



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.5 OF 2020

(BEING REVIEW OF SENTENCING IN NO.420 OF 2018 AT CM's COURT NYERI ON 19/12/2019)

THOMAS KIBOI WANJOHI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. A brief outline of the case was that the applicant **Thomas Kiboi Wanjoi** was charged with the offence of Obtaining Money by False Pretence c/s 313 of the Penal Code; the applicant was convicted and sentenced to a fine of Kshs.300,000/- and in default to serve a term of two (2) years imprisonment;
2. Vide a letter dated the 23/01/2020 the applicant sought for the review of his sentence and requested that the provisions of Section 333(2) be invoked and prayed for an order that the sentence imposed to commence from the date of arrest.
3. At the hearing hereof the applicant was unrepresented whereas the respondent was represented by Prosecuting Counsel Ms.Gicheha; both parties made oral submissions; hereunder are the parties respective submissions;

APPLICANT'S CASE

4. The application is for review of sentence under the provisions of Section 333(2) of the Criminal Procedure Code; that the trial court failed to apply the aforesaid section and ought to have backdated it to commence from the date of his arrest which was 4/04/2018;
5. To support his prayer for review of sentence the applicant stated that he was remorseful and had learnt from his mistakes; that he was a model prisoner and had learnt a trade in prison;

RESPONDENT'S CASE

6. In response counsel stated that the applicant had been convicted on the 19/12/2019 and had been sentenced to pay a fine in the sum of Kshs.300,000/- in default to serve a term of two (2) years imprisonment;
7. Counsel submitted that the applicant had not come to court with clean hands as he had been granted bail in CMCR 258 of 2017 and had absconded; that the time spent in custody was of his own making; and was opposed to the prayer for the review of the sentence;

ISSUES FOR DETERMINATION

8. After hearing the rival submissions this court has framed only one issue for determination which is whether the trial court erred in failing to consider the date of arrest as the commencement date of the sentence;

ANALYSIS

Whether the trial court erred in failing to consider the date of arrest as the commencement date of the sentence;

9. Upon perusal of the trial court's judgment on sentencing this court notes that the commencement date of the sentence is the 19/12/2019; and indeed the trial court ought to have taken into consideration the provisions of Section 333(2) of the Criminal Procedure Code when

sentencing the applicant; the Section reads as follows;

“(2) 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 of which it was pronounced, except where otherwise it is 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”.

10. Based on the foregoing section the trial court ought to have taken into consideration the date of arrest which was the 4/04/2018; indeed the period spent in remand was of the applicant’s own making; having perused the court record this court notes that the applicant had been charged with the same offence in CMCR 258/2017 and had been granted bail; the applicant breached the bail terms by absconding leading to the discharge of the charges under the provisions of Section 87(A) of the Criminal Procedure Code; he was later located and re-arrested on the 4/04/2018 and charged afresh for the same offence and was denied bail leading to his lengthy stay in remand pending the determination of the case;

11. The above notwithstanding the commencement date of the sentence is found to be irregular as it would have been expected that the trial court would have taken into consideration this lengthy period the applicant spent in remand; in the circumstances there is need for this court to interfere by exercising its supervisory powers of revision conferred under the provisions of Section 364 of the Criminal Procedure Code;

12. Having duly exercised the above power this court is satisfied that the applicant is entitled to the benefits of the provisions of the Section 333(2) aforesaid for the time spent in remand during the trial period; case law relied on **Samuel Njue Njeru & 2 Others vs Republic [2020] eKLR** where it was held;

“It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. The petitioners are therefore, entitled to the benefits of the provisions of Section 333(2) should they demonstrate that they spent part of the trial period in custody.”

13. Therefore, the date of commencement of sentence is hereby reviewed; the applicant shall start serving his sentence from the date of his arrest which is stated on the Charge Sheet as being the 4/04/2018;

14. The period from 4/04/2018 to 2/07/2020 translates to a period of two (2) years and two (2) months; which in essence means that the applicant is deemed to have served his term in full and may be released forthwith unless otherwise lawfully held.

FINDINGS AND DETERMINATION

15. For the foregoing reasons this court makes the following findings and determinations;

(i) This court finds that the trial court erred in failing to take into consideration the date of arrest as the commencement date of the sentence in its judgment; the sentence shall commence from the date of arrest as stated on the Charge Sheet as being the 4/04/2018;

(ii) The applicant is found to have fully served a term of two years; this court directs that he be released forthwith unless otherwise lawfully held;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 2nd day of July, 2020

HON. A. MSHILA

JUDGE