Kemei v Republic (Miscellaneous Criminal Application E002 of 2024)
[2024] KEHC 12992 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12992 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2024

RN NYAKUNDI, J

OCTOBER 25, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 19, 20, 22, 25, 27, 28, 29, 50, 51, 159 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF APPLICATION AND ENFORCEMENT OF SECTION 333(2), 362 AND 364(1)(B) OF THE CRIMINAL PROCEDURE CODE, CAP 75 LAWS OF KENYA

BETWEEN

SYLVESTER KIPTOO KEMEI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

Representation:

Mr. Mugun for the State

1. The Petitioner herein was charged and convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code* in Criminal Case No 4397 of 2012 at Eldoret CM's Court and Sentenced to death.

2. The Petitioner lodged an appeal to the High Court at Eldoret in H.C.C.R.A No 34 of 2015 which appeal succeeded partially as the Learned Judge varied the death sentence and in its place sentenced the Petitioner to serve 20 years' imprisonment, from the date of sentence by the lower court.

3. What is pending before me for determination is an undated Notice of Motion Application where the Petitioner is seeking the following orders;

a. That the prayers sought are on sentence only

b. That the Petition be allowed, admitted, heard and determined in the soonest time possible.

c. That the petition is seeking enforcement of section 333(2), 362, 364(1) and 365 of the *Criminal Procedure Code* in relation to sentences that have not factored the time spent in custody in reliance on Article 27(1)(2)(4), 22, 28, 25(c), 50(1)(2) of the *Constitution* of Kenya.

d. That, the Petitioner is seeking reduction of his sentence by the period he spent in remand custody but was not factored in the 20 years' sentence.

e. That, may this Honourable Court be pleased to consider the provisions of the sentencing policy guidelines of 2016 and invoke the provisions of Article 165(3)(a)(b) and 258 of the *Constitution* of Kenya 2010 and reduce his sentence to reasonable term.

4. The Application is supported by the annexed affidavit dated 20th December 2023 sworn by Slyvester Kiptoo Kemei, the Petitioner herein, where he avers as follows;

a. That I was convicted and sentenced to serve 20 years' imprisonment for the offence of robbery with violence contrary to section 296(2) of the Penal Code by Eldoret Magistrate Court.

b. That, my legal application herein is for sentence review under Article 23(1) of the *Constitution* of Kenya for the consideration of the sentence to run from the date of arrest 14/7/2012.

c. That I am a young man who is seeking for a second chance in life since I have a young family depending on me.

d. That may this Honourable Court exercise section 333(2) of the CPC and allow my sentence to commence as mitigated.

e. That I am a first offender.

Analysis and Determination

5. On perusal of the application, the main issue for determination herein is whether the applicant is entitled to review of sentence under Section 333(2) of the *Criminal Procedure Code*.

6. Section 333(2) of the *Criminal Procedure Code* provides: -

> " 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

7. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody.

8. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision 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 19th June 2012."

9. The same court in *Bethwel Wilson Kibor v Republic* [2009] eKLR expressed itself as follows: -

> " By provision to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into 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 10 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."

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

> " The provision 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."

11. This Court associates itself with the decision of the High Court by Hon. G.V. Odunga in *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021] eKLR where a joint Petition was filed by 51 Petitioners whose sentences had not been taken into account the time spent in remand and in order to enhance fundamental rights and freedoms of Petitioners while upholding the intention of the sentencing Court declaration on compliance with section 333(2) *CPC*. The Court held as follows;

> A declaration that Trial Courts are enjoined by Section 333(2) of the *Criminal Procedure Code*, in imposing sentences, other than sentence of death to take into account the period spent in custody.

A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.

A declaration that section 333(2) *CPC* applies to the original sentence as well as sentence imposed during resentencing.....

12. The requirement to comply with section 333(2) *CPC* is mandatory in computation of the sentence to be served by the Convict upon establishing the nature of the sentence to be imposed. The requirement is also amplified by the Judiciary Sentencing Policy and thus an integral part of sentencing process to avoid excessive punishment that is not proportional to the offence committed. In the *Rwabugande Moses v Uganda* (2017) UGSC 8 the Supreme Court of Uganda profoundly held as follows on a constitutional provision with similar provisions with our section 333(2) *CPC* as follows;

> 15. What is material in that decision is that spent in lawful custody prior to the trial and sentencing of the convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This court used the words to deduct and in an arithmetical way as a guide for the sentencing courts but those metaphors are not derived from the *Constitution*
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> 20. Where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict the sentence would not be interfered with by the appellate Court only because the sentencing judge or justice used different words in the judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower court would not be faulted when in effect the court has complied with the constitutional obligation in Article 23(8) of the *Constitution*

13. I am alive to the fact that it is in the trial court's discretion to mete a reasonable sentence considering the circumstances of each case. As an appellate court I am guided by the principles in the court of Appeal case of *Bernard Kimani Gacheru v Republic* (2002) eKLR where it was stated as follows: "It is now settled law, following several authorities by this court and by the High Court, 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 stated is shown to exist."

