REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC. CRIMINAL APLICATION NO 54 OF 2019

MUSA IKOTE NKURUNA....................APPLICANT

Versus

REPUBLIC..RESPONDENT

RULING

Numerous requests for resentencing

[1] The applicant filed appeal number 98 of 2018 against original conviction and sentence arising from the judgment in NAROK CMCCRC NO 1138 OF 2013. The appellate court (Bwonwong'a J.) on 17th January, 2019 delivered judgment thereof and more specifically stated:

> **''As regards sentence the Supreme Court in *Francis Muruatetu and Another v. Republic (2017) Eklr* ruled that as a matter of prudence the issue of sentence should be decided upon by the trial court. Consequently, I hereby quash the death penalty imposed upon the appellants. This case is hereby remitted to the trial court to assess the appropriate sentence in light of the guide lines set out by the Supreme Court in that decision''.**

[2] Pursuant thereto, the applicant was resentenced on 1.03.2019 to serve a jail term of 20 years. The grievance now before the court is that the trial court set commencement date of his sentence to be 1.03.2019 instead of 8th August 2014 when he was first convicted. According to him, this prejudiced him as he has been in custody since he was arrested on 2nd September, 2013. He also stated that he is the father of two school going children, is the sole bread winner and has old parents. He now seeks the court to review the commencement date of sentence to be the date he was first convicted.

[3] In his oral submissions in court, the applicant emphasized that the resentence to 20 years in prison is excessive in so far as it did not take account of the period he had spent in custody. And so he sought for a further reduction of the sentence.

Prosecution: applicant abusing process

[5] The prosecution opposed the application. M/S Torosi, learned state counsel argued that the trial court took his mitigation into account in resentencing. Thus, this request can only be an abuse of process. She sought for its dismissal.

ANALYSIS AND DETERMINATION

[6] According to section 333(2) of the Criminal Procedure Code: -

> ***(2) Subject to the provisions of section 38 of the Penal Code 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] The section does not however specify how the court is to take account of the period spent in custody. Nonetheless, in my view, it is tidier to state how the court has taken account of the time spent in custody especially in resentencing in order to avert absurdity or inadvertent enhancement of sentence without notice or imposition of harsh or excessive sentence or filing of applications such as this one. Be that as it may, it profits this discussion that the phrase ***''take account of''*** ordinarily means to consider something along with other factors. Needless to state that appropriate sentence derives from the peculiar circumstances of each case and upon consideration of all factors relative to the case which include but not limited to; (1) Gravity of the Offence, (2) Age of the Offender, (3) Previous convictions, (4) Character of the offender, (5) Manner of commission of the offence. Therefore, it would be unfair assumption that a resentence which commences on the date imposed did not take account of the time spent in custody. The test should be whether, in the circumstances of the case, the sentence is likely

to lead to an absurdity or inadvertent enhancement of sentence without notice or imposition of harsh or excessive sentence.

[8] In this case, the maximum sentence is death for the offence of robbery with violence. I do note also that the trial court considered the judicial decisions cited by the applicants, the applicant's mitigation and the time spent in jail at the time. She also considered the gravity of the offence and stated that: -

> ***In my view a custodial sentence is the best in the circumstances because I have no basis of treating that robbery as a petty theft case.''***

[9] From the sentence ruling, the trial court took into account the totality of all the circumstances of the case. Therefore, a sentence of 20 years' imprisonment in the circumstances of this case is neither excessive nor harsh.

[9] In the upshot, the undated Notice of Motion filed herein for review of sentence lacks merit and is dismissed. For clarity, with this decision, the other applications filed by the applicant vide NAROK MISC CRIMINAL APP NO 48 OF 2018 and NAROK CRIMINAL APP NO 15 OF 2019 are spent. It is so ordered.

Dated, signed and delivered through Microsoft Teams Application at Narok this 26th day of January 2021

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F. M. GIKONYO

JUDGE