Kabaya v Republic (Petition E005 of 2021) [2022] KEHC 11648 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11648 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

PETITION E005 OF 2021

PJO OTIENO, J

MAY 31, 2022

IN THE MATTER OF THE ENFORCEMENT OF BILL OF RIGHTS UNDER ARTICLES 22(1), 23(1), 25(D), 50(1) AND 51(2) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHT AND FREEDOMS UNDER ARTCILES 25(C), 27(1), 20, 47, 50(2)(P), 51(1), 23(1) AND 165(3) OF THE CONSTITUTION

AND

MATTERS ARISING FROM SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE

BETWEEN

BERNARD KIRIMI KABAYA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The petitioner herein was charged in Meru High Court Criminal Case No. 69/2013, was and convicted on the 17.9.2018, with the offence of Murder contrary to section 203 as read with 204 of the *Penal Code* and sentenced to to serve 20 years imprisonment.

2. He has now moved this court through a petition dated 12/4/2021 making a single prayer that the period he spent in lawful custody from 27/6/2013 be deducted from his 20 years sentence while contending that he was in lawful custody from 27/6/2013 when he was arrested until 4/12/2018 when he was sentenced to serve 20 years imprisonment. He urges the court to take into account that period of 5 years and 6 months in conformity with the decision in *Abdul Aziz Oduor & another v Republic* [2019] eKLR.

3. In his written submissions, the petitioner took the position that the failure by the trial court to consider the time he spent in custody violated his right to equal protection and equal benefit of the law as enshrined under articles 23, 27(1)(2)(4)(6) of the *Constitution* adding that the failure to apply with section 333(2) of the *Criminal Procedure Code* renders his 20 years imprisonment excessive. He relied on *Ahmad Abolfathi Mohammed & anor v Republic* (2018)eKLR and *Bethwel Wison Kibor v R*(2009)eKLR, on the need to consider the time spent in remand. He also cited *William Okungu v R* (2018)eKLR, for the proposition that, where there is a violation of fundamental rights, substantive justice should always prevail over procedural technicalities. To the applicant, the non-inclusion of the pre-trial period in the sentence violated the principle of equality under article 27(1) and the right to fair trial under article 50(2) of *the Constitution*. He submitted that the sentence is deemed to start from the date of arrest and urged the court to order that his 20 years sentence to start running from the date of his arrest in accordance with the provisions of section 333(2) of the *Criminal Procedure Code*.

4. In opposition to the petition, the prosecution submitted that the manner in which the appellant had murdered the deceased required a deterrence sentence therefore beseeched the court not to interfere with the sentence as the petitioner had not demonstrated that the same was illegal or manifestly excessive. It cited *Patrick Muli Mukutha v R*(2019)eKLR and *Bernard Kimani Gacheru v R*(2002)eKLR, on the discretionary nature of sentencing, viewed the sentence very lenient and appropriate and urged that it be upheld so that it could serve the deterrent object of criminal justice.

7. The petitioner's only prayer is to have the period period of incarceration before conviction and sentence taken into account. The provisions of section 333(2) of the *Criminal Procedure Code* as interpreted by the Court of Appeal decision in *Ahamad Abolfathi Mohammed v Republic* (2018) eKLR is relied upon to underscore the point that it is imperative upon the sentencing court.

8. Only the decision on conviction has been availed to court without the portion on sentence. It is therefore not possible to know what the judge did or did not consider before exercising the discretion by imposing a term of 20 years. In those circumstances it is not prudent to second guess how the term was settled upon yet it is the onus of the petition to establish that there was a denial of a legal right under the statute.

9. In any event, I consider the right to re-sentence to only arise where there has been exhaustion of the appellate avenues. It is not that every imagine mi-step entitles the convict to be re-sentenced. As in this matter, if there be demonstration that section 333(2) was not complied with by the High court, it is not open to come to this court and invoke the new found jurisdiction in re-sentencing. Such would clearly be a revisit of the matter the court has dealt with to finality. I consider the situation here to disclose that the High Court has exhausted its jurisdiction, become functus officio and not available to be called upon to revise itself. It matters not that the Judge who dealt with the matter or another is to undertake the task. It is an alien jurisdiction that portends a Judge and the court being called upon to revisit and revise itself contrary to law.

10. I find the petition to be wholly misconceived and not merited at all and order that it be dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 31ST DAY OF MAY 2022

PATRICK J. O. OTIENO

JUDGE

In the presence of:

The Petitioner in person

Ms. Mwaniki for the Respondent

Court Assistant: Mwenda