Kihugwa v Republic (Criminal Petition 60 of 2019)
[2022] KEHC 13332 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13332 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 60 OF 2019

EKO OGOLA, J

SEPTEMBER 28, 2022

BETWEEN

ANDREW MUSAINA KIHUGWA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The petitioner herein was the accused person in HCRC No. 80 of 2011 Republic vs Andrew Musaina Kihugwa. He was convicted of the offence of murder contrary to section 203 as read with section 204 of the *penal code* on 8th November 2019. The court sentenced him to 15 years imprisonment. He then filed the present petition vide a Notice of Motion filed on 21st November 2019 seeking the following Orders;

    1) That the application be certified urgent and disposed on priority.

    2) That the sentence be reduced by time spent in remand custody under section 333 (2) *Criminal Procedure Code*.

    3) That the petitioner is remorseful, repentant and reformed having been a first offender.

2. The application was based on the grounds contained therein.

Applicant's Case

3. The application is based on the grounds that the Court considers the period spent in prison and reduce the same from his sentence under the provisions of section 333(2) of the *Criminal Procedure Code.* The petitioner feels that he was prejudiced by being denied equality of the law as the aforementioned section contravened article 27 of *the constitution*. He also sought for leniency being a first offender and

that the petition is guided by *Home Affairs v Fourie* [2005] ZACC 19:SA 524(CC) 2006 BCLR 3555 (CC) at paragraph 60.

Respondent's Case

4. The respondent filed submissions on 28th April 2022. Learned counsel for the respondent Ms. Emma Okok cited section 333(2) of the Criminal Procedure Code and submitted that it is mandatory that the period that the accused has been held in custody before being sentenced be taken into account in computing the period of the sentence. The petitioner was arraigned in court on 16th November 2011 and took plea on 23rd November 2011. The trial court in sentencing the petitioner took into account the fact that the petitioner had been in remand custody throughout the trial, almost 8 years at the time of sentencing before sentencing him to 15 years in prison. According to counsel, section 333(2) of the *Criminal Procedure Code* was complied with.

5. M/s Okok submitted that the petitioner has not exhausted his appeal. The high court judge Honourable Olga Sewe correctly exercised her jurisdiction in sentencing the petitioner and therefore this court cannot review the sentence as it is a court of similar jurisdiction. The applicant's recourse lies with the court of appeal which can hear his appeal against his sentence. It was her submission that the petition lacks merit and should be dismissed in its entirety.

Issues for Determination

1) Whether section 333(2) of the *Criminal Procedure Code* was complied with.

2) Whether the sentence of the petitioner can be reviewed by this court.

Whether Section 333 (2) of the Criminal Procedure Code was complied with

6. Section 333(2) of the *Criminal Procedure Code* provides 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."
>
> The Court of Appeal has in the case of Bethwel Wilson Kibor v Republic [2009] eKLR pronounced itself on the subject provisions as follows:
>
> "By the proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the Appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009, he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."
>
> The Judiciary Sentencing Policy Guidelines state 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.

7.

12. An offender convicted of a misdemeanor and had been in custody through-out the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely, under section 35 (1) of the Penal Code."

It is mandatory that the period which an accused has been held in custody prior to being sentenced ought to be taken into account by the trial court in meting out sentence unless it is hindered by other provisions of the law. I have perused the judgment and in my view the court considered the period spent in remand before sentencing the applicant.

Whether the sentence of the Petitioner can be reviewed by this Court

7. The petitioner seeks the review of a decision of a court of concurrent jurisdiction. In the case of *Daniel Otieno Oracha v Republic* [2019] eKLR, the Petitioner applied for review of a sentence imposed by a court of concurrent jurisdiction. The court held that it did not have jurisdiction to review the said judgment. The Court observed that: -

" 14. The law abhors that practice of a Judge sitting to review a Judgment or decision of another Judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a Judgment of the subordinate court or if the Petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise....."

16. The Judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own Judgment or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.

8. It is my view that the issue of review is well settled and this Court cannot review the sentence of the accused person at this juncture. He has not exhausted the appeal mechanisms and therefore it would be ultra-vires for this court to review the judgment.

In the premises, the petition fails in its entirety and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE