REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPLICATION NO. 38 OF 2019

SIMON WERU MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Brief Facts

1. The applicant herein has brought a Notice of Motion application dated 2nd October 2019, under Section 333(2) of the Criminal Procedure Code to be invoked in computation of his sentence.

2. The applicant was charged in Karatina Court in Sexual Offences case No. 3 of 2006 with the offence of sexual assault contrary to section 5(1)(2) of the Sexual Offences Act in which he was sentenced to serve thirty 30 years imprisonment. He subsequently appealed to the High court vide Criminal Appeal No. 121 of 2012 where his sentence was reduced to 15 years. He filed a second appeal to the Court of Appeal vide Court of Appeal No. 74/2015 which was dismissed on 13/2/2019. The Court of Appeal upheld the judgement of the High Court.

3. The applicant seeks for orders for rehearing on sentence and asks the court to invoke section 333(2) of the Criminal Procedure Code and take into account time spent in custody being a period of fourteen(14) months to form part of his sentence. The period is computed from 16/03/2011 to 17/07/2012.

4. The parties argued the application by way of oral submissions made a brief summary whose highlight is given below:-

The Applicant's submissions

5. The applicant prayed for his application to be allowed stating that he has served a term of ten (10) years in prison and he is now reformed. He adds that he is hypertensive and prays to be released.

6. The applicant admits to filing his application till the Court of Appeal but he states that they did not hear him instead they advised that it is the High Court that could deal with his application under section 333(2) of the Criminal Procedure Code. He further adds that his appeal was dismissed by the High Court.

Respondent's Submissions

7. According to the prosecution, the instant application is an abuse of the court process because this honourable court cannot review an order of the Court of Appeal. The applicant in this case was initially sentenced to 30 years imprisonment for sexual assault. He appealed to the High Court and the sentence was reduced to 15 years. He appealed once more and the appeal was dismissed by the Court of Appeal.

8. The prosecution contends that section 333(2) of the Criminal **Procedure Code** may not have been complied with but review cannot be carried out in the case herein. In saying so he relies on the case of **Mohammed Salim vs R [2020] eKLR** in which the court dismissed his application under section 333(2) of the Criminal Procedure Code because the accused brought the said application to the High Court which had tried the matter and convicted him of the offences of terrorism.

Issues for determination

9. On perusal of the application, the affidavits and the submissions I find that the main issue for determination is whether the applicant is entitled to the orders sought herein.

The Law

10. **Section 333(2) of the Criminal Procedure Code provides:-**

> **"Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."**

11. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

12. The provisions of **section 333(2) of the Criminal Procedure Code** was the subject of the decision in **Ahamad Abolfathi Mohammed & Another vs Republic [2018]eKLR** where the Court of Appeal held that:-

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."**

13. The same court in **Bethwel Wilson Kibor vs Republic [2009]eKLR** expressed itself as follows:-

> **"By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."**

14. According to **The Judiciary Sentencing Policy Guidelines:**

> **"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 trail. 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."**

15. The applicant has come to this court by way of review provided for under Article 50 of the Constitution. It provides:-

> ***50(2) Every accused person has the right to a fair trial, which includes the right :-***
>
> ***q) If convicted, to appeal to, or apply for review by a higher court as prescribed by the law***.

16. In the case of **Samuel Kamau Macharia Vs KCB & 2 others**, Civil Application No. 2 of 2011, it was stated:-

> "***A court's jurisdiction flows from either the Constitution or Legislation or both. Thus a court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law"***

17. It is not disputed that the accused was convicted for the offence of robbery with violence by the Magistrate's court and sentenced to death. The High Court on appeal reduced the sentence to fifteen(15) years imprisonment. On a second appeal to the Court of appeal, the applicant's appeal was dismissed.

18. The Court of Appeal in upholding the judgement of the High court essentially confirmed the fifteen(15) years imprisonment sentence. This means that this court is being asked to review the Court of Appeal judgement by reducing the fifteen(15) years imprisonment sentence with fourteen(14) months spent in custody during the pendency of the trial.

19. The trial court may not have complied with Section 333(3) of the Criminal Procedure Code. This issue ought to have been raised on appeal before the High court so that it would be addressed. The applicant failed to do this which means that he cannot re-start the process of appeal or review afresh in this court. Under Article 50(2)(q) of the constitution, this court has no jurisdiction to review the decision of the Court of Appeal. Review can only be done by a court of higher jurisdiction.

20. The respondent submitted that this application is an abuse of the court process. I cannot agree more that this is gross abuse of the due process of the court.

21. Based on the above reasoning, I find that this court lacks the jurisdiction to review a decision of the Court of appeal.

22. The application is incompetent and it is hereby struck out.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 2ND DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 2ND day of June, 2021.