



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 43 OF 2020

ELIPHAS GITONGA BAARI.....PETITIONER

VERSUS

DPP..... RESPONDENT

JUDGMENT

1. The petitioner, *Eliphas Gitonga Baari* has approached this court by way of a petition dated 5th June 2020 filed in court on 8th June 2020. In the petition, the petitioner principally seeks a declaration that the trial court's failure to comply with *Section 333 (2)* of the *Criminal Procedure Code* denied him his rights under *Article 50 (2)* of the *Constitution*. He also sought an order directing that the time he had spent in lawful custody prior to the date of his sentence be taken into account and be deducted from his sentence. Alternatively, he prayed that the court issues any other order it may deem fit considering the circumstances of the petition.

2. At the hearing, the petitioner relied on his written submissions. In addition, he made brief oral submissions urging me to set aside his sentence and to substitute it with a non-custodial sentence. He did not lay down any basis for this prayer which was a departure from the reliefs sought in the petition.

3. The petition is opposed by the respondent. In her brief oral submissions, learned prosecuting counsel *Ms. Mati* contended that the petition lacked merit and ought to be dismissed because in her view, it was clear from the record of the trial court that the learned trial magistrate when sentencing the petitioner took into account the period the petitioner had spent in custody prior to the date of his sentence.

4. I have considered the written and oral submissions made by both the petitioner and the respondent. I have also read the trial court's record. I find that this petition is premised on *Section 333 (2)* of the *Criminal Procedure Code* which states as follows:

“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.”

5. The above provision was interpreted by the Court of Appeal in *Bethwel Wislon Kibor V R, [2009] eKLR* where the court in revising the sentence imposed on the appellant by the High Court held as follows:

“We have considered this appeal and it is our view that the appellant who told us that he was a qualified Animal Health Assistant, was made to remain in custody for a long time for no fault of his own. The incident took place way back in 1999. The appellant was promptly arrested and taken to court. There were long adjournments due to transfers and/or changes of trial Judges resulting in long incarcerations of the appellant. By proviso to section 333 (2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody.”

6. A perusal of the trial court's record shows that the petitioner was charged and convicted of the offence of breaking into a building and committing a felony contrary to *Section 306 (a)* of the *Penal Code*. Upon conviction, he was sentenced to pay a fine of KShs.150,000 in default to serve five years imprisonment.

7. The record also shows that the petitioner was arrested on 29th December 2018. He was arraigned in court on 31st December 2018 and though he was admitted to bond, he was unable to comply with the bond terms. He thus remained in custody till 18th February 2020 when he was convicted and sentenced.

8. When passing sentence, the learned trial magistrate stated as follows:

“I have considered the mitigation and the records and bearing in mind the nature of the offence and the prevalence of the same within this jurisdiction. I have also taken into account the duration of time the accused has been at the remand which is now about one year and I hereby proceed to fine the accused to pay a fine of KShs.150,000 in default to serve 5 years imprisonment.”

9. From the learned trial magistrate’s notes on sentencing, there is no doubt that the trial court was alive to the proviso to *Section 333 (2)* of the *Criminal Procedure Code* and that in sentencing the appellant, he complied with the dictates of that section. He did not however specifically calculate the actual period the petitioner had spent in custody prior to the date he was sentenced. The learned trial magistrate just casually indicated that the petitioner had spent about one year in custody. Though indicating that he had taken the time the petitioner had spent in custody into account, the learned trial magistrate did not direct that the said time shall form part of the petitioner’s sentence in default of payment of fine.

10. In my view, *Section 333* of the *Criminal Procedure Code* read as a whole together with *Section 38* of the *Penal Code* leaves no doubt that it enjoins the trial court to take into account the actual period a convict had spent in custody prior to sentence not for purposes of making a decision on the sentence to be imposed in a particular case but for the purpose of incorporating that time as part of the sentence imposed so that the sentence takes effect from the date of the convict’s arrest. Put differently, the period spent in custody prior to the date of sentence should be deducted from the term of imprisonment meted on a convict.

11. As stated earlier, in this case, the learned trial magistrate did not specifically calculate the time the petitioner had spent in custody prior to date of his sentence. My calculation shows that the petitioner had spent in custody a total period of one year and forty seven days. In failing to properly calculate the time the petitioner had spent in custody prior to his sentence and in failing to direct that the said period be deducted from the sentence imposed in default of payment of fine, the learned trial magistrate failed to accord the petitioner a benefit bestowed on him by the law and thus violated his constitutional right to equal protection and equal benefit of the law enshrined under *Article 27 (1)* of the *Constitution*.

12. There is one other observation I would like to make regarding the sentence imposed by the learned trial magistrate in this case. In my view, the period of imprisonment imposed by the trial court in default of payment of fine was illegal in the sense that it exceeded the period prescribed under *Section 28 (2)* of the *Penal Code*. Under the scale provided by *Section 28 (2)* of the *Penal Code*, the maximum period that a court can impose as default sentence for payment of a fine exceeding Kshs.50,000 is twelve months imprisonment. In this case, the appellant was sentenced to pay a fine of Kshs.150,000 in default to serve five years imprisonment. The default sentence was far beyond the period prescribed by the law and was thus unlawful. This in my opinion amounted to a further violation of the appellant’s constitutional right to a fair trial and his right to equal protection of the law.

13. For all the foregoing reasons, I find merit in this petition and it is hereby allowed on terms that the sentence imposed by the learned trial magistrate is hereby set aside. It is substituted with a sentence of a fine of KShs.150,000 in default to serve 12 months’ imprisonment. As the petitioner had spent one year and forty seven days in custody prior to the date of his sentence which ought to have formed part of his default sentence and he has already served slightly over nine months in prison since the sentence was imposed by the trial court on 18th February 2020, I find that he has already completed serving the sentence substituted by this court. In the premises, I direct that the petitioner be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED and SIGNED at NAIROBI this 24th day of November 2020.

C. W. GITHUA

JUDGE

DATED and DELIVERED at EMBU this 26th day of November 2020.

L. NJUGUNA

JUDGE

In the presence of:

Appellant present in person

Ms Mati for the respondent

Esterina: Court Assistant