Otieno v Republic (Petition 124 of 2020) [2023] KEHC 21190 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21190 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 124 OF 2020

OA SEWE, J

AUGUST 4, 2023

IN THE MATTER OF ARTICLES 21(1), 22(1), 27, 159(2) AND 165(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 264 AND 333(2) OF THE CRIMINAL PROCEDURE CODE, CHAPTER 75 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 9(1) OF THE SEXUAL OFFENCES ACT, NO. 3 OF 2006

BETWEEN

LUCAS DALMAS OTIENO ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

(Arising from Mombasa Chief Magistrate's Criminal Case No. 2164 of 2014: Republic v Lucas Dalmas Otieno.)

JUDGMENT

1. The petitioner, Lucas Dalmas Otieno, was arraigned before the lower court on November 26, 2014 on a charge of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*, No 3 of 2006 vide Mombasa Chief Magistrate's Criminal Case No 2164 of 2014: Republic v Lucas Dalmas Otieno It was alleged that on the 24th day of November 2014 at [particulars withheld] Area in Changamwe within Mombasa County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of PA, a girl aged two and a half years. 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 on the 24th day of November 2014 at [particulars withheld] Area in Changamwe within Mombasa County, he intentionally and unlawfully caused his penis to rub the vagina of P A, a girl aged two and a half years.

2. The petitioner denied the allegations and upon trial was convicted and sentenced to 10 years' imprisonment. His appeal, vide Mombasa High Court Criminal Appeal No 143 of 2018: Lucas Dalmas Otieno, was found to be without merit and was accordingly dismissed. The petitioner thereafter lodged the instant petition on September 25, 2020, seeking that the period spent by him in remand pending hearing and determination of his case by the subordinate court be taken into account pursuant to Section 333(2) of the *Criminal Procedure Code*.

3. The Petition was premised on his Supporting Affidavit dated July 14, 2020 in which the petitioner reiterated his averment that he was convicted and sentenced to serve 10 years' imprisonment for the offence of attempted defilement, contrary to Section 9(1) of the *Sexual Offences Act*. He further deposed that he was held in remand throughout his trial; and therefore prayed that the period he spent in remand be taken into account. He confirmed, on the March 16, 2023, that he did not file an appeal to the Court of Appeal.

4. Upon the filing of the Petition, directions were given for the lower court and the appeal files to be availed; and although the lower court file was not availed, the appeal file was traced and availed on April 27, 2023. The Record of Appeal therein confirms that the petitioner was arraigned before the subordinate court on November 26, 2014 on a charge of attempted defilement of a girl contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*. He was also charged with a substantive count of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He denied the charges and upon trial, was convicted and sentenced to 10 years' imprisonment on 18th June 2018. The record further confirms that the petitioner appealed the decision of the subordinate court; and that his appeal was dismissed on 29th January 2019.

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 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.

7. Further to the foregoing, 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."

8. A perusal of the proceedings of the lower court shows that, upon the petitioner's arraignment on November 26, 2014, no order was given for his release on bond. It was not until the petitioner complained on March 31, 2015 that an order was made for his release on bond; and even then it

appears he was not in a position to comply with the terms thereof. The petitioner was still in custody by November 13, 2015 when his bond terms were varied downwards from Kshs. 300,000/= to Kshs. 100,000/= with a surety in like sum. The proceedings of April 19, 2016 further confirm that the petitioner remained in custody pending his trial. Thus, upon conviction, the petitioner mentioned in mitigation that he had been in custody for 3 years and 7 months, undoubtedly hopeful that the period would be taken into account in sentencing.

9. There is no dispute therefore that the petitioner was in custody from the date of his arrest on November 24, 2014 to the date of his imprisonment on 18th June 2018. The proceedings of the lower court further show that the learned trial magistrate did not take into account the period of about 3 years and 8 months spent by the petitioner in pre-conviction detention.

10. In *Ahmad Abolfathi Mohammed & Another Criminal* [2018] eKLR the Court of Appeal explained what is entailed in taking into account the period spent by an accused person in remained for purposes of sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* 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..."

11. 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*."

12. In the result, I find merit in the petitioner's petition filed herein on September 25, 2020. The same is hereby allowed and orders granted as hereunder:

    (a) That the period of the petitioner's detention between November 24, 2014 when he was arrested and June 18, 2018 when his imprisonment 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 10 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