



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL DIVISION

PETITION NO.24 OF 2020

(FROM THE ORIGINAL CR. CASE 10 OF 2016 AT EMBU HIGH COURT)

IN THE MATTER ARISING FROM SECTION 333(1) AND (2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

BETWEEN

DANIEL MBEKE MWILU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. A brief outline of the case was that the petitioner **Daniel Mbeke Mwilu** was charged with the offence of murder c/s 203 as read with Section 204 of the Penal Code; after a full trial the petitioner was found guilty and was convicted and was sentenced accordingly to serve a term of thirteen (13) years imprisonment; being aggrieved with trial court's decision the applicant lodged this Petition seeking the following declarations;

- (i) A declaration that failure to comply with Section 333(1)(2) of the Criminal Procedure Code constitutes to an unfair sentencing;
- (ii) A declaration that failure by the sentencing court to take into account the period spent in custody by the petitioner contravenes Section 333(1)(2) of the Criminal Procedure Code and Article 50(2)(q) of the Constitution.
- (iii) A declaration that the petitioner herein is entitled to all the benefits of the law as stipulated under Article 25©, 27(1)(2), 50(2) (q) and 51(1) of the Constitution;
- (iv) A declaration that failure of the sentencing judge to take into account the period spent in custody by the petitioner before sentencing amounts to unfair discrimination;
- (v) An order that the period spent in custody by the petitioner be taken into account and hence deducted from the imposed sentence of thirteen (13) years imprisonment;
- (vi) An order that the imposed sentence of thirteen (13) to commence on the date of arrest thus to comply with Section 333(1)(2) of the CPC.
- (vii) That this court be pleased to issue any other order that it may deem fit to grant in the circumstances of this petition;
- (viii) That this court may be pleased to order that the petitioners sentence to commence from the date of his arrest in conformity with the High court judgment in **CR. APPEAL NO.18 &102 OF 2018 (NRB) ABDUL AZIZ ODUOR & ANOR VS REPUBLIC;**

2. At the hearing hereof the petitioner was unrepresented whereas the respondent was represented by Prosecuting Counsel Ms Chemenjo and both made oral submissions; hereunder are the parties respective submissions;

PETITIONER'S CASE

3. The petition 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 on 10/06/2016;
4. To support his prayer for review of the commencement date of the sentence the petitioner relied on the grounds on the face of the Petition;
5. The petitioner prayed that balancing mercy and justice his sentence be reviewed to commence effective from the date of arrest which is indicated on the Charge Sheet as 10/06/2016;

RESPONDENT'S CASE

6. In response counsel opposed was opposed to the prayer for the review of the date to commence from the date of the petitioners' arrest; counsel submitted that the judgment was not silent on this period and that at page 80 of the of the un-typed proceedings the trial court had taken into account this period; and therefore prayed for the dismissal of the petition for this reason.

ISSUES FOR DETERMINATION

7. After hearing the rival submissions this court has framed only one issue for determination which is as follows;

- (i) Whether to review the commencement date of the sentence imposed;

ANALYSIS

Whether to review the commencement date of the sentence:

8. Upon perusal of the record this court notes that the trial court invited the petitioner to mitigate; and his counsel requested the trial court to take into consideration the four (4) years he had been in custody; in its ruling on sentence the trial court stated as follows;

“Court: I have considered the period the accused has spent in custody of four years which I take into account in sentencing him.”

9. The trial court found that a non-custodial sentence would have been inappropriate in the circumstances and sentenced him to thirteen (13) years imprisonment;

10. Based on the foregoing extract of the ruling it could be that the petitioner expected a commencement date of the sentence to be included in the ruling; whereas the trial court may have factored in the four (4) years and deducted the same leaving a net sentence of thirteen (13) years;

11. If the petitioner still feels aggrieved and is of the opinion that the omission of a date in the Ruling to be irregular he has the option of considering whether he has exhausted all the appellate mechanisms that are available to him; his recourse will then lie in an appeal to the Court of Appeal which will then be tasked with correcting any anomalies in the sentence imposed;

12. In the alternative as the trial judge is still in station the petitioner is at liberty to apply for the review of the Ruling on Sentence before said trial court for full clarification on how it took into consideration and applied the four (4) years spent in custody.

13. This court is satisfied that the trial court in its Ruling on Sentence took into consideration the four (4) years spent in custody during the pendency of the trial and finds the petition for review of the sentence to be unmerited.

FINDINGS AND DETERMINATION

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

- (i) The petition is found lacking in merit and it is hereby dismissed;

Orders accordingly.

Dated, Signed and Delivered Electronically at Voi this 1st day of October, 2020.

HON LADY JUSTICE A. MSHILA

JUDGE