REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 331 OF 2019

GEORGE MORARA BOSIRE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant, *George Morara Bosire* approached this court through a chamber summons application dated 5th December 2019 in which he sought revision of the sentence meted out on him in several criminal cases registered in the Makadara Chief Magistrate's Court namely, criminal case Nos. 1342 of 2014; 470 of 2014; 526 of 2012; 468 of 2014 and 2830 of 2014.

2. In his application, the applicant principally requested this court to revise the sentences imposed in the above cases by invoking *Section 333 (2)* of the *Criminal Procedure Code* and factoring in the period he had spent in custody during trial in the aforesaid cases or to use its discretion and commute the sentences to the period already served.

3. In the grounds premising the application and in his supporting affidavit, the applicant averred that in all the above cases, he was arrested on 30th March 2014 and was charged with the offence of stealing contrary to *Section 275* of the *Penal Code*; that after trial, he was convicted and sentenced to serve an aggregated sentence of 10 years' imprisonment.

4. The applicant further contended that there were delays in the course of the various trials which made him spend a period of 9 months in custody before the trials were concluded. He urged the court to combine the sentences passed in the five different cases and order that they should run concurrently.

5. On the date the application was scheduled for hearing, the applicant opted to withdraw the part of his application that related to review of sentences imposed in Criminal Case Nos. 1342 and 2830 of 2014 since for reasons that are on record, the original record of the trial court in those cases were not availed to this court before the hearing date. Hearing therefore proceeded in respect of the sentences imposed in the three cases in which the lower court files had been forwarded to the court.

6. At the hearing, both the applicant and the respondent chose to prosecute the application by way of oral submissions. In his submissions, the applicant implored me to commute the sentences imposed in Criminal Case Nos. 526 of 2012; 470 of 2014 and 468 of 2014 to the periods already served noting that he had served more than the maximum sentence pronounced in those cases. Relying on the authority of ***Vincent Sila Jona & 87 Others V Kenya Prison Service & 2 Others, [2021] eKLR***, he urged the court to order that the sentences be computed taking into account the period he had spent in custody during the trial which in his view, the trial courts' failed to consider when passing sentence against him.

7. The applicant further submitted that he was now a reformed man and that if given a chance, he will play his role in the society as a father and a responsible Kenyan citizen. He beseeched this court to allow his application as prayed.

8. While opposing the application, learned prosecuting counsel *Ms. Ndombi* submitted that the applicant had not given any good reason to warrant interference with the sentences imposed by the three trial courts; that sentencing is at the discretion of the trial court and that the impugned sentences were lawful. Counsel also asserted that the period the applicant had spent in custody awaiting trial in the cases in question was considered by the trial courts when passing sentence. She invited me to dismiss the application for lack of merit.

9. I have given due consideration to the application and the submissions made by both parties in support and in opposition thereof. The application invokes the revisional jurisdiction of this court which is donated by *Section 362* as read with *Section 364* of the *Criminal Procedure Code*. *Section 362* reads as follows:

> ***"The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the***

regularity of any proceedings of any such subordinate Court."

10. The applicant has submitted that when passing sentence in the three files subject of this application, the learned trial magistrates erred by failing to factor into the sentences the period he had spent in custody during the trial; that this violated *Section 333 (2)* of the *Criminal Procedure Code* which 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."***

11. A wholesome reading of this section shows that where an accused person has been in lawful custody during the trial, if at the end of the trial a custodial sentence is imposed, the period spent in custody shall be discounted from the sentence. See: ***Bethwel Wilson Kibor V Republic [2009] eKLR.***

12. The *Judiciary Sentencing Policy Guidelines* at *paragraph 7.10* besides offering some insight into the interpretation of the provision gives the rationale for computation of sentences taking into account the time a convict had spent in custody. It states as follows:

> ***"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."***

13. I have looked at the original record of the trial court in Criminal Case Nos. 526 of 2012; 468 of 2014 and 470 of 2014. In Criminal Case No. 526 of 2012, the applicant was convicted in three counts with the offence of stealing contrary to *Section 275* of the *Penal Code*. He was sentenced on 20th August 2014 to serve three years' imprisonment in each count. The sentences were ordered to run concurrently.

