



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 32 OF 2020

EZEKIEL ROTICH KIPLANGAT.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant, *Ezekiel Rotich Kiplangat* approached this court through a Notice of Motion dated 14th January, 2020 seeking two substantive prayers. He sought an interpretation regarding date of commencement of the sentence imposed on him by the trial court in Milimani Chief Magistrate Criminal Case No. 797 of 2014. He also prayed for revision of the said sentence.

2. In an affidavit sworn in support of the application, the applicant deposed that in the trial court, he was charged in three counts but after trial, he was convicted in two counts with the offences of conspiracy to defraud contrary *section 317* of the *Penal Code* and obtaining money by false pretences contrary to *section 313* of the *Penal Code*. He was sentenced to serve one year imprisonment in each count which sentence was ordered to run concurrently.

3. The applicant did not state clearly in his supporting affidavit why he was seeking interpretation of date of commencement of his sentence but when prosecuting the application, he stated that prior to imposition of the sentence in Criminal Case No. 797 of 2014, he was serving a three year sentence in another case; that instead of complying with the trial court's order that the sentence in Criminal Case No. 797 of 2014 should take effect from 25th September 2019 when it was pronounced, the prison authority insisted that the sentence will take effect after he had completed serving the previous sentence meted out in another case which was contrary to the law.

4. Further, the applicant alleged that he had been in custody for 3^{1/2} years from year 2014 to year 2016 which period the learned trial magistrate did not take into account when passing sentence. He therefore prayed for review of sentence to order that the period spent in custody shall form part of his sentence.

5. The respondent represented by learned prosecuting counsel *Ms Akunja* conceded that the applicant's sentence ought to have commenced from the date it was pronounced by the trial court and that it was unlawful for the prison authority to postpone its execution. *Ms Akunja* was however opposed to the prayer for revision of sentence arguing that she had not been able to establish whether the applicant was in custody for the time alleged in respect of the trial in which the sentence subject of this application was passed or in respect of criminal charges he was facing before other courts.

6. I have considered the application and the oral submissions made by both parties. I have also perused the record of the trial court.

The record confirms that the applicant was charged in three counts with the offences of stealing a motor vehicle contrary to *section 278 A* of the *Penal Code*; obtaining money by false pretences contrary to *section 313* of the *Penal Code*; and conspiracy to defraud contrary to *section 317* of the *Penal Code*. He was acquitted of count 1 but was convicted of count 2 and count 3. He was sentenced to serve one year imprisonment in each count.

The trial court specifically ordered that the sentence in each count will run concurrently and will start from the date it was pronounced. This order was clearly captured in the warrant committing the applicant to prison dated 25th September 2019.

7. The law governing execution of sentences involving a term of imprisonment is set out in *section 333 (1) and (2)* of the *Criminal Procedure Code*. *Section 333 (1) and (2)* states as follows:

***“(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 (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.”

8. Section 38 of the Penal Code is not material to the instant application since it relates to escaped convicts and the applicant does not fall in that category. However, section 37 of the Penal Code is relevant and it provides as follows:

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.”

9. A reading of the above provisions of the law leaves no doubt that as a general rule, a sentence to a term of imprisonment should commence on the date it is pronounced unless prior to the conviction and sentence, the convict was serving sentence in respect of a previous conviction. In that case, the subsequent sentence should take effect after expiration of the former sentence if the trial court did not direct that the subsequent sentence shall be executed concurrently with the former sentence or any part thereof.

10. Although there is no evidence in the court record to support the applicant’s claim that he was serving sentence in respect of a previous conviction in another criminal case when he was sentenced in this case, the record confirms that during the trial, he was facing criminal charges in different courts both in Nairobi and Nakuru. But whether or not he was serving sentence in another case though material is insignificant in this case because when passing sentence, the learned trial magistrate ordered that it shall be executed from the date it was pronounced which was 25th September 2019.

11. In the premises, the prison authority did not have any discretion to decide when the sentence was going to take effect. The trial court pronounced itself on the issue and the prison authority was duty bound to follow the orders of the trial court. I therefore agree with the position taken by the applicant and the respondent and hold that the commencement date of the sentence imposed by the trial court in Criminal Case No. 797 of 2014 was 25th September 2019.

12. The above finding automatically leads to the conclusion that since the applicant was sentenced to one year imprisonment in each count which was to run concurrently, he finished serving his sentence on or about 25th September 2020.

13. Having found as I have above, I do not find it necessary to consider the applicant’s prayer for revision of sentence since doing so will not serve any useful purpose. Having finished serving the sentence imposed by the trial court, there is no sentence which is left for this court to revise.

14. Consequently, the only just order which this court can make which I hereby do, is to order that the applicant be released from prison forthwith unless otherwise lawfully held in connection with any other criminal case. Orders accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kiragu for the respondent

Applicant present

Mr. Ichuloi: Court Assistant