



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 122 OF 2019 (CONSOLIDATED WITH

PETITION NO. 223 OF 2019)

1. WILLIAM JUMA SHAURI

2. SALIM SHAURI MWABARI.....PETITIONERS

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioners were convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and sentenced to death in H.C.CR. NO. 5 OF 2011. They appealed in Criminal Appeal No. 45 of 2015 where their conviction was quashed and the life sentence set-aside. The conviction for the offence of murder was substituted with a conviction of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The Petitioners were then resentenced to 12 years imprisonment effective from the 9/07/2014, which was the date of their conviction and sentence, by the High Court.

2. The Petitioners by way of an undated Notice of Motion filed on 29/07/2019 are seeking the following prayers:

a) That this Court must take cognizance of the recent development in law and apply it to the present Application particularly because the same is advantageous to me the Applicant in the decision of the Court of Appeal in the case of Kelvin Musyoka –v- Rep K.C.A NO. 23 OF 2014 whereby his sentence was ordered to run from the date of first pre-trial and first conviction

b) That an Order be made and declared that I the Applicant is entitled of a right to benefit from first arrest on 26/2/2011 since I spent 4 years while undertaking trial.

c) That an Order be made and declared that the appellate judges in sentencing me to serve 12 years imprisonment they ought to have ordered the 12 years sentence to run from the date of first pre-trial on 26/2/2011 by dint of the provision to Section 333(2) of the criminal procedure code cap 75 of the laws of Kenya as that was avail in the case of laws of kenya KELVIN MUSYOKA –V- REP K.C.A NO. 23 OF 2014. Failure of which contravened Article 27(1) (2) (4) of the Constitution which guarantees equality before the law of Kenya.

d) That I am requesting the honourable Court to consider the 4 years that I served while in remand undergoing trial to be part of my sentence of 12 years imprisonment, since I am now a corrected person and fully reformed, as I have so far undergone rehabilitation within Shimo la tewa Maximum Prison, which is a penal and correctional institution.

3. The Petitioners' Application was opposed by the Respondent who filed Grounds of Opposition dated 12/12/2020, based on the grounds summarized herein below:

a) That the Petitioners herein have failed to furnish material to prove that indeed they were in custody and not out on bond during trial.

b) That under Article 49(h) of the Constitution the Petition were released on bond or bail on reasonable conditions and there is no proof before Court to demonstrate that the Petitioners were denied bail/bond.

c) That the Petition is hapless, presumptive and an abuse of the Court process.

4. Ms. Balongo learned prosecutor submitted that the twelve-year sentence imposed by the Court of Appeal was sufficient and the same ought to start after the time of their conviction as was held by the Court of Appeal. Ms. Balongo cited the case of **Patrick Muli v Republic**

High Court Criminal Appeal No. 58 of 2017 eKLR, where the Court held that the terms and conditions imposed by a sentencing Court on how or when the sentence is served should not be interfered with by a Court on Appeal.

The Determination

5. Section 333(2) of the *Criminal Procedure Code* provides as hereunder:

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

6. It is evident that Section 333 (2) enjoins a court to take into account the period spent in custody where the person sentenced has, prior to such sentence, been held in custody. Therefore, in undertaking a resentencing, the Court is enjoined to find out the period for which the convict was in custody prior to the date of resentencing including the period he served pending his trial and after his initial conviction and sentencing. That whole period must be taken into account in computing the sentence to be imposed on him in handing down the appropriate sentence during resentencing. Unless this is done, the resentence is likely to fall foul of Article 50 (2) (p) of the Constitution which provides that:

“50(2) Every accused person has the right to a fair trial, which includes the right—

(p)to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and”

7. In **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR** where the Court of Appeal held:

“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.”

8. In the result, it is my finding that the petitioners have made out a good case for reduction of their respective sentences by the period of their pre-conviction detention, pursuant to Section 333(2) of the Criminal Procedure Code. In the premises, it is hereby ordered that the Petitioners’ sentence of 12 years’ imprisonment be reduced by the three years and four months’ and 13 days of pre-conviction detention that they were subjected to before imprisonment. Hence, it is judged and ordered that the sentence be reckoned from 26/02/2011, which was the date of the Petitioners’ arrest. There is evidence in the last paragraph of the Court of Appeal judgment dated 27/5/2016 that indeed the Petitioners were in legal custody since 2010. That means that they were not released on bond and so they have proved that indeed they served time in remand.

9. The Petitioners’ sentence shall run from 26/2/2011.

That is the Judgment of the Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioners in person

Ms. Anyumba for DPP

Ms. Peris Court Assist ant