



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

PETITION NO.E002 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 SENTENCE COMPUTATION UNDER SECTION 333(1) (2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

BETWEEN

MOHAMMED ABDI KATELO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

(In the matter arising from Criminal Case No.269 of 2017 at Moyale Law Court and High Court Cr. App. No.4 of 2018 at Marsabit High Court)

RULING

1. The petitioner herein was convicted by the lower court at Marsabit for the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to suffer death. He appealed at the High Court in Marsabit HCCA No.4 of 2018 wherein the sentence was substituted with 10 years imprisonment. He has now come back to the High Court complaining that the courts that imposed the sentences on him failed to take into account the period spent in custody before sentencing him as required by the provisions of section 333(2) of the Criminal Procedure Code. He contends that failure to do so amounts to an unfair trial in sentencing. He sought for an order that the period spent in custody be taken into account and hence be deducted from the imposed sentence of 10 years. Further that the sentence of 10 years imprisonment commences from the date of his arrest so as to comply with the provisions of section 333(2) of the Criminal Procedure Code.
2. The petition was opposed by the learned state prosecutor, **Mr. Koima**, on the grounds that the High Court considered all the circumstances of the case and particularly the decision in the *Muruatetu* case and reduced the sentence to 10 years imprisonment. He urged the court to dismiss the petition.
3. The petitioner however urged the court to consider the petition and reduce the sentence. He relied on the case of **Abdul Aziz Oduor & Stephen Omondi Wanyama V Republic**, Nairobi HCCA No.18 of 2018(2018)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 Abodlfathi Mohammed & Another –V- Republic**, Nairobi HCCA No.135 of 2016 (2018)eKLR 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. I have considered the petition and the grounds in opposition thereto. There is no doubt that a sentencing court is under obligation to consider the period spent in custody before imposing a particular sentence. The question is whether the High Court did so when it considered the appeal.

7. The original court file of the petitioner’s appeal to the High Court was availed to this court during the hearing of the petition. In his judgment the judge who determined the appeal, Chitembwe J, stated as follows:

The trial Court imposed the death penalty. As held in the case of SAMSON MURUATETU & ANOTHER -V- ATTORNEY GENERAL & OTHERS, Supreme Court Petition numbers 5 & 6 of 2015 the mandatory nature of the death penalty is unconstitutional. In my view the unconstitutional nature of the death penalty cut across both murder and robbery with violence cases. The appellant was involved in another case of theft of a motor cycle but was acquitted or the case was withdrawn. He asked the Court to consider the period he was in custody. The incident occurred on 29th June, 2017. He was sentenced on 19.4.2018. Taking into consideration the circumstances of the case, I do find that the death sentence is not appropriate. Mr. Chirchir, Prosecution Counsel, appreciate that the Court can alter the sentence. I do hereby set aside the death sentence and replace it with ten (10) years imprisonment.

In the end, the appeal on conviction is disallowed. The death sentence is set aside and is replace by ten (10) years imprisonment from the date of conviction.

8. It is clear from the above passage that the learned judge considered the period spent in custody before imposing the sentence of 10 years. As sentencing is at the discretion of the trial court it was within the mandate of the judge to order that the sentence commences from the date of conviction.

9. The upshot is that the petition is bereft of merit and is accordingly dismissed.

DATED, DELIVERED AND SIGNED AT MARSABIT THIS 15TH DAY OF APRIL, 2021.

JESSE NYAGA NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Respondent

Petitioner Present in person

Court Assistant Galgalo

Language: English/Kiswahili

14 days Right of Appeal.