REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 3 OF 2020

ELPHAS FEDHA NYONGESA..........................PETITIONER

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

1. This petition was brought by way of a Notice of Motion dated **10 January 2020.** The petitioner thereby prayed that his sentence be reduced by the time he spent in remand custody while awaiting trial before the lower court. He premised his application on **Section 333** of the **Criminal Procedure Code**, **Chapter 75** of the **Laws of Kenya**. The application is supported by the petitioner's own affidavit, sworn on **10 January 2020**, in which he averred that he was charged, tried and convicted of the offence of defilement under **Section 8(1) and (2)** of the **Sexual Offences Act, No. 3 of 2006**; and that he spent 3 years in remand while undergoing trial before the lower court. He therefore prayed that his sentence be reduced by the pre-conviction period of 3 years.

2. The petitioner further averred that he had undergone surgery that did not go well; and that he was supposed to be re-admitted in hospital for corrective surgery but the same has not been possible because the prisons department is unable to facilitate the same owing to the suspension of their credit facility at Moi Teaching and Referral Hospital. Among the documents annexed to the petitioner's Supporting Affidavit are the Committal Warrant dated **16 June 2015**, as well as a Discharge Summary, a Prescription Form dated **4 July 2019** and an Attendance Card; all issued by Moi Teaching and Referral Hospital.

3. There was no response to the application by the State; and, when the matter came up for directions on **23 October 2020**, the petitioner indicated that he would rely entirely on his application and had no submissions to make. The State was then granted time to put in written submissions. So far no such submissions have been filed.

4. I have nevertheless perused the record of the lower court and confirmed that the petitioner was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The offence was alleged to have occurred on **11 November 2012** at [particulars withheld] Village in Lugari District, involving a child then aged 16 years. He was also faced with an alternative charge of indecent act with the said child. He denied the allegations and was taken through the trial process. Ultimately, he was found guilty of the main charge by the trial court. He was accordingly convicted and sentenced on **16 June 2015** to serve 15 years' imprisonment.

5. The record further shows that the petitioner appealed his conviction and sentence; and that his appeal, on both scores, was dismissed by the High Court **(Hon. Mrima, J.)** on **1 November 2018**. He thereafter filed this petition for sentence review, propounding only one ground; namely, that the period spent by him in remand pending trial was not taken into account as required by **Section 333** of the **Criminal Procedure Code**. I hasten to point out that the petitioner did not raise the issue of his pre-conviction detention before the appellate court; and, therefore, that the matter did not attract attention on appeal. In the circumstances, I take it that the issue can and has competently been raised by way of petition.

6. It is also noteworthy that the petitioner made his approach by way of Notice of Motion; and that he did not specifically cite any particular provision of the Constitution that was infringed in his case, or set out the nature of the infringement with the degree of specificity recommended in **Anarita Karimi Njeru vs. Republic** [1979] eKLR. Nevertheless, I am satisfied that the petition does raise a constitutional issue worth considering, bearing in mind the pronouncement by the Court of Appeal in **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others, Civil Appeal (Application) No. 152 of 2009, that:**

> **"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well-established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."**

7. Moreover, as was aptly observed by **Hon. Odunga, J.** in **Julia Wangeci Githua vs. Commissioner General of Prisons & 2 others** [2020] eKLR:

> **"…the decision in *Anarita Karimi Njeru* must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that a petitioner ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a constitutional petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation…"**

8. The learned Judge went on to state thus, which expressions I fully agree with:

> **"45. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a constitutional court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.**
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> **46. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of, would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former…"**

9. Needless to say that one of the fair hearing rights entrenched in **Article 50(2)** of the **Constitution** is the right to have the trial begin and conclude without unreasonable delay. **(see Article 50(2)(e)** of the **Constitution).** Thus, at the conclusion of every trial resulting in a conviction, the trial court is under obligation to bear in mind the period taken in conducting the trial and, in particular, to factor in the period spent by the convicted offender in custody pending trial, when computing any ensuing sentence of imprisonment. To this end, **Section 333** of the **Criminal Procedure Code** explicit that:

> **(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.**
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> **(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."**

10. The record of the lower court shows that the petitioner's trial lasted for 31 months, spanning **16 November 2012 and 16 June 2015.** It is also manifest from the record that that although an order was made for the petitioner's release on bond of **Kshs. 200,000/=** with a surety of similar amount, he remained in custody from **16 November 2012** and **16 June 2015** when he was sentenced to 15 years' imprisonment. The record of the lower court further confirms the petitioner's assertion that, at the sentencing hearing, no thought was given by the trial court to the time the petitioner spent in custody pending trial. Thus, the single issue that presents itself for determination herein is whether the failure by the sentencing court to take into account the pre-conviction detention period amounts to a violation of the petitioner's constitutional right to fair trial.

11. In the **Judiciary Sentencing Policy Guidelines** it is recognized, as a matter of concern, at Paragraph 7.7 that:

> **"There have been divergent practices in respect to the impact of the time served in custody during trial on the sentence imposed. Some courts have been keen to consider the pre-conviction detention and have imposed a shorter sentence. Others have not been taking this into account."**

12. Hence, in Paragraph 7.10 of the said Guidelines, it is emphasized that:

> **"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."**

13. Thus, in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** the Court of Appeal held that:

> ***"…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 19th June 2012.

14. It is not lost on the Court that the sentence that is the subject of this petition was passed in **2015;** before the decision of the Supreme Court of Kenya in **Francis Karioko Muruatetu vs. Republic** (2016] eKLR. At the time, the general flow was that the penalties set out in **Section 8** of the **Sexual Offences Act** were mandatory. Thus, in **Stephen Ngwili Mulili versus Republic [2014] eKLR** the Court of Appeal took the stance that:

> ***"The Sexual Offences Act removed discretion in sentences particularly where the victims are minors. The sentence provided for is therefore, mandatory and not discretionary"***

15. Likewise, in **Denis Kinyua Njeru –Vs- Republic [2017] eKLR, the** Court of Appeal was of the view that:

> **"the penalties under the SOA, may be described as "straight jacket" penalties leaving no room for the exercise of any discretion by the sentencing court."**

16. However, in **Evans Wanjala Wanyonyi vs. Republic [2019] eKLR**, the Court of Appeal restated its current thinking on the matter as hereunder:

> ***"…the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another –v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the forestasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***
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> ***In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.***
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> ***25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."***

17. In the light of the foregoing, a trial court need not henceforth feel constrained to pass the minimum sentence; but may nevertheless pass the prescribed penalty, should the circumstances of a particular case warrant it. I note too that the High Court has already pronounced itself on the propriety of the sentence and held that the appellant was rightly sentenced under **Section 8(4)** of the **Sexual Offences Act**; and it is therefore not open to this court to revisit the same for any other purpose than that envisaged by **Section 333(2)** of the **Criminal Procedure Code.**

18. In the result, it is my finding, that the petitioner has made out a good case for reduction of his sentence by the period of his pre-conviction detention, pursuant to **Section 333(2)** of the **Criminal Procedure Code**. In the premises, it is hereby ordered that the petitioner's sentence of 15 years' imprisonment be reduced by the 31 months' of pre-conviction detention that he was subjected to before imprisonment. Hence, it is ordered that the sentence be reckoned from **15 November 2012,** which was the date of the petitioner's arrest.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF JANUARY 2021

OLGA SEWE

JUDGE