Loonkomok v Director of Public Prosecutions (Petition 24 of 2021) [2023] KEHC 21197 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 24 OF 2021

OA SEWE, J

AUGUST 4, 2023

BETWEEN

MARIPET OLE LOONKOMOK .... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

JUDGMENT

1. The petitioner, Maripet Ole Loonkomok, filed this Petition on 2nd February 2021 seeking that his 20 years' sentence be reduced and that the period spent by him in remand custody be counted as part of his sentence pursuant to Section 333(2) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya. He approached the Court under Articles 19, 20, 21, 22, 23, 24, 25, 27, 28 and 48 of the Constitution and relied on his Supporting Affidavit sworn on 1st February 2021, in which he deposed that he was arrested and charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No. 3 of 2006; and that, although he denied the allegations against him, he was found guilty after trial, convicted and sentenced to 20 years' imprisonment.

2. The petitioner further averred that he appealed against both conviction and sentence vide Mombasa High Court Criminal Appeal No. 83 of 2012, which appeal was dismissed. He accordingly prayed that his matter be reconsidered with a view of sentence review pursuant to Section 333(2) of the Criminal Procedure Code.

3. Upon the filing of the Petition, directions were given for the lower court and the appeal files to be availed. By 4th May 2023, the records had not been availed. Consequently, the Court proceeded to consider the Petition on the basis of the documents supplied by the Petitioner. They include:

    (a) Certified copies of the Charge Sheet, proceedings and judgment of the lower court, delivered by Hon. E.K. Usui Macharia, SRM, in Kwale Principal Magistrate's Criminal Case No. 456 of 2010: Republic v Maripet Ole Loonkomok;

(b) A copy of the P3 Form issued by Diani Police Station to the complainant, D N O, on 12th March 2010;

(c) Copies of the initial Memorandum of Appeal as well as the Amended Memorandum of Appeal filed by M/s Musyoki Mogaka & Co. Advocates in Mombasa High Court Criminal Appeal No.83 of 2012: Maripet Ole Loonkomok v Republic;

(d) A copy of the proceedings and judgment delivered by Hon. Muya, J. in Mombasa High Court Criminal Appeal No. 83 of 2012; and,

(e) A copy of the judgment delivered by the Court of Appeal in Mombasa Criminal Appeal No. 68 of 2015: Maripet Loonkomok v Republic.

4 A perusal of the documents on record confirms that the petitioner was indeed arraigned before Principal Magistrate's Court at Kwale on 16th March 2010 in Kwale Principal Magistrate's Criminal Case No. 456 of 2010 to answer a charge of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that between February 2010 and 11th March 2010 at Kibundani Village in Diani Location of Msambweni District, he unlawfully and intentionally committed an act which caused his penis to penetrate into the vagina of D N O, a girl then aged 10 years.

5 In the alternative, the petitioner was charged with indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, in that, between February 2010 and 11th March 2010 at Kibundani Village in Diani Location of Msambweni District, he indecently committed an act to D N O, a girl aged 10 years by touching her private parts.

6 The proceedings of the lower court further show that, although the petitioner denied the charges, he was tried and found guilty of the substantive charge. He was accordingly convicted thereof and sentenced to 20 years' imprisonment on 26th January 2012. Being aggrieved by that decision, the petitioner filed an appeal to the High Court at Mombasa, being Mombasa High Court Criminal Appeal No. 83 of 2012. The appeal was dismissed on 18th April 2013 by Hon. Muya, J. Thereupon the petitioner filed Mombasa Criminal Appeal No. 68 of 2015 to the Court of Appeal. His second appeal was similarly dismissed by the Court of Appeal on 27th May 2016.

7 The petitioner thereafter filed the instant Petition seeking that his imprisonment term of 20 years be counted from the date of his arrest. The Petition was accordingly filed pursuant to Section 333(2) of the Criminal Procedure Code and was hinged entirely on the petitioner's Supporting Affidavit. Thus, it was the petitioner's prayer that his Petition be allowed.

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

9 The single issue arising 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 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.

10 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. 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."

11 A perusal of the proceedings of the lower court shows that, upon his arraignment on 16th March 2010, the petitioner was released on bond to await the hearing and determination of his case. The proceedings further show that, at some point in time, the appellant jumped bail and a warrant of arrest was issued against him along with summons to his surety. The warrant arrest remained in force from 17th June 2010 till 22nd November 2010 when his surety, a prison warder, was able to trace him and effect his arrest. Upon being presented before the lower court, the petitioner's bond was cancelled and his surety discharged.

12 There is credible proof therefore that the petitioner was in custody between 22nd November 2010 and 26th January 2012 when the lower court's judgment was delivered. The proceedings further show that the learned trial magistrate did not give consideration to the period of 14 months spent by the petitioner in pre-trial detention pending his trial. There is no indication either, that the anomaly was given consideration on appeal to the High Court or to the Court of Appeal. I am satisfied therefore that there is substantial merit in the petition.

13 As to what is entailed in taking into account the period an accused person had spent in pre-conviction 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(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..."

14 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."

15 It matters not that the petitioner had exhausted his chances of appeal; the key consideration being whether the pre-conviction detention period was a factor in the appeal. In this regard, I am in agreement with the position taken in Jona & 87 others v Kenya Prison Service & 2 others 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..."

16 In the result, I find merit in the petitioner's petition filed herein on 2nd February 2021. The same is hereby allowed and orders granted as hereunder:

(a) That the period of the petitioner's detention, between 22nd November 2010 when his bond was cancelled and 26th January 2012 when the lower court's judgment was delivered and his imprisonment 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 20 years, the period aforementioned be included accordingly.

17 Orders accordingly.

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

OLGA SEWE

JUDGE