



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. APPLICATION NO. E017 OF 2021

BONIFACE MUGENDI KINYUA.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

(In the matters arising from the original conviction and sentence in

Criminal Case No. 1891 of 2004 (Chuka), HCCRA No. 104 of 2008(Meru),

Criminal Appeal No. 468 of 2010 (Nyeri) and Petition No. 39 of 2018 (Chuka))

RULING

Introduction

1. The application pending before this court is the one dated 01/02/2021. The application is premised under **Section 333(1)(2)** of the **Criminal Procedure Code**. The applicant seeks that this court intervenes in computation of the imposed sentence by deducting from it the period the applicant has already spent in custody.

Brief case summary

2. The applicant was charged in Criminal Case No. 1891 of 2004 (Chuka) with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was tried and found guilty and was convicted accordingly and sentenced to serve 12 years imprisonment.

3. The applicant then appealed to the High Court (HCCRA No. 104 of 2008 (Meru)) against both the conviction and the sentence whereby the sentence was enhanced to death sentence.

4. The applicant was aggrieved by that decision and moved the Court of Appeal (Criminal Appeal No. 468 of 2010) whereby the decision of the first appellate court was upheld.

5. Having exhausted all avenues of appeals, the applicant applied for re-sentence in Petition No. 39 of 2018 (Chuka) whereby he was sentenced to serve 25 years imprisonment.

6. The present application seeks orders that the period that the applicant has served in remand be considered to reduce the sentence imposed on him. The application is not opposed.

Issue for determination

7. In my view, the only issue arising for determination by this court is whether this court should review the sentence imposed on the applicant to take into account the period he has already spent in custody.

Analysis

8. **Section 333** of the **Criminal Procedure Code** provides 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. 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.”

9. The duty to take in account the period an accused person had remained in custody in sentencing is also contained in **Clauses 7.10 and 7.11** of the **Judiciary Sentencing Policy Guidelines** provide 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.”

10. The duty by the court to take into account the period that an offender has spent in custody was also acknowledged by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** and also in **Bethwel Wilson Kibor vs. Republic [2009] eKLR**.

11. In **Ahamad Abolfathi Mohammed & Another vs. Republic** (supra) the court stated 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 and still order the sentence to run from the date of conviction because that amounts to ignoring altogether the period already spent in custody.”

12. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be taken into account in meting out the sentence where it is not hindered by other provisions of the law.

13. The court, when imposing the 25 years’ imprisonment sentence on the applicant, expressed itself as follows:

“In the premises this court shall exercise its discretion and set aside the death sentence imposed and its place impose a sentence of 25 years imprisonment to give more time to the applicant to reform and a possibility of a complete transformation in order to be useful not only to his children but the community at large.”

14. The above-mentioned decision of the court was dated and delivered on 24/04/2019. From the record, the applicant has been in custody since October 2004. This means that the applicant had spent a total of 14 years and 6 months in custody until when the sentence was imposed. This was however not taken into account in assessing the sentence and as such, it is proper, in my view, to conclude that the court did not apply the provisions of Section 333(2) of the Criminal Procedure Code.

Conclusion

15. I find that the applicant had spent 14 ½ years in prison at the time of sentencing. This was not taken into consideration when the court imposed the sentence of Twenty Five (25) years. I thereof order that the sentence of Twenty Five years shall be reduced by 14 ½ years. The applicant shall serve the remainder of the sentence of 10 ½ years.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF MAY 2021.

L.W. GITARI

JUDGE