Nagira v Republic (Petition 12 of 2019) [2024] KEHC 12797 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12797 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION 12 OF 2019

E OMINDE, J

OCTOBER 24, 2024

BETWEEN

MOSES WANJALA NAGIRA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant Moses Wanjala Nangira was charged with the offense of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that between the night of the 23rd and 24th February, 2011 at 12:00 midnight at Tairi Mbili Village, Mbangara Sub-location, Mautuma Location in Lugari District within Western Province, he murdered Stephen Toili Macho.

2. The Applicant pleaded not guilty to the charge and after a full trial he was convicted and sentenced him to death for the offence of Murder.

3. Aggrieved by the judgment of the High Court, the Applicant preferred an appeal in the Court of Appeal being Eldoret Criminal Appeal No. 87 of 2016 wherein the Court dismissed the appeal against the conviction but allowed the appeal against the sentence, setting aside the sentence of death and substituting it with a sentence of 20 years imprisonment to take effect from 14th July 2015, this being the date when the Appellant was sentenced by the High Court.

4. The Applicant has now approached this Court with the Notice of Motion dated 04/04/2019, seeking re-sentencing under the proviso to Section 333(2) of the *Criminal Procedure Code*. The Applicant seeks to have his 20 years sentence factor in the time spent in remand custody.

5. The Applicant also filed submissions wherein he cited Section 333(2) of the *Criminal Procedure Code*. In a nutshell, the Applicant submitted that he has been in custody from the year 2011 and has now spent 10 years behind bars and that he was never granted bail or bond. The Applicant urged the Court to consider the above proviso of the law in determining his petition.

Issues for Determination

6. The sole issue for determination is

> " Whether the Applicant is entitled to review of sentence under the proviso to Section 333(2) of the *Criminal Procedure Code*".

Analysis and Determination

7. Section 333(2) of the *Criminal Procedure Code* provides ads follows:

> " 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."

8. From the above proviso to Section 333(2), it is clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence where it is not hindered by other provisions of the law.

9. This position is buttressed by case law as follows;

10. The Court of Appeal in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, stated thus:

> " By proviso to section 333(2) of *Criminal Procedure Code*, where a person sentenced has been held in custody prior to such sentence, the sentence shall take 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 ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

11. In the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR the Court of Appeal again addressed itself to the issue at great length and finally held as follows:

> " 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 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 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 provision 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 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".

12. I have perused the proceedings of the High Court. It indicates that the applicant took plea on 12th April 2011. Even though he was granted bond of Ks. 500,000/- with one surety, he seems not to have met the bond terms and therefore stayed in custody throughout the trial.

13. The accused was convicted on 14th July 2015 and sentenced to death. Given that the nature of the sentence that was meted out by the High Court, to wit the death penalty, the Court did not have to consider the period of time the Applicant had spent in remand and it therefore goes without saying that this period was not taken into account.

14. The Prosecution is not opposed to the application. The period that the Applicant spent in custody is 4 years and 3 months.

15. Having considered the relevant Statute Law and Legal Authorities as herein above summarised, it is my finding that the application by the Applicant has merit and the same is therefore allowed in its entirety with.

16. The period of 4 (four) years and 3(three) months that the Applicant spent in custody is to be factored into the 20 years imprisonment that the Court of Appeal Commuted his death sentence to and is also to be computed in the period already served.

17. It is now hereby so ordered and the Applicant Right of Appeal within 14 days from the date of this Ruling is explained.

READ, DATED AND SIGNED AT ELDORET ON 24TH OCTOBER 2024

E. OMINDE

JUDGE