REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL REVISION NO. 8 OF 2020

DOMINIC KIVUVA MWAMBI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The applicant herein moved this court vide the instant application which is dated 3/02/2020 seeking for orders for revision of sentence downwards by the Embu Chief Magistrate passed on 19/10/2016 of seven (7) years imprisonment.

2. The record shows that the applicant was convicted of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The value of the property robbed was Kshs. 374,000/= according to the charge.

3. The application was premised on the grounds that the applicant had already served 3 years and 3 months in prison. He claimed that the sentence was meted upon the applicant without the court taking into consideration the period of six (6) months that the applicant was remanded in custody.

4. The applicant further averred that he was terminally ill having been diagnosed with diabetes, hypertension, peptic ulcers and asthma and which conditions were delicate, care-intensive and financially draining on the applicant as he was frequently in and out of the hospital for monitoring and evaluation of his health and thus the conditions in the prisons did not favour him. Further that he had exhibited exceptional good behaviour during his period of the incarceration and had actively pursued education. The said application was further supported by the affidavit sworn by the appellant/applicant and wherein he reiterated the grounds in the application.

5. The court gave directions that the application be canvassed by way of written submissions and pursuant to which directions the parties filed their respective submissions.

B. Analysis of law & Determination

6. I have considered the application herein as well as the submissions by both the applicant and the respondent. In my view the only issue for determination is whether the applicant has made a case for revision.

7. From the face of the application, it is clear that it was brought to court pursuant to the provisions of section 362 and 364 both of the Criminal Procedure Code. One of the grounds in the application is the period the applicant spent in custody was not taken into account during sentencing. It is not clear whether the applicant wanted to include this fact as a second prayer in its application.

Section 333(2) requires a court where the person sentenced under subsection (1) has, prior to such sentence, been held in custody.

8. Section 362 empowers the High Court to reverse decisions and orders of subordinate courts in its supervisory jurisdiction. Section 364 provides for the powers of the High Court in exercise of its revisionary jurisdiction to wit, *to call for and examine the record of any criminal proceeding before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court).* It provides that:

"(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order…."

9. As such it is my opinion that this court has jurisdiction to entertain this application pursuant to its revisionary jurisdiction under Section 362. The applicant despite raising an issue in his submissions as to whether he is entitled to remission, this application is for the revision of the sentence by way of taking into account the period spent in custody.

10. The applicant has pleaded that he was terminally ill and required medical attention and which was not available in prison and further that he had exhibited good behaviors and pursued courses while in prison. The applicant further submitted that he was entitled to remission under Section 46 of the Prisons Act (Cap 90 Laws of Kenya) as he was not a prisoner excluded from remission pursuant to section 46(1)(ii) of the Act. In this regard, I am aware that the power to grant remission is vested in the Commissioner General of Prisons and not to the courts. It is imperative to note that this was not pleaded as a prayer in the application.

11. As to the general revision of sentence downwards, it is important to note that the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code carries a sentence of death which is still lawful despite the **Francis K. Muruatetu Petition No. 15 of 2015** which only declared unconstitutional the mandatory nature of death sentence.

12. In my considered opinion, that the trial magistrate who must have been aware of the **Muruatetu decision** sentenced the applicant to serve seven (7) years. This was after considering the mitigation of the applicant. The record states: -

I have considered what the accused have said about their families and their young children who are still in school. However, I find that the offence was committed deliberately in a well-planned manner. The accused were armed with a pistol and had handcuffs and police pocket phone which were not recovered.

13. The trial magistrate also noted that the huge amount stolen of Kshs. 370,000/= was not recovered. He then proceeded to sentence the accused persons to seven (7) years imprisonment.

14. In my view, the magistrate exercised his discretion in sentencing after taking into account the mitigation. The applicant does not in any way fault the trial court on the issue of discretion or in any way suggest that mitigation was not taken into account.

15. The applicant pleads that he suffers from hypertension, peptic ulcers and asthma which are care-intensive conditions and financially draining. This appears to be the main ground supporting the application for revision. However, the applicant has not attached any medical report to support the allegations. As such the allegations of ill-health on part of the applicant have not been established. The applicant has a duty to satisfy the court on his health condition. Section 107 of the Evidence Act provides that "he who alleges must prove". In my view, the applicant can still be treated in prison and if need be, be referred to Government medical facilities where further medical treatment at a higher level can be procured.

16. It is my finding tht the applicant has failed to demonstrate any mistake or irregularity in meting out of the seven (7) years imprisonment sentence. The fact that the applicant has served almost half of the sentence has no implication on the provisions of

Section 362.

17. The applicant's case was that the period of six (6) months he spent in custody be considered. In response to the same, the respondent submitted that the applicant was arrested on 9.04.2014 and released on bond on 28/07/2014 and thus he spent 3½ months in custody as opposed to the seven (7) months that he claimed in his petition. I have perused the trial court file and noted that indeed the applicant was arrested on 9/04/2014 and released on bond on 28/07/2014. The correct position is that the petitioner spent about three months and 19 days in custody. Further it is clear from the said records that the trial court did not take into account the said period in meting out the sentence on the applicant.

18. It is my considered opinion that the failure to comply with Section 333(2) of the Criminal Procedure Code was an irregularity as well as an illegality on part of the trial magistrate and that it ought to be corrected by this court under Section 362 and 364 of the Criminal Procedure Code.

19. This court having confirmed that the period of three and half (3½) months spent in custody was not taken into consideration will *suo moto* correct this irregularity and order that the seven (7) year imprisonment sentence imposed by the trial court do run from 9/04/2014 being the date of arrest.

20. It is my considered view the application for revision of sentence must fail for the foregoing reasons.

21. It is hereby dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JUNE 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petitioner through Video Link