



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC CRIMINAL PETITION NO. E009 OF 2020

(CORAM: F.M. GIKONYO J.)

(Revision from Original Conviction/Sentence in HCCR 09 of 2017 at Narok)

SOLONKA SANGEN KUNGU.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Time spent in custody

[1] Before me is an application dated 7/11/2020 seeking for orders that the court to take account of time spent in pursuant to section 333(2) of the criminal procedure code and reduce his sentence accordingly.

[2] The applicant was convicted and sentenced to 13 years' imprisonment for manslaughter contrary to section 205 of the Penal Code.

Applicant's submission

[3] The Applicant only pleads that time spent in custody be taken into account. He urges the court to take into account the one year he spent in custody before conviction which the prison authority has refused to take into account despite being stated in the judgment of this court. In his mitigation he stated that he is a breadwinner. He also need probation so that he can go home and take care of his family.

Prosecution's submission

[4] Ms. Koina for the Respondent in her submission opposed the application and argued that the high court has pronounced itself. Therefore, this court lacks the requisite jurisdiction to handle the petition. She opined that the petitioner should proceed to the court of appeal for redress under section 361 of the criminal procedure code. She urged this court to dismiss the application.

ANAYSIS AND DETERMINATION

[5] The application herein seeks a consideration of time spent in custody prior to conviction and to reduce the sentence accordingly in accordance with section 333(2) of the Criminal Procedure Code. The said section provides that: -

“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 (emphasis mine).”

[6] Court's duty under section 333(2) of the CPC has been further explained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that:

“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.”

[7] Of section 333(2) of the Criminal Procedure Code, the Court of Appeal in ***Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR***. (see also ***Bethwel Wilson Kibor vs. Republic [2009] eKLR***) was categorical that court should give real effect to the said provision.

[8] Requirements in Section 333(2) of the CPC pertains to fair trial and justice; ensures that a person gets appropriate sentence. Thus, non-adherence with the section may result into the person serving a more severe sentence than is required in law which is a violation of the right to a less severe sentence enshrined in article 50 [q] of the Constitution.

[9] Similarly, failure to give full effect to section 333(2) of the CPC rattles the right to protection and benefit of law guaranteed under Article 27(1) & (2) of the Constitution which provides that:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. [Underlining mine]

[10] Daringly, a sentence that does not give any effect to section 333(2) of the CPC leaves the period served in custody unaccounted for, and may be impeached for being a deprivation of freedom arbitrarily or without a just cause contrary to Article 29(a) of the Constitution which provides that:

Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

[11] This school of thought bases its arguments on rights. Accordingly, it posits that a claim of violation of section 333(2) of the CPC may found an application under Article 23(1) of the Constitution which provides that

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

[12] For completeness of the argument, Article 165(3)(b) of the Constitution provides that:

Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

[13] Be that as it may, the DPP has submitted that the court pronounced itself on sentence and the only option for the petitioner is an appeal to the Court of Appeal. I am particularly perturbed to note that the judge made quite refined pronouncements that:

“That the penalty provisions of section 205 of the Penal Code (Cap 65) Laws of Kenya, do authorize the court to impose a sentence of life imprisonment for this offence of manslaughter.

I have considered both the aggravating and the mitigating factors including the fact that the accused has been in remand since 25th March 2016. In the light of the applicable penalty provisions I find that the appropriate sentence is thirteen years’ imprisonment, which I hereby impose.”

[14] A dilemma arises; that tackling this application before me is akin to sitting on appeal over the said decision. In the circumstances of this case, the court should decline jurisdiction. Subject to limitation of time, it is most appropriate that the petitioner makes arguments for a reduced sentence in an appeal in the Court of Appeal which has power to evaluate whether this court took account of time spent in custody in light of the above stated pronouncement by the court. This will avoid embarrassment to this court. In the upshot, I dismiss the petition.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 17TH DAY OF MAY, 2021

F. M. GIKONYO

JUDGE

In the presence of:

1. The applicant

2. Ms. Torosi for the Republic

3. Mr. Kasaso CA

F. M. GIKONYO

JUDGE