REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. E024 OF 2020

BRIAN SASI ..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In his undated application filed on 16th September 2020 Vide a Notice of Motion, the applicant, *Brian Sasi* beseeched this court to review the sentence meted out on him by the trial court in Chief Magistrates Kibera Criminal Case No. 532 of 2009.

2. In the affidavit supporting the motion, the applicant deposed that he was convicted of the offence of robbery with violence contrary to *Section 296 (2)* of the *Penal Code* and was sentenced to serve five years imprisonment; that when passing sentence, the learned trial magistrate did not take into account the period he had spent in custody and this period should form part of his sentence; that he was a first offender and the sentence was harsh and excessive considering all the circumstances of the case.

3. At the hearing, the applicant and the respondent chose to prosecute the application by way of oral submissions. In his submissions, the applicant restated his averments in the supporting affidavit and added that the court should exercise leniency towards him and substitute the sentence imposed by the trial court with a non-custodial sentence. This prayer was grounded on the claim that his father had passed away and his wife was disabled.

4. The application was partially contested by the state. Learned prosecuting counsel *Mr. Mutuma* conceded to the applicant's prayer that his sentence should be reduced by taking into account the time he had spent in custody prior to his conviction and sentence if the same had not been considered by the trial court. He however strongly opposed the prayer seeking substitution of the sentence with a non custodial sentence noting that given the nature and seriousness of the offence for which the applicant was convicted, the sentence of five years' imprisonment was very lenient and should not be disturbed. He invited the court to note that the prescribed punishment for the offence was a death sentence.

5. I have given due consideration to the prayers sought in the application, the depositions in the applicant's supporting affidavit and the parties' rival submissions. I have also read the original record of the trial court.

6. The record confirms that the applicant was charged and convicted of the offence of robbery with violence and was sentenced to serve five years' imprisonment. In her pre-sentence notes, the learned trial magistrate stated that she had considered the nature of the offence and the circumstances in which it was committed. She also noted that the offence on conviction attracted the death penalty but guided by the Supreme Court's decision in ***Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR***, which declared minimum mandatory sentences unconstitutional, she exercised her discretion and sentenced the applicant to five years' imprisonment. She did not make any reference to the period the applicant had spent in custody prior to his sentence and it is obvious that she did not take it into account.

7. The trial court's record shows that the applicant was arrested on 18th April 20219 and he remained in custody throughout the trial. He was convicted and sentenced on 5th December 2019. This means that he had been in custody for seven months and five days prior to the date he was sentenced.

8. *Section 333 (2)* of the *Criminal Procedure Code* stipulates in no uncertain terms that in passing sentence, the trial court should consider the period the convict had spent in custody prior to the date sentence was imposed. The provision states as 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."***

9. The Court of Appeal in ***Ahamad Abolfathi Mohammed & Another V Republic, [2018] eKLR*** when interpreting the aforesaid section emphasized that "taking into account'' the period spent in custody meant reducing the sentence passed by the period spent in custody during the trial. It is important to note that the section is coached in mandatory terms and failure to comply with it amounts to an error of law which this court is obligated to correct in the exercise of its revisional jurisdiction. The first limb of the applicant's application therefore succeeds and is allowed on terms that the sentence imposed by the trial court shall take effect from the date of his arrest which is 18th April 2019.

10. The applicant has also implored this court to revise his sentence by substituting it with a non custodial sentence. In support of this prayer, he urged me to find that the sentence was harsh and excessive considering that he was a first offender; that his father had passed away and his wife was disabled.

11. Though the trial court record confirms that the applicant was to be treated as a first offender, it shows that in his plea in mitigation, the applicant did not claim that his father was deceased and that his wife was disabled. This is however neither here nor there since in an application invoking this court's revisional jurisdiction such as the one made by the applicant, the court can only revise a sentence, if it is satisfied that in passing the sentence, the trial court erred in law or fact or that there was impropriety or irregularity in the proceedings as a result of which sentence was passed.

12. In this case, I find that though the law prescribes a death penalty for persons convicted of the offence of robbery with violence like the applicant, the sentence imposed on the applicant was lawful since in passing it, the learned trial magistrate was guided by the decision of the Supreme Court in ***Francis Karioko Muruatetu & 5 Others V Republic, [supra]*** to the effect that minimum mandatory sentences were unconstitutional and that a trial court had discretion to impose any other appropriate sentence depending on the facts and circumstances of each case. Following the above decision, the learned trial magistrate in the exercise of her discretion, sentenced the applicant to serve five years' imprisonment.

13. Given the nature and seriousness of the offence with which the applicant was convicted, and although I cannot fault the legality of the trial court's decision in sentencing, I agree with the learned State Counsel that the sentence passed against the applicant by the trial court was quite lenient. It cannot be validly said that the sentence was either harsh or excessive. The only error the trial court committed in passing the sentence was that of contravening *Section 333(2) of the Criminal Procedure Code* which this court has already corrected. My view is that the applicant has not laid down any legal basis that would justify further revision of his sentence by substituting it with a non custodial sentence. That prayer is therefore rejected.

14. In the result, the application is partially allowed to the extent specified in paragraph 9 above.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2021.

C. W. GITHUA

JUDGE

In the presence of:

The applicant

Mr Okatch holding brief for Ms Kibathi for the respondent

Ms Karwitha: Court Assistant