Francis v Republic (Criminal Appeal 47 of 2021)
[2023] KECA 281 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 281 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 47 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

MARCH 17, 2023

BETWEEN

SAMUEL OTIENO FRANCIS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (J. Wakiaga, J.) dated 30th May 2018 in HC.CR. A No. 64 of 2014)

JUDGMENT

1. The appellant, Samuel Otieno Francis was charged before the High Court, Nairobi with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He was convicted of that offence after a trial in a judgment delivered on May 30, 2018 by J Wakiaga, J.

2. Upon conviction of the appellant, the trial Court called for a presentencing report and victim impact statement. Upon consideration of the two reports, the trial Judge sentenced the appellant to 15 years in jail. Aggrieved by the judgement, the appellant filed a notice of appeal dated April 12, 2022 against both the conviction and sentencing.

3. At the hearing, the appellant was represented by Mr Sanjay P Bhansali and Ms Margaret Matiru appeared for the state. Mr Bhansali informed the court that the appellant wished to abandon the appeal against the conviction and challenge the sentence only.

4. In his written submissions dated August 15, 2022 and which he highlighted orally, Mr Bhansali submitted that the trial Judge erred in sentencing as he failed to invoke section 333 (2) of the *Criminal Procedure Code* by failing to factor the time spent in remand by the appellant in the sentence. He argued that although the Judge had stated in the judgment that he had taken into account, that the appellant had stayed in remand for 4 years, the said period was not deducted from the sentence. The appellant

argued that the fact that the judge had indicated that he had taken into account the period spent in custody, but failed to deduct the period, the Judge fell into error.

5. Ms Matiru for the state opposed the appeal. She relied on her written submissions dated January 31, 2023 and which she highlighted orally. She submitted that in the judgment, it was clear that the Judge had addressed his mind to the principles set out in the Judiciary Sentencing Policy. The learned Judge also addressed himself to the oft quoted Supreme Court decision in *Francis Karioki Muruatetu & Another v Republic* (2017) eKLR, that declared the mandatory nature of death sentence as unconstitutional. She submitted that the period the appellant had spent in custody, had been taken into account by the learned Judge before sentencing.

6. We note that the appeal before us, is confined to the narrow point of whether the period the appellant had spent in custody before sentencing, was taken into account in the sentence that was imposed. In addressing this issue, we note that section 333(2) of the *Criminal Procedure Code* provide as follows:

> "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."

7. We also note that the *Judiciary Sentencing Policy Guidelines* at clause 7.10 and 7.11 provides as follows:

> "7. 10 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.
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> 7. 11 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."

8. The question that arises for determination is the definition of "taking into account the period in which an offender was held in custody during trial." In other words, should a Judge when imposing a sentence, do a mathematical deduction of the time spent in custody during trial or can a trial Judge consider all the factors and impose a sentence that is just in the circumstances.

9. We note that the appellant's grievance is that the learned Judge failed to exercise his discretion properly when imposing the 15-year custodial sentence, by failing to take into account the time he had spent in remand. Normally, this court will not interfere with the exercise of discretion by the court appealed from, unless it is demonstrated that the court: acted on wrong principles; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. This approach was adopted in *Bernard Kimani Gacheru v Republic*, Cr Appeal No 188 of 2000 where this court expressed itself as follows:

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material,

or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

10. The question of the applicability of section 333(2) of the *Criminal Procedure Code* was considered by this Court in *Ahamad Abolfathi Mohammed & Another v Republic*, Criminal Appeal No 135 of 2016 and the Court stated thus:

> " The appellants have been in custody from the date of their arrest on June 19, 2012. 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(s) 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

11. The same question of taking into account the period spent in remand was also considered in the Supreme Court of Uganda in the case of *Bukenya v Uganda* (Criminal Appeal No 17 of 2010) [2012] UGSC 3 (January 29, 2013) in which the Court stated thus:

> " Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking theremand period into account should be done mathematically suchas subtracting that period from the sentence the Court wouldgive. But it must be considered and that consideration must benoted in the judgement." (emphasis ours)

12. The above case of Bukenya v Uganda was applied by DK Kemei J in the case of *Michael Nthenge Kisina v Republic*, Criminal Revision No E003 of 2020 and we quote with approval his holding, which the Court stated thus:

> " 10. For the avoidance of doubt, in view of jurisprudential trends, I wish to point out that the intention of the court when meting the 20 year sentence on the applicant was to sentence the applicant to 24 years, however because the court took into account the time spent in remand custody a sentence of 20 years

was passed on the applicant which incidentally was to start from the date of conviction namely March 22, 2018. This court clearly considered the time that the applicant was in custody and therefore it satisfactory met the requirement under section 333(2) of the Criminal Procedure Code. There is no doubt that the period spent in custody was duly considered by this court when it passed the sentence and that the same cannot now be stretched any further."

13. We now turn to the ground raised by the applicant. We note that the appellant was convicted of the offence of murder. The appellant murdered one Boniface Omwawa Mutula. The appellant without any provocation went to the premises where the deceased was running a barber shop and without any provocation stabbed him to death with a knife. On the sentence, the trial Judge stated as follows:

> " 6. In this matter the court called for Pre-sentencing report in which it was stated that the offender dropped out of school in Form two (2) due to financial constraints and from 2005 to the time of his arrest in 2014 was engaged as a casual labourer at construction sites. In the report he offers a defence which he did not tender before court that while collecting money for the funeral expenses of his dead brother the deceased provoked him by saying that they don't usually contribute towards the funeral expenses of thieves and robbers and that he should collect the money from his friends or in the alternative his mother should burn the body and eat it. That it was those words that triggered the anger in him. The family of the accused (convict) stated that he was hard working and through his effort was able to put food on their table and pay school fees for them. The convict regrets his action.
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> 7. On Victim Impact Statement it was stated that the deceased was the last born in their family who related well with members of the community. He not only supported his mother financially but also other members of the extended family and pray for a harsh sentence to be meted to the convict.
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> 8. Having taken into account the mitigation of the convict, the fact that he is a father of one child who has lost his support and the prosecution submission for a deterrent sentence as weighed against the offence, I am of the view that a deterrent sentence balanced with rehabilitation would be the most adequate and just sentence herein. I would therefore sentence the convict to imprisonment period of fifteen (15) years during which period while in custody would undergo further rehabilitation towards anger management. I have in passing this sentence taken intoaccount the fact that the convict has been in custody for four(4) years and is declared a first offender by the prosecutionthough the probation report indicated that he had beenconvicted and sentenced to two (2) years for being in possessionof narcotic substances."(Emphasis ours)

14. The learned judge is very clear in his ruling that, in imposing the 15-year sentence, he had considered, or as it were, taken into account that, the appellant had been in custody for 4 years. Therefore, the argument by the appellant that the period that he was in custody was not taken into account in the sentence flies in the face of the ruling. We hasten to add that the maximum sentence for offence of murder, upon conviction is death. *Francis Karioki Muruatetu* case (supra) did not abolish the death sentence but declared section 204 of the *Penal Code* unconstitutional as it had taken away the

discretionary power of the court in sentencing. This means that where circumstances justify, accused persons ought to get stiff sentences.

15. In this appeal, we note that, the appellant stabbed an innocent person to death and was lucky to be handed a 15-year sentence. To try to further reduce the sentence by 4 years through judicial craft, is stretching his luck too far. We are satisfied that in imposing the 15 years, the Court took into account the 4 years that the appellant had spent in custody during trial.

16. Consequently, this appeal is without merit and we dismiss the same.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR