REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC. CRIMINAL APPL. E010 OF 2020

(CORAM: F.M. GIKONYO J.)

Revision from Original Conviction/Sentence in NKR CMCCRC No. 2 Of 2017 of and NKR HCCRA 126 of 2017

FRANKLINE KIPROTICH RONO..APPLICANT

-VERSUS-

REPUBLIC...RESPONDENT

JUDGMENT

Account of time spent in custody

[1] The application dated 2/12/2020 is seeking the court to review sentence by taking account of the time spent in custody as provided in section 333(2) of the Criminal Procedure Code and article 27(i) of the Constitution of Kenya 2010.

[2] The applicant was convicted for the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 20 years' imprisonment by hon. W. Juma on 25/08/2017. He then **preferred an appeal** to the High Court in **Narok HCCRA 126 of 2017** in **which the sentence was reduced to 8 years' imprisonment by Bwonwong'a J. The applicant claims that, although the judge in reducing the sentence stated that he had taken into account all the mitigating and aggravating factors, he also directed that the sentence shall commence from the date of judgment. According to him, the judge did not did not take account of the time he had spent in custody.**

[3] In his appeal, the applicant took advantage of the Supreme Court decision in the matter of ***Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR.*** It is the resentencing order by the High Court which aggrieved the applicant and gave rise to this application.

[4] The applicant's gravamen is that time spent in custody before sentencing was not considered which was in contravention of article ***27(1) (2) and (4) ,29(f) and 50(2) (p) of*** the Constitution of Kenya and section 333 (2) of the CPC. This position was reiterated in his submission.

[5] Ms. Torosi for the respondent in her oral submission opposed the application and submitted that the High Court had took into account all factors and reduced the sentence to 8 years. She therefore insisted that the applicant should go to the court of appeal and proceeded to urge the court to dismiss the application.

ANAYSIS AND DETERMINATION

[6] The quest herein is in the nature of re-sentencing. Re-sentencing hearing; is neither a hearing *de novo* nor an appeal. It is a proceeding undertaken within the court's power to review sentence only. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding *inter alia*, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

[7] In light of the application, the relevant law as well as the submissions by the parties, I see two issues for determination;

1. ***Whether this court has jurisdiction in this matter.***

2. ***Whether the application has merit in so far as it is founded on section 333 (2) of the CPC.***

Jurisdiction

[8] It has been authoritatively stated that jurisdiction is everything and without it the court cannot lawfully adjudicate over the dispute in issue. See the sweetest canticle in the words of **Nyarangi, J.A**. in the often-cited case of ***The Owners of Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1*** at page 14:

> ***"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

[9] The Supreme Court of Kenya buttressed the essence of jurisdiction in ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011***, where it pronounced that:

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…"***

Can the court entertain this application?

[10] The application herein is for redress of denial or violation of a right and or fundamental freedom in the Bill of Rights. It is premised upon section 333(2) of the CPC, article 27, 29(f) and 50(2)(p) of the Constitution. The specific allegation made is that the re-sentencing judge did not take account of the time he spent in custody prior to the resentencing, thus, violating or denying him the right to fair trial.

Nature of section 333(2) of CPC

[11] Section 333(2) of the ***Criminal Procedure Code*** provides as hereunder:

> ***(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.***
>
> ***(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.***

[12] A preliminary matter; Section 333(2) of the CPC does not make a distinction between re-sentencing and original sentencing. It refers to *the sentencing judge or magistrate* and time spent in custody*, prior to such sentence...* For clarity, however, time spent in custody in section 333(2) of the CPC includes the time spent in custody during trial as well as the period served in the original sentence, in case of resentencing or revision of sentence.

[13] Be that as it may, the requirement in section 333(2) of the CPC is inextricable to and concerns sentencing. And, sentencing is part of fair trial. Failure to take account of time spent in custody subjects a person to a more severe sentence which infringes the right to fair trial. The right to fair trial includes the right to less severe sentence. See article 50(2)(p) of the Constitution, that: -

> ***50(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;***

[14] In some situations, especially in resentencing, failure to give effect to section 333(2) of the CPC, may result into embarrassing absurdity and imposition of illegal sentence. Fathom this; a person's original sentence of 10 years' imprisonment is reduced to 5 years' imprisonment with effect from the date of re-sentence; at the time, he has already served 6 years. Given the right to remission, and also on the basis of simple arithmetic, the applicant will serve a more severe sentence than the original sentence. Is such not illegal enhancement of sentence, and or imposition of illegal sentence? Is such not a denial or violation of right to fair trial?

Of redress for violation of right

[15] Article 23(1) of the Constitution provides that;

> ***'The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.'***

[16] Article 165(3)(b) of the Constitution provides that:

> Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

[17] Accordingly, sentencing that denies a person the benefits under section 333(2) of the CPC, founds a cause of action in the nature of a constitutional application for redress of a denial or a violation of a right or fundamental freedom in the Bill of Rights; therein lies court's jurisdiction derived from article 23(1) and 165(3)(b) of the Constitution to entertain this application.

[18] This jurisdiction of the High Court was also discussed in the Supreme Court (**Mutunga, CJ**) in **JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI ESTATE & 4 OTHERS[1]** where he expressed himself as hereunder*;*

"[111]…The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the Constitution). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in Protus Buliba Shikuku v R, Constitutional Reference No. 3 of 2011, [2012] eKLR.

[112] The Shikuku Case fell within the criminal justice system; it involved a claim of violation of the petitioner's fundamental rights by the Court of Appeal, in a final appeal. The trial Court failed to impose against the petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned judges, relying on Articles 20, 22, 23 and 165 of the Constitution, rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated with approval the dicta of Shield J, interpreting the provisions of the 1963 Constitution in Marete v. Attorney General [1987] KLR 690:

"The contravention by the State of any of the protective provisions of the Constitution is prohibited and the High Court is empowered to award redress to any person who has suffered such a contravention."

