



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. E022 OF 2021

(From Original case No.174 of 2013 in Kilifi Hon. L. N. Wasige – SRM)

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION 2010

AND

IN THE MATTER OF THE ARTICLES 23 (1), AND 165(3) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 19,20,24,27 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 333 (2) OF THE CRIMINAL PROCEDURE CODE

BAHATI RAMA KAZUNGU & ANOTHER.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Bahati Rama Kazungu &

Kadenge Jamanda Kombe – Petitioners

Mr Mwangi for the state

RULING

The Petitioners before me are convicts of murder contrary to section 203 and with section 204 of the Penal Code serving sentence of 23 years imprisonment with effect from 24.11.2014 under Article 23 (1) and 165 (3) of the Constitution, 19,20,24, 27 of the Constitution to be read conjunctively with section 333 (2) of the Criminal Procedure Code, the Petitioners have applied for review of the sentence. The affidavits evidence in support avers that before the final order on conviction and sentence both of them had been in remand custody for four years.

Decision

The main issue for the Court's determination is whether, this Court has the jurisdiction to review the sentence to factor in the provisions of section 333(2) of the Criminal Procedure Code. The Court's jurisdiction to hear matters of this nature flows from the provisions of Article 50 (2) (P) & (Q) and 6 (a) (b) of the Constitution.

The test is whether in light of all circumstances and non-compliance with section 333 (2) of the Criminal Procedure Code the petitioners are likely to suffer prejudice or injustice in regard to serving sentence which no doubt that a period of pretrial detention ought to have been credited to the final order. It is a logical impossibility for the Court to leave that error, omission or mistake in law to persist as the petitioners would suffer violations of their constitutional rights for which they are entitled to an effective remedy.

On the basis of the foregoing and the record bears me witness that the convicts before being sentenced to 23 years imprisonment had been in remand custody for 4 years. As already sanctioned by the constitution under Article 50 (2) (P) & Q of the Constitution, the petitioners convict whose right to the benefit of the least severe of the prescribed punishment of the offence. In this regard, the Court imposed a sentence of 23 years imprisonment, but he law counter mands that a measure of leniency be extended to those convicts who were in remand custody before the conclusion of their trial.

Parliament having enshrined this principle in legislation by providing that in defined circumstances benefits obtained is a result of an accused person being in remand custody pending trial should be credited in the main scheme of the final order of sentence imposed for the crime. This was a statutory offence and the petitioners were prosecuted and sentenced for it. There was no justification for withholding the period spent in remand custody when interpreting Section 204 of the Penal Code. I think a sentencing Court ought to be vigilant and zealous to uphold the provisions of the statute intended to guarantee certain rights and remedies for convicted persons.

Indeed, the petitioners having persuasively argued that by virtue of statutory interpretation, the oversight by the Court promoted an illegality in which they were prejudiced. The Courts therefore in sentencing an offender must adjust the threshold of reasonableness in adherence to the importance of the rights involved in applying section 333 (2) of the Criminal Procedure Code. The proportionality principle in the final verdict was contravened by virtue of non-compliance in crediting the four year pretrial custody as stipulated in the aforesaid section.

That decision though lawful was incompatible with the petitioners right under section 333 (2) of the Criminal Procedure Code and Article 50 (2) (P) and (Q) of the Constitution.

In my Judgment, what is required is for the committal warrant to be as specific as possible in relation to section 333 (2) of the Criminal Procedure Code to enable the officer incharge of our correctional facilities to cover the implementation of the order objectively and as ascertainable from the verdict of the Court. Unless section 333 (2) is interpreted as indicated, it would permit the special procedural regime established for the petitioners to seek judicial review of the proceedings in respect of the decision on sentence as explained above. That is the jurisdiction exercisable by this court.

In so far as this petition is concerned, there is material at the outset to exercise jurisdiction to vary the sentence initially imposed and in respect the committal warrants be amended to credit the four year remand custody for the benefit of the petitioners.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Bahati Rama Kazungu & Kadenge Jamanda Kombe – Petitioners
2. Mr Mwangi for the state