



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO.2 OF 2020

JOHN KAREBI MUHIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was convicted of two counts of sexual assault contrary to section 5(1)(a)(i) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 15 years imprisonment on each count. Sentence was ordered to run concurrently.

2. The applicant has now filed this petition contending that the trial court did not comply with the requirements of section 333(2) of the Criminal Procedure Code when it sentenced him to 15 years imprisonment. The said section provides 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

3. The petitioner is seeking that this court do take the period spent in while awaiting trial into account and adjust the sentence accordingly.

4. The petition was canvassed by way of written submissions of the petitioner and of those of the learned prosecution counsel, **Miss Mwaniki**. The petitioner submitted that the sentencing court did not factor in the pre-trial detention before imposing the sentence of 15 years. That the trial court was obligated to take that period into account as was held by the Court of Appeal in **Ahamed Abolfathi Mohammed & Another v Republic (2018)** eKLR that:

The appellants have been in custody from the date of their arrest on 19th June 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.

5. The petitioner further submitted that failure to comply with the stated section rendered the sentence excessive. The petitioner relied on the case of **Vincent Sila Jona & 87 Others v Kenya Prison Service & two Others (2021)**KLR.

6. The case of **Mohamed Salim v Republic** (2020) eKLR was also cited where Lesiit J. (as she then was) considered the provisions of section 333(2) of the CPC and held that:

13. The law requires that the court takes into account the period a person has been held in custody before the sentence. That period should be the time the accused person was in custody during the pendency of the trial. It cannot be the period of time when he was held under investigations. That period is outside the trial period. I do not believe that the drafters of this law would have intended for the court to look outside of the period before it to find out what happened before the accused person was arraigned in court. Secondly, it is sufficient for the court to note on record that it has considered or taken account of the incarceration during the pendency of the trial. That Taking into account cannot be an arithmetic or mathematical exercise.

7. The prosecution counsel opposed the petition on the grounds that though the trial court did not record that the time spent in custody was considered, it was apparent from the record that the court was guided by the sentencing report and the aggravating circumstances in the case in imposing the sentence of 15 years imprisonment. That the sentence is not excessive but was commensurate to the offences committed. Therefore, that the petitioner is not entitled to the review of the sentence.

8. I have considered the petition, the grounds in support thereof and the submissions of the petitioner and the prosecution counsel. The petitioner is urging this court to find that the trial court made an error in not considering the pre-trial detention when imposing its sentence. He relied on section 333(2) of the Criminal Procedure Code and the authorities cited above.

9. Article 165(6) of the Constitution of Kenya 2010 gives the High Court supervisory jurisdiction over subordinate courts and for that purpose may under Article 165 (7) call for the record of any proceedings before any subordinate court and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

10. By dint of this provision of the constitution, it is the duty of this Court to correct any unlawful errors that may be made by a subordinate court in the course of a trial.

11. It is clear that section 333(2) of the CPC is couched in mandatory terms. The words used are “shall take account of...” The trial court was therefore obligated to comply with the provisions of the section and indicate whether it had taken into account the period spent in custody in imposing the sentence of 15 years.

12. It is admitted that the trial court in this case did not indicate in the court record whether it had factored in the period spent in custody before imposing the sentence of 15 years imprisonment. It was an error and a breach of the petitioner’s right to fair trial for the trial court to fail to take the period spent in custody into account when sentencing the petitioner.

13. I have perused the court file of the trial court. The petitioner was arraigned in court on the 2/8/2011 and was sentenced on the 25/4/2013. He was therefore in custody for a period of over 20 months while awaiting trial. That period should therefore be taken into account. The petition is therefore merited. I am in agreement with the holding in **Mohamed Salim v Republic** (supra) that the period to be taken into account starts from the time of arraignment in court as that is the time when a trial commences.

14. In view of the foregoing, I order that the sentence of 15 years imposed on the petitioner be computed from the time of his arraignment in court, i.e. on the 2/8/2011.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF MARCH 2022.

J. N. NJAGI

JUDGE

In the Presence of:

Appellant: In person

Mr. Mururu: for Respondent

Court Assistant: Kinyua

14 days R/A.



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