



**Nasimiyu & 2 others v Republic (Criminal Case 16 of 2012)
[2024] KEHC 9936 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 16 OF 2012**

**DK KEMEL, J
JULY 29, 2024**

BETWEEN

JANET NASIMIYU 1ST PETITIONER

CHRISTINE MURICHO 2ND PETITIONER

PHYLIS MATINGI MURICHO 3RD PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. A perusal of the record of these proceedings reveals that on 30th June 2023, this Court made some re-sentence orders against the Petitioners herein. