



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 20 OF 2019

ANTONY NDEGWA NGARI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling relates to the undated chamber summons filed in court on 20/08/2019 seeking for orders that the court do make a finding that the law envisaged that the sentence should run from the date of arrest and not from the date of conviction within the meaning of Sections 333(2) and 137(1)(2) of the Criminal Procedure Code. He further urges the court to declare that the sentence of fifteen (15) years imposed by the Court of Appeal in Nyeri in Appeal No. 352 of 2012 do run from 18/07/2009 being the date of arrest. The said application was supported by an affidavit wherein the applicant reproduced the content of the application.

2. The said application was opposed by the respondent vide a replying affidavit sworn by its counsel Ms. Mati. She deposed that the applicant herein was serving a fifteen (15) years imprisonment following the judgment of the Court of Appeal delivered on 27/06/2012 that overturned the previous sentence to serve life imprisonment and substituted it with fifteen (15) years imprisonment. As such the application is misconceived as the applicant is serving a lawful sentence imposed by a court of higher jurisdiction that revised the judgement of this court.

3. When the application came up for hearing, the applicant chose to rely on his written submissions. However, Ms. Mati in her oral submissions submitted that she was not opposed to the application as she had noticed that Section 333(2) of the Criminal Procedure Code had not been complied with.

B. Analysis of the law

4. From the face of the application and the nature of the prayers sought therein, it is clear that the same was filed pursuant to the provisions of section **333(2) of the Criminal Procedure Code**. 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).

5. This duty is also contained in the *Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that: -*

“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. 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.”

6. The duty to take in account the period an accused person had remained in custody in sentencing (under section 333(2) of the Criminal Procedure Code) was acknowledged by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR.** (see also **Bethwel Wilson Kibor vs. Republic [2009] eKLR.**)

7. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be taken into

account in meting out the sentence where it is not hindered by other provisions of the law.

8. I have perused the trial court's records and it is clear that the applicant herein was initially convicted of the offence of murder in Embu High Court Murder Case No. 16 of 2009 and subsequently sentenced to serve 40 years imprisonment. The trial court (H.I Ong'udi J) ruled as follows: -

“.....The accused appears to be in his early 30s. I find that he doesn't deserve a non-custodial sentence even after considering the period of about 3 years he has been in custody. He will therefore serve 40 years imprisonment....”

9. However, the applicant appealed to the Court of Appeal vide Nyeri Court of Appeal Criminal Appeal No. 352 of 2012 and after hearing the said appeal the court (A. Visram JJA, M. Koome JJA and I Otieno- Odek JJA) allowed the appeal and did set aside the conviction for murder and substituted the same with that for manslaughter. The Court of Appeal further did set aside the death sentence and substituted the same with a fifteen (15) years imprisonment **to run from 26/06/2012 when the appellant was convicted and sentenced by the High Court.** This therefore means that the judgment of the Court of Appeal is valid to date. As far as criminal cases are concerned, the Court of Appeal is the court of last resort.

10. The applicant calls upon this court review on the grounds that the court did not apply the provisions of Section 333(2) of the Criminal Procedure Code. The issue for determination therefore is **whether this court can review the judgment of the Court of Appeal for any reason whatsoever.**

11. The Court of Appeal is above the High Court in that the decisions of this court are appealed in the Court of Appeal. It follows therefore that this court has no power to review the decisions of the Court of Appeal.

12. I find that this application is misconceived and incompetent for want of jurisdiction. It is therefore struck out accordingly.

13. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF JUNE 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant through Video Link