



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. 288 OF 2019

JAMES KEGOCHA MAGIGE..... ACCUSED

VERSUS

REPUBLICDPP

RULING

The applicant JAMES KEGOCHA MAGIGE filed this application on 30.10.2019 seeking orders under section 333(2) of the Criminal Procedure Code so that the period he spent in custody pending determination of his case be considered in his sentence. The applicant has submitted that he had been in custody from 19.2.2016. That he had 2 different cases, being Criminal case number 344/2014 in which he was sentenced on 18.4.2017, and criminal case number 2042/2014 on which he was sentenced on 8.4.2019. This particular application relates to yet another case number Cr. 859/2016 (Kibera).

In the affidavit in support of this application, at paragraph 4, the applicant has deponed that he remained in custody from the date of arrest on 19.2.2016 to date of conviction on 26.8.2019, when he was sentenced to serve a term of 7 years' imprisonment.

The counsel for the state, Ms. Kabithi, basically stated that the state would not oppose the application if indeed the court did not give consideration to the period spent in custody pending trial.

I have considered the provisions under which this application has been brought section 333(2) of the Criminal Procedure Code, states;

“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 date on which it is pronounced, except where otherwise provided by this code.

Provided that where the person sentenced under section 5(i) has prior to such sentence, been held in custody, the sentence, shall take account of the period spent in custody.”

Clearly, the above provision dictates that the period spent in custody ought to be accounted for in the sentence unless there is a contrary provision. The issue for determination herein, is however, whether the applicant's case qualifies for consideration under this provision. There is no doubt as to the fact that applicant has face a plethora of cases at the magistrate's courts at Milimani and Kibera Law courts. There is Kibera chief Magistrates Criminal case number 859/2016, the subject matter of this application. There is also Kibera Chief Magistrate's criminal case number 2042/2014. He also faced Nairobi Chief Magistrate's court criminal cases number 344/2013 and 305/2016 (Both Milimani). These last 2 are contained in the ruling made pursuant to his Revision application number 232/2019 and 288/2019 (Hon. Justice L. Kimaru).

I have perused and considered the ruling of the Hon. Justice L. Kimaru dated 19.12.2019. In the said application, the applicant had sought for 2 orders. First, the order to consolidate his criminal revision applications numbers 232/2019 and 288/2019 arising from the lower court cases numbers 2042/2014 (Kibera) and 859/2016 (Kibera), our instant case. The second order the applicant sought were that the periods he spent in custody be considered and accounted for in the sentences meted out in the 2 cases.

The learned Judge, in his considered ruling, held that the applicant had in fact been in prison serving sentences in respect of the 2 cases at Milimani, being criminal 344/2013 and criminal 305/2016. He was not therefore in custody awaiting trials in the 2 cases of Kibera law courts (Including the subject of this application. While dismissing the applicant's consolidated applications (Revision 232 and 288/2019), the Honourable Judge noted that the applicant had clearly misled the court and told a blatant lie.

The applicant, has again made the same application before this court. Just as held by the Honourable Justice Kimaru in the ruling of 19.12.2019, the truth is that the applicant was serving sentence and NOT in custody pending determination of this case. I am not in the

circumstances convinced that the provisions of section 333(2) of the Criminal Procedure Code in his favour. This application to say the least, is an abuse of the process of the court being on an issue already determined by this court. I do not find any merit in this application of the applicant filed herein on 30.10.2019. I hereby dismiss the same. It is so ordered.

D. O. OGEMBO

JUDGE

12.6.2020

Court:

Ruling read out in open court in presence of the applicant and Ms. Chege for the state.

D. O. OGEMBO

JUDGE

12.6.2020