



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CR. APPLICATION NO. 5 OF 2020

MICHAEL ONYANGO OBONDO.....1ST APPLICANT

DUNCAN OUMA AGANG'O2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

MICHAEL ONYANGO OBONDO and **DUNCAN OUMA AGANG'O** are the Applicants.

1. The said Applicants were convicted for the offence of **Robbery with Violence** Contrary to **Section 296 (2)** of the **Penal Code**.
2. Each of them was then sentenced to suffer death as by law prescribed.
3. The sentences were handed down by the trial court on 15th November 2007.
4. Being dissatisfied with both their convictions and the sentences, the Applicants appealed to the High Court. However, their appeals were unsuccessful.
5. The Applicants thereafter lodged appeals to the Court of Appeal. After giving due consideration to the said appeals, the Court of Appeal dismissed the same.
6. In 2019 the Applicants filed Petitions seeking re-sentencing. The said Petitions were premised on “*the Muruatetu Case*”, through which the Supreme Court had declared that it was unconstitutional for a trial court to hand down a sentence, (even one which appeared to be mandatory), before giving to the accused person an opportunity for mitigation.
7. After giving due consideration to the respective petitions, the Court re-sentenced each of the Applicants to 30 Years Imprisonment. The said sentences were to run from 15th November 2007, which is the date when the trial court had handed down the original sentence.
8. The Applicants have now filed applications pursuant to **Section 333 (2)** of the **Criminal Procedure Code**, seeking a reduction of the sentences. They asked the court to take into account the period of one (1) year, which they had spent in custody from the time they were arrested.
9. They submitted that the High Court had failed to take into account the said one (1) year, at the time of re-sentencing.
10. In support of their application, the Applicants cited the case of **PETER KARIUKI MATHI Vs REPUBLIC CRIMINAL REVISION NO. 103 OF 2019.**
11. In that case the Applicant had sought an order for remission, as well as an order for the review of the sentence that had been passed during his re-sentencing.
12. The learned Judge pronounced herself thus;

“For this reason, I order that the sentence imposed by this court shall be reduced proportionately by the period the applicant had

been in custody. The period commences from the date of arrest. See the case of Ahamad Abolfathi Mohamed & Another Vs R [2018] eKLR, where the Court of Appeal, sitting in Nairobi stated that while applying

Section 333 (2) of the Criminal Procedure Code, alongside its proviso, the sentence of imprisonment ought to run from the date of arrest.”

13. In the light of the said pronouncement, I decided to look-up the provisions of **Section 333 (2)** of the **Criminal Procedure Code**; this is how it reads;

“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.”

14. Thus, every sentence shall commence from the date when it is pronounced; and not from the date of arrest.

15. Unless an accused person is convicted on the same date when he was arrested, he is presumed to be innocent until the contrary is proved: that is what **Article 50 (2) (9)** of the **Constitution** stipulates.

16. Therefore, if the person was held in custody prior to his conviction, it would be wrong to consider the period he spent in custody as constituting part of the sentence. I so hold because it would otherwise imply that if the accused person was acquitted, after having been held in custody, he would already have served some sentence for an offence which he did not commit.

17. The proviso to **subsection (2)** of **Section 333** of the **Criminal Procedure Code** comes into play upon conviction. It is then that the trial court is required to take account of such period as the convict had spent in custody.

18. In the case of **PETER KARIUKI MATHI Vs REPUBLIC** (supra) the learned Judge noted as follows;

“By dint of Section 333 (2) of the Criminal Procedure Code, the learned trial magistrate was obliged to take into account the period the applicant spent in custody before sentencing him.

By failing to pronounce herself on this issue, implies that the applicant would start serving sentence from the date of resentencing, which is 18th February, 2019.”

19. I am in agreement with the learned Judge in that respect.

20. In this case, the Court expressly ordered that the Applicants would serve the 30 Years of imprisonment from the date when they were first sentenced.

21. Therefore, there was no ambiguity on the issue about the date from when the sentences would run.

22. Furthermore, the power of Revision is only exercisable when the Applicant satisfies the Court that there was an issue as to the;

“... correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of proceedings of any such subordinate court.”

- See **Section 362 of Criminal Procedure**

Code.

23. In the event, I doubt that I can sit on application for the Revision of orders made by my court.

24. However, in the event that the High Court has the requisite authority to sit on revision in respect to its own orders, I find that the Applicant have not satisfied me that there was any issue concerning the correctness, legality or propriety of the sentence which the Court handed down during re-sentencing.

25. Accordingly, I decline the Applicants' invitation, which sounds like a more structured mitigation. Issues concerning their respective families and also their respective qualifications which they earned whilst serving imprisonment were already raised, and were therefore given due consideration at the time of re-sentencing.

26. I find no merit in the application, and therefore the same is dismissed.

DATED, SIGNED and DELIVERED at KISUMU

This 29th day of April 2020

FRED A. OCHIENG

JUDGE