REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISC. CRIMINAL APPLICATION NO. 19 OF 2019

Consolidated with Misc. Cr. Appl. No. 25 of 2019

JAMLICK NJERU IRERI……...……..1ST APPLICANT

JAMES MURIITHI MARETE…….……2ND APPLICANT

VERSUS

REEPUBLIC…….....……...….....RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the consolidated applications dated 16th July 2019 by the 1st applicant and the other dated 1st October 2019 filed by the 2nd applicant. The two applications were consolidated on 5/12/2019 and heard together.

2. The applicants' move court to make a finding that their sentence should run from the date of arrest as opposed to the date of conviction as provided for within section 333(2) of the criminal procedure code.

3. The applicants herein were jointly charged in Embu Criminal Case 1402 of 2000 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. They were convicted and sentenced to death and subsequently appealed to the High Court vide Criminal Appeal No. 76 of 2002 that was dismissed and their sentences upheld.

4. Following the decision of the Supreme Court in the case of **Francis Kariuki Muruatetu & Another v Republic [2017] eKLR,** the applicants petitioned for resentencing in Petition No. 1 of 2019 and had their death sentences reduced to 30 years imprisonment.

5. In his oral submissions, the 1st applicant submitted that he stayed in remand for two years from June 2000 to August 2002 and thus this period of incarceration ought to be taken into consideration in his sentence.

6. The 2nd applicant filed written submissions in which he submitted that it was unfair for the period spent in custody to not be factored in as part of his 30-years sentence. He relied on the provisions of section 333 (1) (2) of the criminal procedure code as well as the cases of **Ahmed Abolfathi Mohamed & Another v Republic [2018] eKLR** and that of **Criminal Appeal No. 18 & 102 of 2018; Abdul Aziz Oduor & Stephen Omondi Wanyama v Republic.** It must be noted that the applicants did not include the prayer in the current application in HC Petition No. 1 of 2019 for consideration by the court.

7. Ms. Mati for the respondent did not oppose the applications as it were grounded in law specifically Article 50 (2) (1) of the Constitution and Section 333 (2) of the Criminal Procedure Code. Reliance was placed on the cases of **Ahmed Abolfathi Mohamed (supra)** and that of **Joseph Mutunga & Another v Republic [2019] eKLR.**

B. Analysis & Determination

8. I have considered the application herein as well as the submissions by both the applicants and the respondent.

9. Section 333(2) of the ***Criminal Procedure Code*** provides that:

> ***"(2) 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."

10. The law provides that the period spent in custody pending trial must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so.

11. I associate myself with the decision in **Ahamad Abolfathi Mohammed [supra]** where the Court of Appeal held that:

"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

12. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

"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. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

13. According to ***The Judiciary Sentencing Policy Guidelines***:

"The proviso 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."

14. It is not in doubt that the applicants herein were arrested on or about the 10th June 2000 and convicted on 13/08/2002. Consequently, after their death sentences was reduced to thirty (30) years imprisonment in Petition No. 1 of 2019. It is my finding that this application has merit and it is hereby allowed.

15. The court in Petition No. 1 of 2019 noted that the applicants herein had already served seventeen (17) years in prison and ordered that they serve the balance of twelve (12) years out of the thirty (30) years sentence.

16. The original file for Embu Principal Magistrate Case No. 1402 of 2000 shows that the applicants were apprehended on 13/06/2000 and plea taken on 13/06/2000 while the date of conviction was 13/08/2002.

17. It is clear from the record that the applicants stayed in custody pending trial for two (2) years and two months. this period was not taken into account during resentencing in Petition No. 1 of 2019.

18. I therefore find that this application is meritorious and I hereby allow it by issuing the orders sought herein that: -

The thirty (30) year imprisonment sentence given in Embu High Court Petition No. 1 of 2019 shall commence from 13th June 2000.

19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Lokorio or Respondent

Both Applicants