Ngare v Republic (Criminal Appeal 43 of 2020)
[2021] KEHC 111 (KLR) (6 October 2021) (Judgment)

Neutral citation: [2021] KEHC 111 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 43 OF 2020

DAS MAJANJA, J

OCTOBER 6, 2021

BETWEEN

DAVID MURIUKI NGARE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, DAVID MURIUKI NGURE, filed this matter as an application for revision of the sentence by Hon. Olwande, SPM at Limuru Magistrates Court on 2nd July 2019. It was registered as an appeal causing the Appellant to complain to the court by the letter dated 23rd September 2020 that what he filed was an application to review the sentence imposed by the learned magistrate. When the letter was placed before the court for directions. On 3rd November 2020, Kasango J., ruled that the matter was rightly registered as an appeal against the sentence.

2. The undisputed facts are that the Appellant was charged with the offence of robbery with violence contrary to section 296(2) of the *Francis Karioko Muruatetu & Another v Republic* (Chapter 63 of the Laws of Kenya) in Limuru Magistrates Court Criminal Case No. 1603 of 2004. He was convicted and sentenced to death on 23rd March 2005. His first appeal to the High Court; Nairobi High Court Criminal Appeal No. 167 of 2005 was dismissed by Ojwang'and Dulu JJ on 24th July 2007. The second appeal to the Court of Appeal, NRB CA Criminal Appeal No. 335 of 2007 was also dismissed.

3. Following the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR the High Court in his petition; KBU HC Petition No. 36

of 2018 directed that the re-sentencing petition be heard before the Magistrates Court. The learned Magistrate considered the petition and by the ruling dated 2nd July 2019, stated as follows:

> I therefore sentence the Accused to imprisonment for a period of 25 years. The Accused was convicted on 23/5/05. He has served 14 years imprisonment. The period shall be deducted from the sentence of 25 years so that the Accused shall serve 11 more years.

4. In his application, the appellant has invoked the provisions of section 346 of the *Criminal Procedure Code* (Chapter 75 of the Laws of Kenya) in which he challenges the legality of the sentence against him. He states that the court did not consider the application of section 333(2) of the Criminal Procedure Code in relation to the time spent in custody and applicability of 1/3 remission of the term of imprisonment imposed. He urges that the court declare the entire probation report as untrue and should be deleted under Article 35(2) of the *Constitution of kenya, 2010*.

5. Whether this matter is an appeal or revision, the manner in which the court may intervene is circumscribed by the principle that this court, as an appellant court, may interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see *Wanjema v Republic* [1971] EA 493).

6. Noting that the issue before the court was for resentencing and not clemency, I hold that the learned magistrate considered all relevant factors including the Appellant's submissions in coming to the conclusion that a sentence of 25 years' imprisonment from the date of sentencing was appropriate. The sentence of 25 years' imprisonment for the offence of robbery with violence is not inordinate or outside the range of sentences imposed in similar circumstances.

7. It is true, however, that the learned magistrate did not take into account the time spent in remand custody during the trial. In *Ahmad Abolfathi Mohammed & Another v Republic* NRB CA Criminal Appeal No.135 of 2016 [2018] eKLR, the Court of Appeal stated:

> 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.

8. While I affirm the sentence imposed of 25 years imposed by the learned magistrate. The Appellant shall be given credit for the time spent in pre-trial remand in accordance with the proviso to section 333(2) of the Criminal Procedure Code from 2nd July 2004 to 23rd March 2005.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF OCTOBER 2021.

M. KASANGO

JUDGE

Appellant in person.

Mr Kasyoka instructed by the Office of the Director of Public Prosecutions for the respondent.