14. In Criminal Case No. 468 of 2014, the applicant was convicted in two counts with the offence of stealing contrary to *Section 275* of the *Penal Code*. He was sentenced on 4th September 2014 to serve a period of two years' imprisonment in each count. The sentences were also ordered to run concurrently.

15. In Criminal Case No. 470 of 2014, the applicant was convicted in seven counts with the offence of stealing contrary to *Section 275* of the *Penal Code* and in count 8 with the offence of obtaining money by false pretences contrary to *Section 313* of the *Penal Code*. In counts 1 to 7, he was sentenced to serve two years' imprisonment while in count 8, he was sentenced to serve 4 years' imprisonment. The sentences were pronounced on 4th July 2014 and were to run concurrently.

16. The applicant's prayer that the sentences be combined and that this court should order that they run concurrently cannot succeed because the sentences were imposed in different cases in respect of offences committed in the course of different transactions. In any event, this is not a prayer that can be granted by this court in the exercise of its revisional jurisdiction since under *Section 37* of the *Penal Code*, the trial court is given discretion to determine whether sentences imposed subsequent to prior conviction and sentence of the convict in a different case shall be executed concurrently with the former sentence.

17. In my considered view, decisions made by trial courts in the exercise of their discretion can only be challenged by invoking this court's appellate jurisdiction unless in exceptional circumstances where there is patent abuse of discretion or misapplication of the law in which case revision applications can be entertained. The facts in this application do not present such a case.

18. In Criminal Case No. 526 of 2012, the record shows that the applicant was arrested on 31st July 2012 and was released on bond on 14th February 2013. He subsequently absconded and was arrested under a warrant of arrest on 31st March 2014. After his arrest, his bond was cancelled and he remained in custody till case was concluded on 20th August 2014. This means that the applicant was in custody for about 9 months' prior to the date he was sentenced.

19. In Criminal Case No. 468 of 2014, the records show that the applicant was arrested on 29th March 2014 and he remained in custody throughout his trial. The trial was concluded on 4th September 2014 while in Criminal Case No. 470 of 2014, he was arrested on 29th March 2014 and was sentenced on 4th September 2014.

20. It is important to note that some of the periods the applicant claims were not factored into his sentence were periods in which he was serving a lawful sentence imposed in Criminal Case No. 526 of 2012. The proviso to *Section 333 (2)* of the *Criminal Procedure Code* in my opinion applies to the period the convict was in remand custody awaiting conclusion of his trial and does not apply to time when the convict was serving a lawful sentence in a different case during the trial.

21. Drawing from the foregoing, the period the applicant was in remand custody in the three cases discounting the time he was serving sentence in Criminal Case No. 526 of 2012 amounts to a period of five months.

22. Having read the trial court proceedings in each of the three cases, I agree with the applicant that the learned trial magistrates when passing sentence in each of the cases did not make any reference to the period he had spent in custody during the trial. It is therefore obvious that none of the trial courts factored in the period the applicant had spent in custody before imposing sentence in each case.

23. This omission by the trial courts amounted to violation of *Section 333 (2)* of the *Criminal Procedure Code* and was an error of law which this court is enjoined to correct in its revisional jurisdiction. As noted in my earlier decision in ***Josephat Ndungu V Republic, HCCr Rev No. 287 of 2019 [unreported]***, failure to correct such an error may result in the violation of the applicant's right to equal benefit and equal protection of the law enshrined in *Article 27 (1)* of the Constitution of Kenya, 2010.

24. Considering that the sentences in each of the three cases were supposed to be executed consecutively since there was no order by any of the trial courts that they should run concurrently and given that the sentences were all pronounced in the year 2014, it is not clear to me which sentence has now been fully served and which sentence the applicant is currently serving. If the applicant is serving sentence in any of the aforesaid three cases, I hereby allow the application on terms that the period he had spent in remand custody as tabulated above shall be computed as part of his sentence.

25. For the avoidance of doubt, the above order shall apply only to the sentences imposed in Criminal Case Nos. 526 of 2012; 468 of 2014 and 470 of 2014.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2021.

C. W. GITHUA

JUDGE

In the presence of:

Ms Kimani holding brief for Ms Ndombi for the respondent

Applicant present

Ms Karwitha: Court Assistant