Kivesi v Republic (Criminal Revision E282 of 2022)
[2023] KEHC 1704 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1704 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL REVISION E282 OF 2022

OA SEWE, J

MARCH 10, 2023

BETWEEN

JOSEPH WILLY KIVESI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the sentence passed in Criminal Case No. 329 of 2019 in the Chief Magistrate's Court at Voi by Hon. D. Wangechi, PM, on 16 June 2021)

RULING

1. The applicant herein, Joseph Willy Kivesi, was charged jointly with two others with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act*, No 4 of 1994. It was alleged that on the March 23, 2019 at Manyatta Trading Centre within Voi Sub-county of Taita Taveta County, they were found trafficking in narcotic drugs namely 1900 stones and 5970 long rolls of cannabis of approximate street value of Kshs 1,176,000/= in motor vehicle Registration No KBU 787B/Trailer ZD8264 in contravention of the said Act.

2. The applicant was ultimately found guilty in a considered Judgment delivered by Hon. Wangeci, PM, on June 16, 2021. He was convicted accordingly and sentenced to a fine of Kshs 3,537,000/= in default to serve one year's imprisonment on the first limb. In respect of the 2nd limb, the applicant was sentenced to 15 years' imprisonment. The sentences were to run consecutively from the date of judgment, namely June 16, 2021.

3. Aggrieved by the decision of the lower court, the applicant filed an appeal against both conviction and sentence. The appeal was heard and determined on January 27, 2022 by Hon Mativo, J (as he then was). The learned judge dismissed the appeal on both scores and confirmed the decision of the lower court. Undeterred, the applicant filed the instant application for review on September 15, 2022, praying that the Court be pleased to order that the sentence of 16 years which was imposed on him by the trial

court do take into account his pre-trial detention period pursuant to Section 333(2) of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya.

4. The applicant approached the Court under its supervisory jurisdiction under Article 165 of *the Constitution*, and I entertain no doubt that the Court has jurisdiction to entertain the application, notwithstanding that the applicant's appeal against sentence has already been dismissed by a court of concurrent jurisdiction. A similar issue arose in *Jona & 87 others v Kenya Prison Service & 2 others* (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) and was resolved in favour of equality before the law as opposed to procedural technicalities. In particular, Hon Odunga, J (as he then was) held thus:

> What then is the position where as a result of the failure to apply the said provisions, a person has exhausted his appellate options? In my view, unless the sentence was substituted by the appellate court, the same position applies. Where the appellate court considered the appeal and disallowed the same without interfering with the sentence, it is clear that the decision on sentencing remains that of the trial court and if that sentence was imposed in contravention of the provisions of section 333(2) of the *Criminal Procedure Code*, nothing bars this court in the exercise of its constitutional mandate pursuant to article 165 of *the Constitution* from redressing the situation. Accordingly, notwithstanding a dismissal of an appeal, a person sentenced in disregard of section 333(2) aforesaid is not thereby disentitled from invoking this court's supervisory jurisdiction to consider whether or not the sentence imposed was lawful. While it may be argued that in so doing this court would be interfering with the decision of the appellate court which in effect affirmed the decision of the trial court, in my respectful view that would not be the position where an appeal is simply dismissed without the sentence being reviewed..."

5. That said, I now turn to the merits of the application, which was hinged on Sub-articles (6) and (7) of Article 165 of *the Constitution*. They state:

   (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

   (7) For purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may me any order or give any direction it considers appropriate to ensure the fair administration of justice.

6. Accordingly, Section 362 of the *Criminal Procedure Code* provides that:

> " The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court."

7. Further to the foregoing, Section and 364(1)(b) of the *Criminal Procedure Code* stipulates that:

> " In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may ... in the case of any other order other than an order of acquittal, alter or reverse the order."

8. Thus, the record of the lower court was called for pursuant to the aforementioned provisions and upon perusal thereof, it is manifest that, in sentencing the applicant, the trial court was explicit that

the imprisonment terms would run consecutively from June 16, 2021 which was the date of judgment, yet the record shows that the applicant was held in custody for some time before his release on bond on June 12, 2019. In this regard, Section 333(2) of the *Criminal Procedure Code* is explicit 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) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

9. In the same vein *The Judiciary Sentencing Policy Guidelines* provide thus at Paragraph 7.10:

The proviso 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.

10. The Court of appeal had occasion to consider the import of Section 333(2) in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR and had the following to say:

> " 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."

11. I note that Mr Sirima, learned counsel for the respondent, conceded that the period of about two and a half months of the applicant's pre-trial detention ought to be taken into account for purposes of Section 333(2) of the *Criminal Procedure Code*.

12. In the result, I find merit in the applicant's application for revision filed herein on September 15, 2022, is hereby allowed and orders granted as hereunder:

(a) That the period of pre-trial detention of two months and 20 days between the date of the applicant's arrest on March 23, 2019 and the date of his release on bond by the lower court on

June 12, 2019 be taken into account for purposes of Section 333(2) of the *Criminal Procedure Code*.

(b) In reckoning the applicant's imprisonment term of 16 years, the period aforementioned be included accordingly.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF MARCH 2023

OLGA SEWE

JUDGE