14. It is common to describe the principles enunciated in Bernard case as connoting various factors of error if established by an appeal's court does vitiate the exercise of discretion by the trial court. I can classify them as express errors which include error of principle, an error of law, or an error of fact or failing to take into account relevant matters. The other category of error is commonly referred to as "implied" error because even though an express error is not evident from a review of the process or the observation made at the time of sentence, the sentence imposed is "unreasonable or plainly unjust" with the consequence that error can be implied from the outcome.

15. The Applicant was charged with the offence of robbery with violence and upon the conviction he was sentenced to death. Upon Appeal, this Honourable Court varied the sentence to 20 years' imprisonment. The court in sentencing the accused person was not clear on when the sentence would start running. I share the same thoughts as the court in *Ahamad Abolfathi Mohammed &*

another v Republic [2018] eKLR that the trial court should have directed the applicant's sentence of imprisonment to run from the date of arrest in 2014.

16. Therefore, in consonance with Section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the Applicant person was in custody during hearing and determination of the case before sentence was meted out.

17. The sentencing process and its outcomes are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revisionary jurisdiction pursuant to Article 165(6(& (7) of the *Constitution* as read with Section362 &364 of the *CPC*. The question for this court is to ensure that an accused person tried, convicted, and sentenced to a custodial sentence he or she ought to be accorded a fair trial and the sentenced so imposed to capture the spirit of the law under section 333(2) of the *CPC*. I don't think it will be an overreach for this court to state that the custodial sentence passed against a convict who has been in pre-trial remand without incorporating the above provisions may be considered illegal. What is material to the decision are the principles in Rwabugande case (supra).

18. From the above discussion there is certainly evidence to show that Section 333(2) of the *CPC* was not complied with by the trial court and this Honorable Court on Appeal.

19. Although this section is discretionary, not mandatory, in my view a sentencing judge should ordinarily give credit for pre-trial custody. At least a judge should not deny credit without good person. To do so offends one's sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused's liberty. Moreover, in two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centers ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody wait. (see *Her Majesty the Queen v Level Aaron Carvery* SCC No 35115).

20. In our constitutional imperatives, in Art. 26, every person has the right to life, Art. 27, every person is equal before the law and has the right to equal protection and equal benefit of the law. Art. 28, every person has inherent dignity and the right to have the dignity respected and protected and Art. 29, every person has the right to freedom and security which includes the right not to be deprived of freedom arbitrarily or without just cause thereof except in accordance with the principles of fundamental justice.

21. The fundamental purpose of Section 333(2) of the *Criminal Procedure Code* is to contribute in protecting and guaranteeing the provisions in our Bill of Rights which for an accused person is underpinned in Art. 50 2(a) which provides that every accused person is to be presumed innocent until the contrary is proved by the state beyond reasonable doubt. In determining the final verdict of an accused person upon being found guilty and convicted of the offence, the court has to take into account the period spent in pre-trial custody pending the hearing and determination of the charge. It is instructive to note that many of the indigent suspects may be granted bond under Art. 49(1(h) of the *Constitution* but be constrained to raise the necessary bond terms to secure their freedom pending trial of the charge dependent on evidence to be adduced by the prosecution.

22. The Applicant in this case also shared a medical report detailing a deteriorating eye sight condition which has rendered him almost completely blind. This sentence which was passed by the trial court and later considered by the High court if left at his original status and carried out to its final conclusion, in my view, it will be disproportionate extremes given his current health condition. I am of the persuasive view that this court cannot disregard the Applicants interest on issues of right to life which lies at the

very heart of human dignity. The principles in *S v Banda and others* (1991) (2) SA 352 manifest this facts as Friedman J explained that: " The elements of the triad contain an equilibrium and a tension. A court should when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and this circumstances and the impact of the crime on the community, its welfare and concern.

23. Indeed the wide formulation of the above principles, are ostensibly so all impressing that the interests of the applicant which are legitimate in securing his health rights cannot be ignored by this court. The ambit of Section 333(2) of the *CPC* is also applicable in respect of the facts of this application. As a consequence, therefore the Applicant is entitled to the credit period spent in a pre-trial detention awaiting trial and final judgment of his case. Individually and collectively, these factors weigh more towards reviewing the custodial sentence with the same being substituted to the period already served as a sanction for the offence. As a consequence of this order, the applicant shall be set free and be at liberty unless otherwise lawfully held.

DATED AND SIGNED AT ELDORET THIS 25TH DAY OCTOBER, 2024

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R. NYAKUNDI

JUDGE