



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC CRIMINAL PETITION NO. E008 OF 2020

(CORAM: F.M. GIKONYO J.)

(Revision from the conviction and sentence of Hon. H. Ng'angá (SRM) in Narok CMCCRC No. 26 of 2017 on 18th October 2017 and Hon. J. M. Bwonwong'a J. in Narok HCCRA N0.134 of 2017 dated 4th December 2019)

DAVID KANGÉTHE.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Time spent in custody

[1] Before me is an undated application received in court on 10/12/2020 which is asking the court: -

i) 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 five years' imprisonment for rape contrary to section 3(1)(a) (c) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006 and offence of assault causing actual bodily harm contrary to section 251 of the Penal Code.

Applicant's submission

[3] According to the Applicant, the appellate court did not take into account the time spent in custody when its passed its sentence. In his submission, he took the view that *Muruatetu* decisional law allows him to come back to this court for orders sought. In his mitigation he stated that he is young and needs this court to help him.

Prosecution's submission

[4] Ms. Torosi for the Respondent in her submission opposed the application and argued that time spent in custody was taken into account as per section 333(2) of the criminal procedure code. Therefore, this application is an abuse of the court process. She urged this court to dismiss the application.

ANAYSIS AND DETERMINATION

Muruatetu decisional law

[5] The application herein is based on the proviso to section 333(2) of the CPC which requires court to take account of time spent in custody in sentencing. I doubt whether right to approach this court on the basis of section 333(2) of CPC derives from *Mutruatetu* decisional law as stated by the applicant. The issue of jurisdiction, will however, be tackled later as I consider the application.

Purport of the S. 333(2) of CPC

[15] The proviso to section 333(2) of the CPC requires the court to take account of time spent in custody in sentencing. 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 obligation under and purport of Section 333(2) of the CPC has been explained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) thus:

“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] Decisional law has also emphasized that courts must give full effect to section 333(2) of the Criminal Procedure Code. See the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR. (see also Bethwel Wilson Kibor vs. Republic [2009] eKLR).

[8] Section 333(2) of the CPC, therefore; creates a statutory obligation on the court to take account of time spent in custody in sentencing. The section does not, however state how this should be done. But, as its purport is to prevent subjecting a person to a more severe sentence than prescribed in law, the requirements of the section must be given real practical grip and representation in the sentence. The section pertains to fair trial and justice. Thus, in my view, failure to give full effect to the section is a violation of the right to; (i) a less severe sentence enshrined in Article 50 (2)(q); and (ii) protection and benefit of law guaranteed under Article 27(1) & (2) of the Constitution. Article 27(1) & (2) of the Constitution 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]

[9] The spell cast by the Constitution upon courts is to be prepared to take on a different view of the situation in section 333(2) of the CPC, and exhibit sheer courage on the part of the judges to break free from the bindings of earlier restricted judicial approaches of merely stating that “ I have taken into account the time spend in custody” and allow such provision of existing law which tend to confer, protect or promote rights and fundamental freedom to take fight under section 7 of the Sixth Schedule of the Constitution, to gain conformity to the Constitution; and under article 259 and 20 of the Constitution; develop the law to give effect to a right or fundamental freedom in real practical sense. For example, if the person remained in custody from date of arraignment, the practical way of giving effect to section 333(2) of the CPC is for the sentence to commence from the date of arraignment in court. Yet another example. Upon resentencing or review of sentence, is it not the constitutional demand that the time served in custody be accounted for? I should think that courts must follow after the constitutional command in article 20(3) & (4) of the Constitution that: -

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

[10] Daringly, therefore, I must admit that, a sentence that does not give effect to section 333(2) of the CPC leaves the period spent in custody unaccounted for in law; hence, 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 about section 333(2) of the CPC on the Bill of Rights; and, posits that violation of the section founds a claim for redress of a denial, violation or infringement of a right or fundamental freedom in the Bill of Rights 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] I do not wish to defend a less austere version of this model of the Constitution, by weakening the notion of redress for denial or violation of right or fundamental freedom. Accordingly, the jurisdiction of the court for redress of failure to give effect to section 333(2) of the CPC derives from article 165(3)(b) of the Constitution. The claim may be made in an application under article 23(1) of the Constitution or in an appeal, as the case may be. I therefore reject the notion that the claim on alleged violation of right on the basis of court's failure to give effect to section 333(3) of the CPC should only be made by way of appeal.

Applying the test

[14] Be that as it may, the DPP has submitted that the court took account of the time spent in custody in its judgment, thus, the question of section 333(2) of the CPC is moot before this court. They took the view that the applicant should seek redress from the Court of Appeal. I am particularly concerned that the judge made quite refined pronouncements on this aspect as follows:

“3. The trial court found that the rape was beastly. It took into account the mitigating factors, but never took into account the period he had been in custody, which is a mandatory requirement under section 333(2) of the Criminal Procedure Code (cap 75) laws of Kenya. The period he has been in custody is a mitigating factor.

4. After taking into account both the mitigating and aggravating factors, I hereby reduce the sentence to five years' imprisonment, which he now has to serve.”

[15] A dilemma arises; the specific pronouncement by the judge on section 333(2) of the CPC makes this a matter for appeal. For that reason, this court should decline jurisdiction. In the upshot, I dismiss the petition

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 2ND DAY OF JUNE 2021

F. M. GIKONYO

JUDGE

In the presence of:

1. The Applicant

2. DPP - absent

3. Mr. Kasaso CA

F. M. GIKONYO

JUDGE