



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

PETITION NO.E001 OF 2021

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1), 23(1) 25(D), 50(1) AND 51 (2) OF THE CONSTITUTION OF KENYA 2010 AND SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 20(1) (2) (4), 21(1), 48, 258(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 25(C), 27(1) (2), 47, 48, 50 (2) (p) 51(1) AND ARTICLES 23(1) 165(3) OF THE CONSTITUTION OF KENYA 2010

AND

AND IN THE MATTER OF ARISING FROM SECTION 333(1) (2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

BETWEEN

MOHAMMED ABBAKAR.....PETITIONER

AND

REPUBLIC.....RESPONDENT

(In the matter arising from Criminal Case No.29 of 2017 at Marsabit Law Court and High Court Cr. App. No.19 of 2018 at Marsabit High Court)

RULING

1. The petitioner herein was convicted by the lower court at Marsabit of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 15 years imprisonment. His appeal to the High Court in Marsabit HCCA No.7 of 2018 on the conviction and the sentence did not bear fruit. He has now come back to the High Court complaining that when the High Court upheld the sentence of 15 years imprisonment it did not take into account the period spent in custody as required by section 333(2) of the Criminal Procedure Code. He sought for a declaration that failure to comply with the said section constitutes a contravention of Article 50(2) (p) of the constitution of Kenya on fair trial in regard to sentencing and amounts to unfair discrimination. He consequently sought for an order that the sentence of 15 years` imprisonment imposed on him commences from the date of arrest so as to comply with the provisions of section 333(2) of the Criminal Procedure Code.

2. The petition was opposed by the state through the learned State Counsel, **Mr. Koima**. Counsel submitted that there is no merit in the petition as petitioner`s appeal was dismissed by the High Court.

3. The petitioner however insisted that he was entitled to enjoy the benefits of section 333(2) of the Criminal Procedure Code. He relied on the case of **Abdul Aziz Oduor & Stephen Omondi Wanyama v Republic**, Nairobi HCCA No. 18 of 2018 (2019)eKLR where Kimaru J. faulted the trial court for failing to take into account the time spent in custody before sentencing the appellants for the offence of robbery with violence and consequently took the period into account and deducted the period spent in custody from the sentence. In the said case the learned judge cited the case of **Ahamad Abolfathi Mohammed & Another –V- Republic** Nairobi HCCA No.135 of 2016 (2018) where the

Court of Appeal held that:

“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.”

4. The duty to consider the period spent in custody is also contained in the *Judiciary Sentencing Policy Guidelines* (under clause 7.10 and 7.11) where it is provided that:

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.”

5. In **Vincent Sila Jona & 7 others –V- Kenya Prison Service & 2 others** (2021)eKLR Odunga J held that prisoners who are sentenced in violation of section 333(2) of the Criminal Procedure Code are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.

6. There is no doubt that a sentencing court is under obligation to consider the time spent in custody before sentencing an accused person. The original file in respect to the petitioner’s appeal to the High Court was availed to this court. The said proceedings also contained the judgment of the lower court. Neither of the judgments of the trial magistrate nor that of the appellate judge indicates whether the period spent in custody was put into account when the sentence of 15 years was imposed and upheld. Both courts were silent on the period spent in custody. The presumption is that the period was not considered. The petitioner was entitled to have the period spent in custody taken into account.

7. The proceedings of the lower court indicate that the petitioner was arrested on the 8th January 2017 and arraigned in court on the 19th January 2017. The trial concluded on the 1st November 2017 when the petitioner was sentenced. He was in remand throughout the trial which was a period of 9 months. This period ought to have been taken into consideration when sentencing the petitioner.

8. In the foregoing, I find that the sentencing of the petitioner contravened the provisions of section 333(2) of the Criminal Procedure Code in failing to take into account the period spent in custody. The petition is therefore merited. I do order that the sentence imposed on the petitioner of 15 years’ imprisonment runs from the date of his arrest, i.e, on 8th January 2017.

Orders accordingly.

Read, delivered and signed at Marsabit this 15th day of April 2021

JESSE NYAGA NJAGI

JUDGE

In the presence of:

..... for Respondent

..... for Petitioner

Court Assistant:

Language: English/Kiswahili

14 days Right of Appeal.