Longor v Republic (Miscellaneous Criminal Appeal E088 of 2023) [2024] KEHC 809 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEHC 809 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

MISCELLANEOUS CRIMINAL APPEAL E088 OF 2023

RN NYAKUNDI, J

FEBRUARY 1, 2024

BETWEEN

ESEKON LONGOR ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being a review on sentence in the Resident Magistrate Court at Kakuma Criminal Case No. E079/2021 by Hon. C.A Mayamba (PM) dated 5th December, 2022)

RULING

1. The applicant filed the certificate of urgency together with a notice of motion expressed to be brought in the matter of alleged contravention of section 333(2) of the *CPC* and Article 22 (1), 23 (1) and 27(1) of the *Constitution* of Kenya 2010. The notice of motion is based on the following grounds;

    1. That the applicant was arrested, charged, tried and convicted for the offence of attempted murder and sentenced to five (5) years imprisonment

    2. That the Applicant pleaded not guilty

    3. That the applicant has no previous criminal record

    4. That the applicant spent one year (1) and three months in custody

    5. That the period spent in custody was no factor in during resentencing.

    6. That section 333(2) requires a convict to be sentenced form the date of arrest.

    7. That the applicant relies in the case of Lotesiro Ekuwom and another (2023) Lodwar, he was resentenced form the date of arrest.

8. That the applicant believes the court will consider Article (271) as the applicant is not an exception to benefit from the law.

2. The brief facts of this case are not in dispute as reflected by the record of the trial court. The applicant was charged with attempted murder contrary to section 220 (a) of the *Penal Code*. The particulars of the offence are that on the 25th day of September, 2021 at Kalobeyei sub-location in Turkana West sub County within Turkana County, attempted unlawfully to cause the death of James King'ongo And Edwin Wachiye by shooting at them with an AK 47 rifle. In a full trial comprising 6 witnesses summoned by the state and being placed on its defence the applicant offered an explanation in rebuttal to the circumstances of the offence. In the judgment of the trial court the applicant was found guilty, convicted and sentenced to five years imprisonment on 5th December, 2022. In the pronouncing sentence the learned trial magistrate had this to say; I note the mitigation and also period taken in custody awaiting trial and determination on this case, I do sentence the accused person for five years in prison.

3. In his latest application this court is being urged to re look at the sentence and have it reviewed consistent with the provisions of section 333(2) of the *Penal Code* to factor the period spent in pre-trial detention.

Resolution

4. This is the first appeal and it is the duty of the court pursuant to the principles in *Pandya v R* [1957] E.A 336 to re-evaluate and examine the evidence presented before that trial court and draw its own inferences without disregarding the judgment of the court appealed from the appellant. Whether in review or appeal on aspects of sentence arising out of a decision by the trial court the threshold still remains as pronounced in the various case law. For instance in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, the court pronounced itself on this issue as follows;

> The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors"

Shadrack Kipkoech Kogo v R. Eldoret criminal Appeal No 253 of 2003 the Court of Appeal stated thus:-

> sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R* [1989 KLR 306]"

5. 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) ha, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

6. I have reconsidered this case on matters of sentence and I am still of the view that the trial court was correct in its decision of imposing five years imprisonment with a rider that the period spent in pretrial remand had been taken into account. That means there was compliance with section 333(2) of the *Criminal Procedure Code*. The period to be served by the applicant could have been more than five

years custodial sentence. With respect I think this application misses the essential point on the letter and spirit of the provisions as it relates to giving credit by a trial court for the period spent in pretrial detention. I considered this further application an unnecessary and waste of judicial time. On review the application is dismissed in terms of section 382 of the *Criminal Procedure Code*.

Orders accordingly.

DATED AND SIGNED AT LODWAR THIS 1ST DAY OF FEBRUARY, 2024

.....

R NYAKUNDI

JUDGE

In the presence of

Yusuf for the state

Appellant present