Marufa v Republic (Criminal Petition 5 of 2019)
[2024] KEHC 309 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 5 OF 2019

RN NYAKUNDI, J

JANUARY 24, 2024

BETWEEN

WYCLIFF WANGUSI MARUFA ..... ACCUSED

AND

REPUBLIC ..... PROSECUTOR

(Being an Application for Appeal in The Cr. Case No. 136 of 2009)

RULING

1. The petitioner charged of Robbery with violence contrary to Section 296(2) of the *Penal Code* was arraigned in court on 27.1.2009. The brief facts of the charge were that on the 24th day of January 2009 at Eldoret township in Uasin Gishu district within Rift Valley Province jointly with others not before court while armed with a dangerous weapon namely a pistol robbed Sophia Lobolel of Ksh 70,000 and at or immediately before the time of such robbery wounded the said Sophia Lobel.

2. The petitioner was tried before the Chief Magistrate's Court at Eldoret in Cr. Case No 570/2009 as a consequence of the trial he was found guilty, convicted and sentenced to suffer death as prescribed under the law. Being aggrieved with conviction and sentence he filed an Appeal to the High Court of Kenya at Eldoret in Cr. Case. No 136 of 2009 in which the two bench Judge dismissed the appeal on both conviction and sentence. Further in exercising his right of appeal the petitioner moved to the Court of Appeal and on 1.3.2018 the appeal on conviction was dismissed whereas the sentence of death was set aside and substituted with a custodial sentence of 20 years imprisonment with effect from 19.8.2009.

3. In the latest petition the petitioner filed yet another notice of motion expressed to be brought under Section 361 and 333(2) of the *Criminal Procedure Code*. The gist of the grounds in support of the Notice of Motion is as deposed in the supporting affidavit on oath as follows:

1. That I was convicted and sentenced to death in Cr Case No 570/2009 which was dismissed upon first appeal by high court at Eldoret but was later reduced to 20 years by the court of appeal in Criminal Appeal No 22/2015

2. That I was now seeking leave for further revision of the custodial sentence with that of non-custodial on the basis under section 362,365 and 364(1) of the *CPC* 75 laws of Kenya

3. That I have been in prison for 10 years and 11 months including time spent in remand custody

4. That I am remorseful, repentant, and reformed of what befall of me and promise to live a decent life as a good citizen if my payers will be granted.

5. That denial of non-custodial sentence to me infringes the provisions of Art.279(1) (2) (94) of the *constitution* of Kenya 2010 and prejudices my citizenship as I feel discriminated upon by the law.

6. That the Hon. Court has got unlimited jurisdiction powers and discretion as contemplated under art 165(3) a, b, d and 258(1) of the *constitution* of the Republic of Kenya to handle matters of this kind.

Analysis and Determination

4. I have considered the application and the court's mandate is to determine the application of section 333(2) of the *Criminal Procedure Code*. The section provides as follows:

> (2) 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 *Judiciary Sentencing Policy Guidelines* are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

6. In *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR 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 June 19, 2012."

7. The punishment imposed by the Court of Appeal is that of 20 years imprisonment being a substitution of the death penalty. In my considered view it is trite as stated in the case of *Benard Kimani Gacheru vs Republic* (2002) eKLR that it is now the position in law that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle, even if the Appellate court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states in shown to exist." There is no evidence in this application for this court to interfere with the sentence passed by the Court of Appeal going by the *Guidelines* above. However, I bear in mind that the petitioner has invoked the jurisdiction of this court on resentencing under Art.50 (6) (a) & (b) of the *Constitution* for a new trial on sentence.

8. In this respect the purported new trial is based on Section333(2) of the *CPC* which reflects the general rational for giving credit to a convicted person for any time spent in remand custody pending trial and conclusion of his or her case. The practice of using Section 333(2) of the *CPC* is to award enhanced credit for both the quantitative and qualitative consequences of pre-sentence detention now deeply entrenched in our sentencing system. As for the legislature by enacting this provision it is presumed to have created a coherent, consistent and harmonious scheme which should be interpreted in a manner that is consistent with the principles and purposes of sentencing set out in the various statutes and the code as a guide.

9. Consequently, the hearing before this court is structured in terms of section 333 (2) of the *CPC* that tends to indicate a directory general rule for a trial court to take into account the period spent in remand custody by an offender before conviction and sentence. The fundamental purpose of sentencing in our *Policy Guidelines* is to contribute along with crime prevention initiatives for the respect of the rule of law and maintenance of a just, peaceful and safe society by imposing sanctions that have one or more of the following objectives.

    a. To denounce unlawful conduct

    b. To deter the offender and other persons from committing offences

    c. To separate offenders from society where necessary

    d. To assist in rehabilitating offenders

    e. To provide reparations for harm done to victims or to the community and

    f. To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community

10. This means that non of the above objectives is ranked superior to the other. Indeed, my reading of the record shows that the 20 year imprisonment as a substitute of the death penalty did not factor the spirit of the law in section 333 (2) of the *CPC*. So that this specific individual who particularly spent a considerable period of time in remand custody before conclusion of his case and final judgement dated 19/8/2009. The substantive record shows the petitioner having taken plea on 27.1.2009. There

is therefore a period of 7 months which he qualifies for as credit for the sentence imposed by the court as it was to take effect from 19.8.2009.

11. The petitioner has demonstrated as supported by the record that he should be awarded enhanced credit as a result of his pre-trial detention. The broad view for reason of this paradigm is that for individuals who would be ultimately acquitted of the charges and having spent a measure of time in remand custody may seek financial compensation if reasonably their detention was not justified. A corollary to this point is that the public may turn a blind eye to the pre-trial detention and it is far reaching consequences under Art.28,29 25, & 50 (2) (a) and (e) of the *Constitution* because this burden falls disproportionately on the poor, marginalized and vulnerable class of our society.

12. The popular response might be quite be a different story if those incarcerated for long periods in pre-trial detention draw their large numbers from the upper or middle class of our society. It is empirical that in our prison system the majority in remand custody who bear the burdens of pre-trial detention are those in the bottom model of the pyramid. There is no doubt that preventing danger to our communities is a legitimate goal of a justice system but only to the extent that should not be a punitive tool to restrain suspects for long period of time without a measure of considering the constitutional imperatives and the intent of the fundamental rights and freedoms that are guaranteed by the Supreme law. The enactment of the sentencing *Policy Guidelines* and Section 333(2) of the *CPC* provide a powerful complement in the regulatory framework on custodial sentencing in Kenya. To that extent the committal warrant to prison issued in favour of the petitioner shall be amended to give effect to Section 333(2) of the *CPC* to factor an enhanced credit for the custodial sentence commencement for the due date to be 27.1.2009. Largely it will ensure an early release of the petitioner.

13. Orders Accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 24TH JANUARY 2024

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mugun for the State