Moru v Republic (Miscellaneous Criminal Appeal E046 of 2023)
[2024] KEHC 3792 (KLR) (5 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3792 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

MISCELLANEOUS CRIMINAL APPEAL E046 OF 2023

RN NYAKUNDI, J

APRIL 5, 2024

BETWEEN

PAMELA EKADELI MORU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for review of sentence in criminal case No. 415 of 2018 in a judgment dated 1/12/2020 before Hon C M Wekesa)

RULING

1. The applicant was charged in the trial court with the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*. The particulars were that on 12th June, 2018 at Nalipomoon village in Turkana South Sub- County within Turkana County the applicant unlawfully killed Benvictor Ekitela Lobali.

2. The applicant was convicted of the said charge and a ten years sentence was imposed. The applicant has now filed the instant application seeking to benefit from the provisions of Section 333(2) of the *CPC*.

Analysis and Determination

3. 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.

4. 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.

5. In the case of *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."

6. It follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.

7. The punishment prescribed by the law for the offence of manslaughter is life imprisonment. I take note that the applicant was found guilty of the offence of manslaughter. The trial court considered the mitigating factors and the objectives of sentencing in their totality.

8. The trial court in its sentencing decision stated as follows:

> " I have social inquiry report together with mitigation presented by the accused. Someone lost his life, one of the children appeared as a witness and was resentful of her mother who is the accused notably from social inquiring report, the accused is not remorseful, despite the above, the period of time that she has been in custody is noted putting all the factors into consideration, accused is sentenced to serve imprisonment for a period of ten years."

9. Section 333(2) of the *CPC* is now a very progressive provision that appears to be addressing the injustices that may have been or may be visited upon the convicts if their sentences do not incorporate the letter and spirit of the legislature. Notwithstanding that position this court has to point out that a review of a judgement or order of another court with concurrent jurisdiction is a serious step and reluctant resort to it is proper only where glaring omission or patent mistake or like grave error that has crept in earlier by reason of judicial fallibility. Practically, now there are many petitions filed on re-sentencing through different counsels or by the same parties on old and overruled arguments without

any new evidence to pursued the court with a review of the order is necessary. In my considered view, the interest of justice require the court to balance the rule of law and the need for legal certainty in the finality of criminal convictions as well as the effect of fair administration of justice. If convicts or petitioners who have exhausted their right of appeal to the highest court of the land on such matters are allowed to approach the court on multiple occasions on the same matter it is only appropriate that the doctrine of res-judicata be invoked in criminal cases.

10. From the foregoing, it is my considered view that the sentence meted by the trial court was reasonable and took into account the provisions of section 333(2). Therefore, the applicant cannot benefit from the provisions of section 333(2).

11. In my judgment appeals or review courts should approach the imposition of sentence by trial courts conscious of what the legislature has prescribed within the penal statutes. The specific sentences are not to be departed from lightly and for flimsy reasons nor should the court consider speculative or subjective hypotheses agitated by the applicants or offenders seeking undue sympathy from the court. What is significant is for the court to consider all other factors, guidelines and principles traditionally taken into account in sentencing to see if cumulatively weighed there could be a justification from the standardized scheme as ordained by the legislature. As specified and in sum the court cannot assist the applicant as part of the totality factors cannot constitute substantial and compelling circumstances to rule in her favor.

12. In its wisdom, I believe the trial court considered the bounds of section 333(2) of the *Criminal Procedure Code* in giving an appropriate sentence. The application is thus dismissed.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 5TH DAY OF APRIL, 2024.

In the presence of;

Mr. Wasike for the ODPP.

The Applicant

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R. NYAKUNDI

JUDGE