



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL DIVISION

PETITION NO. 26 OF 2020

(FROM THE ORIGINAL CR. CASE 15 OF 2013 AT EMBU HIGH COURT)

IN THE MATTER ARISING FROM SECTION 333(1) AND (2) OF THE

CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

SILVESTER KINYUA NJAGI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. A brief outline of the case was that the applicant **Silvester Kinyua Njagi** was charged with the offence of murder c/s 203 as read with Section 204 of the Penal Code; upon a Plea Bargain Agreement being entered the accused was then charged with the offence of manslaughter c/s 202 as read with Section 205 of the Penal Code;

2. The petitioner was convicted on his own plea of guilty and was sentenced accordingly to serve a term of ten (10) years imprisonment; being aggrieved with trial court's decision the applicant lodged this Petition seeking the following declarations;

(i) A declaration that the period spent in custody by the petitioner before being sentenced ought to have been taken into account as part of the imposed sentence of 10 years term of imprisonment.

(ii) A declaration that failure of the sentencing court to comply with Section 333 (1) (2) of the CPC offends Articles 25 (c), 27 (1) (2) and denied the petitioner his rights under Articles 50 (2) (q) and 51(1) of the Constitution;

(iii) An order directing the declaration that Section 333 (1) (2) of the CPC denied the petitioner the rights under Article order striking out the sentence of 10 years from the date of conviction and a substitution of the same with a reduced sentence of 10 years from the time of arrest and 3years probation;

(iv) An order for reduction of the new sentence imposed to commence from the date of arrest.

(v) The court to take into account the fact that the applicant was a first offender and a model prisoner and has shown remorse for his deeds.

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 application is for revision 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 in August, 2013;

4. To support his prayer for revision 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 revised to commence effective from the date of arrest which is said to be on or about the 14/08/2013;

RESPONDENT's CASE

6. In response counsel confirmed that the sentence was silent on the commencement date; and was not opposed to the prayer for the revision of the date to commence from the date of the petitioners' arrest;

ISSUES FOR DETERMINATION

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

- (i) Whether this court has the jurisdiction to revise the commencement of the sentence imposed;

ANALYSIS

Whether the this court has the jurisdiction to revise the commencement date of the sentence;

8. Upon perusal of the trial courts judgment on sentencing this court indeed notes that it is silent on the aspect of the commencement date of the sentence; and indeed the trial court ought to have taken this factor into consideration; the applicable law is found under the provisions of Section 333 (2) of the Criminal Procedure Code;

9. Based on this provision of the law the petitioner is indeed entitled to the benefits of the provisions of the Section 333 (2) aforesaid for the time spent in remand during the trial period;

10. Nevertheless, regardless of the forgoing circumstances there is need for this court to consider firstly, whether, it has supervisory powers of revision over a court with concurrent jurisdiction; in answer to this the court opines that the powers conferred under the provisions of Section 364 of the Criminal Procedure Code are limited to the courts subordinate to the High Court and have no bearing to courts that have concurrent jurisdiction;

11. Secondly, this court has to consider whether the petitioner has exhausted all the available avenues of appeal; to this the answer would be that the petitioner has not exhausted all his appellate avenues and that his recourse lies in an appeal to the Court of Appeal which will then be tasked with correcting any anomalies in the sentence;

12. This court finds that it has no jurisdiction to revise a decision of a court with concurrent jurisdiction.

FINDINGS AND DETERMINATION

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

- (i) This court finds that it has no jurisdiction to grant the orders sought.
- (ii) This court finds the Petition to be incompetent and it is hereby struck out.

Orders accordingly.

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

HON. A. MSHILA

JUDGE