[113] Thus, in answer to Mr. Nowrojee's first two questions posed to the Supreme Court, my answer is this: There is no injustice that the Constitution of Kenya is powerless to redress."

[19] On that basis, I find that this court has jurisdiction to determine the question whether the applicant's right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as claimed. Whether the application succeeds is a different thing altogether.

Giving meaningful effect to S.333 (2) of CPC

[20] The foregoing recapitulation of the constitutional vitality in section 333(2) of the CPC leads to two questions; (i) whether courts may choose to give or not to give effect to the requirements in the section; and (2) how the court should give such effect? The section does not state how the court should take account of the period spent in custody. However, the emerging jurisprudence show that courts are obliged to take into account the period spent in custody prior to the sentence. The Court of Appeal in **AHAMAD ABOLFATHI MOHAMMED & ANOTHER VS. REPUBLIC[2]** held that: -

"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…

[21] The decision in **AHAMAD ABOLFATHI MOHAMMED & ANOTHER VS. REPUBLIC*[3]*** gives a splendid exposition of the application of the section as follows:

"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 19th June 2012."*** *[Underlining mine].*

[22] More judicial pronouncements; The Court of Appeal in **BETHWEL WILSON KIBOR VS. REPUBLIC[4]** expressed itself as follows:

"By 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."

[23] According to ***The Judiciary Sentencing Policy Guidelines***:

> ***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. 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.***

[24] According to section **137I (2) (a) of the CPC***:* -

> ***(2) In passing a sentence, the court shall take into account—***
>
> > ***(a) the period during which the accused person has been in custody;***

[25] It is now appropriate to state that the requirement in section 333(2) of the CPC is not optional. Failure to comply with the section; (1) is injurious to the right of the accused to less severe sentence; (2) subjects the accused to a more severe sentence than the one prescribed; and (2) inadvertently condones deprivation of liberty contrary to law. The section must, therefore, be given real effect by setting commencement date of sentence in such way that it reflects the period spent in custody in the sentence imposed; lest the sentence should be amenable to impeachment in a constitutional application for redress for denial or violation of a right or fundamental freedom enshrined in the Bill of Rights.

Applying the test

[26] The record herein consists in the Narok trial court typed proceedings and the High Court appeal proceedings and judgment. The following relevant dates are discernible from the record; the accused was arraigned in court on 3rd January, 2017 and was first sentence on 25th August, 2017 to 20 years' imprisonment; he was re-sentenced to 8 years' imprisonment with effect from 10th December, 2019.

[27] The record states as follows:

> ***''…in re-assessing the appropriate sentence, I am required to take into account the mitigating and aggravating factors.***
>
> ***The mitigating factors are as follows. The appellant is a first offender. He has been in custody since 29th December 2016, which translates to about three years.***
>
> ***…The appellant has been convicted of serious offence that carries a minimum sentence of twenty years' imprisonment. He kept the victim in his custody from 11/12/2016 to 28/12/2016, which translates to about 12 days. The victim was a school going student.***
>
> ***After taking into account all the mitigating and aggravating factors, I find the appropriate sentence is eight years imprisonment, which takes effect from today.***
>
> ***Signed***
>
> ***10/12/2019***

[28] The original sentence was 20 years' imprisonment. On the basis of Muruatetu, the sentence was reduced to 8 years' imprisonment. The judge was aware that the offence was serious and this was indicated by the minimum sentence provided, i.e. 20 years. He also stated that the accused had been in custody for about three years. He stated that he took into account all mitigating and aggravating factors. In light of all these factors, judge found a sentence of eight (8) years imprisonment to be appropriate. Except, he stated that the sentence will commence from the date of the judgment. Given the position of the law adumbrated above, the applicant is entitled to less sever sentence as a matter of right. Article 27(3) of the Constitution requires that: -

> ***(3) In applying a provision of the Bill of Rights, a court shall—***
>
> > ***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and***
> >
> > ***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom***

[29] In such circumstances, the path that promotes enforcement of the right herein is for the sentence to run from the date he was arraigned in court. I will make this the penultimate order in this decision.

Remission

[30] Regarding remission; this is governed by Section 46 of the Prisons Act, Cap 90 which provides as follows: -

> ***"(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.***
>
> ***Provided that in no case shall -***
>
> ***(i) any remission granted result in the release of a prisoner until he has served one calendar month;***
>
> ***(ii)any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.***
>
> ***(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.***
>
> ***(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-***
>
> > ***(a) spent in hospital through his own fault; or***
> >
> > ***(b) while undergoing confinement as a punishment in a separate cell.***
>
> ***(4) A prisoner may be deprived of remission -***
>
> > ***(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;***
> >
> > ***(b) where the Cabinet Secretary for the time being responsible for Internal security considers that it is in the interests of public security or public order.***
>
> ***(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground. [Act No. 25 of 2015, Sch.]."***

[31] **Nothing shows any breach of the law by** the Commissioner of Prisons to warrant court's intervention.

Conclusions and orders

[32] **The upshot is that the** instant application succeeds only to the extent that the sentence herein will run from the date of arraignment in court. In specific terms: -

> ***1) The eight (8) years imprisonment imposed on 10th December 2019 shall run from 3rd January, 2017 being the date of arraignment in court.***

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 20TH DAY OF APRIL 2021

F. M. GIKONYO

<u>JUDGE</u>

In the presence of Court Assistant Mr. Kasaso and Miss. Torosi for the state/respondent and the Applicant.

F. M. GIKONYO

<u>JUDGE</u>

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[1] **[2013] EKLR**

[2] **[2018] eKLR**

[3] ibid

[4] **[2009] eKLR**