REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC. CRIMINAL APPLICATION NO. 43 OF 2019

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. T.A. Sitati (S.R.M) in Narok CMCR No. 1138 of 2012 on 30th December, 2013 and HCCRA 61 of 2017 at Narok)

NIXON KIPRONO LANGAT.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Time spent in custody

[1] The Applicant moved this court vide an application dated 17/10/2019 seeking for orders that his sentence to start from 30th December, 2013 for the interest of justice. That he was resentenced to serve 10 years to start from 13th March 2019 instead of 30th December, 2013 hence being prejudiced.

[2] The Applicant appealed against his conviction and sentence of death in respect of robbery contrary to Section 296(2) of the Penal Code.

[3] The Applicant on appeal had his conviction upheld. The death sentence was quashed and the case was remitted to the trial court for resentencing hearing.

[4] He was resentenced to serve 10 years' imprisonment on 12/03/2019.

Applicant's submission

[5] The Applicant orally submitted that he was arrested on 10th September 2012. He was resentenced to 10 years with effect from date of judgment. Time spent was not taken into account according to Section 333(2) of the Criminal Procedure Code.

Prosecution's submission

[6] Mr. Karanja for the Respondent in his oral submission opposed the application and argued that re-sentencing is discretionary by trial court which considered all relevant matters including time spent in custody. Nothing shows the trial court failed to exercise discretion as per the law. He should now appeal the resentence not file application.

ANALYSIS AND DETERMINATION

[7] The application herein is for consideration of time spent in custody prior to and after conviction and reduction of sentence pursuant to the provisions of Section 333(2) of the Criminal Procedure Code. The section provides that: -

> ***"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 (emphasis mine)."***

[8] The objective of the section was explained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) as follows:

> ***"The provision 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."***

[9] I have perused the trial court's records and it is clear that the Applicant herein was convicted of the offence of robbery contrary to Section 296(2) of the Penal Code and was sentenced to death. He was subsequently re-sentenced to serve 10 years' imprisonment. The trial court (Hon. W. Juma.) noted that his sentence had been commuted to life imprisonment and so he may not have benefited from *Muruatetu* decisional law. The court also noted the offence was a serious one. And she convicted him to 10 years.

[10] I do note that the objective of Section 333(2) of the CPC as was explained in the sentencing policy is to ensure that a person serves sentence that is proportionate to the offence. The offence herein was robbery with violence whose maximum sentence is death. Accordingly, the sentence pronounced by the trial court is most lenient. Even if the applicant had served 7 years, in the circumstances of this case, the sentence of 10 years imposed by the trial court is appropriate.

[11] I do note also that the applicant got advantage of the *Muruatetu* decisional law and received a reduction of sentence. The judge set aside the death sentence on the basis of *Muruatetu* decisional law and remitted the file back to the trial court for resentencing. The Supreme Court has, however, clarified the scope and application of *Muruatetu* decisional law and hemmed it to only murder cases; it ought not benefit other cases such as the applicant's. I do not wish to state that the applicant is pushing his luck too far, but the fact remains that he derived benefit from application of *Muruatetu* decisional law.

[12] In sum, I reject his application. Should he feel aggrieved by this decision, he has the right to appeal to the Court of Appeal and make arguments for reduced sentence. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26TH DAY OF JULY, 2021.

F. M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for the Respondent

2. The applicant in person

3. Mr. Kasaso – CA

F. M. GIKONYO

JUDGE