



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL MISC. APPLICATION CASE NO. 74 OF 2020

ANSOUMANA CONDE.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

By an application dated 26.2.2020, the applicant, **ANSOUMANA CONDE**, seeks that the sentence meted out against him on 20.9.2018 in the chief magistrate's court, Kibera, in Criminal case number 217 of 2013 be revised.

He had been sentenced to serve a term of 10 years imprisonment. His application is supported by an affidavit sworn by himself on 25.2.2020. In the affidavit, he pleads that the period he spent in remand pending conclusion of his case, a period of 5 years and 8 months be accounted for in the sentence in accordance with section 333(2) of the Criminal Procedure Code. These are the same submissions adopted by learned counsel, Ms. Akello for the applicant. Counsel otherwise added that should that period be accounted for, then the applicant ought to be released from prison as he has then completed the term.

In a short response, learned counsel, Ms. Ndombi for the state, only urged the court to peruse the proceedings to ascertain if indeed period spent in custody had not been considered in the sentence.

I have considered the 2 parallel submissions. Section 333(2) of the Criminal Procedure Act, cap 75, Law of Kenya, 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 day of, the date on which it was pronounced, except when otherwise provided in this code”.

There is therefore no doubt that in sentencing, the period spent in custody (if not granted bail) waiting conclusion of the trial ought to be taken into consideration. This fact is conceded even by the prosecution side. The question is therefore whether indeed the learned trial magistrate did not give account to this period served in custody as the applicant waited for conclusion of his case. In discerning this, this court has considered the following factors:

(i) The applicant has been charged with Trafficking in Narcotic Drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic substances control Act, No. 4 of 1994.

Section 4(a) of the said Act states:

Section 4

Any person who trafficks in any narcotics drug or psychotropic substance or any substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable –

(a) In respect of narcotic drug or psychotropic substance, to a fine of one million or three times the market value of the narcotic drug or psychotropic substances, whichever is greater, and, in addition to imprisonment for life.

The above provision clearly dictates that the offence for which the applicant was charged, tried and convicted, attracts a penalty of a fine of one million shillings or three times the value of the subject substance. In addition to this, the offence would attract a life imprisonment term.

(ii) I have perused the proceedings in the lower court. In his mitigation, the applicant pleaded with the court to consider the period he has spent in custody as he conducted his trial. In the sentence, the court also noted that it had taken into account the time spent in remand.

(iii) There is a clear disparity between the maximum sentence prescribed by the law i.e upto life imprisonment and the term of 10 years meted out by the learned trial magistrate. This can only mean that the learned magistrate in passing the sentence, duly considered the mitigation of the applicant and the circumstances of the case including the period the applicant had spent in remand. I so find.

It is for these reasons that this application for revision, based on the ground that the period spent in custody was not considered by the sentencing court, lacks any merit. Same is dismissed. The applicant shall serve 10 years imprisonment as ordered by the trial court. For avoidance of doubt, the term of 10 years is to run from the date of sentence on 20.9.2018.

HON. JUSTICE D. OGEMBO OGOLA

23RD OCTOBER 2020

Court:

Ruling read out in open court (on-line) in the presence of the applicant, Mrs. Akelo, for the applicant, and Mr. Momanyi for the state.

HON. JUSTICE D. OGEMBO OGOLA

23RD OCTOBER 2020