Mathu v Republic (Criminal Miscellaneous Application E008 of 2024) [2024] KEHC 8384 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8384 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION E008 OF 2024

PN GICHOHI, J

JULY 9, 2024

BETWEEN

PETER GICHUKI MATHU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Peter Gichuki Mathu (hereafter referred to as the Applicant) appeared jointly with three (3) others in Nakuru CMCR. No. 3226 of 2011 where they were jointly charged with the offence of stealing stock contrary to Section 278 of the *Penal Code*. They denied the charge and after conclusion of the case, the trial court acquitted two of the accused persons while the Applicant and another were convicted and sentenced to serve ten (10) years imprisonment on 9th December 2019.

2. He has now approached this Court vide an application under a certificate of urgency dated 11th January 2024 seeking orders that:-

    1. Spent

    2. The honourable court be pleased to consider the period of 2 years and 8 months remaining left for him to complete the sentence and release him on parole.

    3. That he did not concur with the previous court's decision hence this application.

    4. The compelling factors for the request for release will be given at the time of the hearing of the application.

3. He swore an affidavit in support of that application where he simply stated how he was charged with the said offence, pleaded not guilty and was finally sentenced to serve 10 years imprisonment which he was serving as at the time of this application.

4. In his oral submissions on 28th May 2024, the Applicant told the Court that he had no issue with the conviction and the sentence hence the reason he did not appeal to the High Court.

5. He told the Court that he was serving the sentence and that only 2 years and 4 months remained for him to complete the sentence. He urged the Court to consider the remaining period and allow him go home to his family.

6. In reply, the Respondent orally submitted that the Applicant was sentenced on 9/12/2019 to 10 years imprisonment and therefore, the Applicant was yet to serve a substantial portion of that sentence. He urged the Cout not to interfere with the sentence.

Determination

7. This Court has heard both parties and perused the lower court file .Section 278 of the Penal Code under which he was charged provides that:-

> " If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years."

8. Having been sentenced on 9th December 2019, and considering the computation of prison sentences, the Applicant has certainly served a substantial part of that sentence. It is however clear that the Applicant has no issue with conviction and sentence and that is why he did not prefer an appeal.

9. He is not seeking resentence either and, in any event, there are no mitigating factors placed before this Court to warrant the orders sought and therefore, there is no justification for this Court to interfere with the sentence herein.

10. The Applicant is only entitled to the period spent in custody from the date of arrest as provided for under Section 333 (2) of the *Criminal Procedure Code* which is in mandatory terms. Indeed, the Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic [2018]* eKLR held: -

> " The appellants have been in custody from the date of their arrest on 19th June 2012. 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(s) 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." [Emphasis added]

11. In this case the Applicant was arrested on 6th September 2011 and arraigned in court the following day. He was released on bond on 9th September 2019. In the circumstances, the Applicant is entitled to have the days spent in custody from the date of arrest to the date he went out on bond.

12. In conclusion, the application is disposed in the following terms:-

    1. The Applicant to complete his ten (10) years sentence while in prison.

    2. In computing the sentence of 10 years imprisonment, the period spent in custody being 6th September 2011 when he was arrested, to 9th September 2019 when he went out on bond, should be taken into account.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF JULY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Peter Gichuki Mathu - Applicant

Mr. Kihara for Respondent

Ruto- Court Assistant