he was tried and found guilty; whereupon he was sentenced to death. His appeal to the High Court was dismissed on conviction. However, his death sentence was set aside and substituted with 14 years' imprisonment.

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

6 Accordingly, the issue for determination in this Petition is 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 provision is explicit that:

> " 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."

7 Further to the foregoing, the *Judiciary Sentencing Policy Guidelines* (under Clauses 7.10 and 7.11) explains 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.
>
> 7.11 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."

8 A perusal of the proceedings of the lower court shows that, although an order was made on the June 3, 2014, for the petitioner's release on Kshs 300,000/= bond with a surety, he was unable to comply with the terms given by the lower court. Hence, all indications are that he remained in custody until June 20, 2016 when his death sentence was pronounced. The proceedings of the lower court further show that the learned trial magistrate did not take into account the period of about 2 years and 3 months spent by the petitioner in pre-conviction detention.

9 As to what is entailed in taking into account the period an accused person had remained in custody for purposes of sentencing pursuant to 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(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..."

10 It is plain therefore that failure to factor in the pre-sentence detention period, as complained of herein, amounts 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 lawfully prescribed one by failing to comply with section 333(2) of the *Criminal Procedure Code*."

11 In the result, I find merit in the petitioner's petition filed herein on February 3, 2021. The same is hereby allowed and orders granted as hereunder:

(a) That the period of the petitioner's detention between March 21, 2014 when he was arrested and June 20, 2016 when his death sentence was pronounced, be taken into account for purposes of Section 333(2) of the *Criminal Procedure Code*.

(b) In reckoning the applicant's imprisonment term of 14 years, the period aforementioned be included accordingly.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF AUGUST 2023

OLGA SEWE

JUDGE