Longidi v Republic (Miscellaneous Criminal Appeal E057 of 2023)
[2023] KEHC 24053 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24053 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

MISCELLANEOUS CRIMINAL APPEAL E057 OF 2023

RN NYAKUNDI, J

OCTOBER 25, 2023

BETWEEN

LOBOKORO LONGIDI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being a review from original conviction and sentence in Lodwar high Court criminal Case No. 15 of 2019, Hon. Justice Sergon on 28th February, 2023)

RULING

The sentencing decision is the symbolic keystone of the criminal justice system: in it, the conflicts between the goals of equal justice under the law and individualized justice with punishment tailored to the offender are played out, and society's moral principles and highest values – life and liberty – are interpreted and applied: the search for reform (1983)

1. The applicant underwent trial for the offence of murder contrary to section 203 as read with section 204 of the *penal code* and was convicted for the offence of manslaughter on 28th February, 2023. This court invited he accused and his legal advisers to submit on facts in mitigation to guide this court in determining the appropriate sentence.

2. The court after considering the submissions of either party, sentenced the applicant to serve a short custodial sentence of 3 years. The applicant now seeks a review on the basis of section 333(2) of the *criminal procedure code*.

Analysis and Determination

3. The attention given to judicial sentencing in Kenya by the judges and litigants alike in the recent times should be understood as a part of a sea wave that is occurring in the sentencing philosophy and the organizing constitutional principles. The conflicts between the goals of legal justice under

the constitutional imperatives is an essential feature of our constitutionalism. The judges in our Republic have been charged with the responsibility of refining constitutional principles by keeping the common law a blest of the social economic and political conditions and expectations anchoring the development of the law in *the constitution*. This is an integral part of the function of judges to fashion the outstanding contribution on transformative jurisprudence in the particular sets of sentencing. This radicle departure within the jurisdiction has caused a storm in the structure and scheme of things in sentencing from what has previously been considered to be settled principles on sentencing. Perhaps the most remarkable examples of such jurisprudential development has to be found in the decisions of the Supreme Court i.e. Muruatetu, and plurality of them from the court of appeal. The living instrument principle in our constitution has been put to test which has stirred into a jurisprudential hot pot on sentencing. The sprinkle of it as brewed by the apex courts is now being partaken by the trial courts in every sphere of their jurisdictions. It is from this sea of change the applicant has invoked the jurisdiction of this court to revisit the order on sentencing made by the courts at one time or another.

4. I have considered the application and the court's mandate is to determine the application of section 333(2) of the *Criminal procedure code.* The section 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.

5. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

6. In the case of *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."

7. It follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.

8. The punishment prescribed by the law for the offence of manslaughter is life imprisonment under section 205 of the *Penal Code*. I note that this court considered the accused's mitigation and meted an appropriate short custodial sentence of 3 years. Given the period one should serve for such an offence, I believe this court considered the provisions of section 333(2) of the *Criminal Procedure Code*. I find it mischievous that the applicant who is enjoying a rather lenient sentence decided to seek refuge in the provisions of section 333(2) of the *Criminal Procedure Code.* The applicant has not persuaded the court in all the circumstances that the sentence of three years is disproportionate and inappropriate to the offence in question. The offence of murder as known in law carries a maximum sentence of the death penalty in Kenya. The direct of it is that the people of Kenya view it as a serious and heinous crime of our time. The text of article 26 of *the constitution* reads inter-alia that every human being shall be entitled to respect for his or her life. That no one may be arbitrarily deprived of this right to life unless as per law established. Therefore the right to life is the fulcrum of all other rights. It is the fountain through which all other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of law. Given the facts of this case it provides a clear picture of a sentence decreed with compassion and the cries from the applicant are hostile to what is essentially settled principles on punishment respectively.

9. In the end, I believe this court considered the bounds of section 333(2) of the *Criminal Procedure Code* in issuing the custodial sentence and proper directions were so issued. The application is thus dismissed.

DATED AND SIGNED AT LODWAR THIS 25TH DAY OF OCTOBER, 2023

In the presence of;

The Applicant

Mr. Yusuf for the DPP

.....

R. NYAKUNDI

JUDGE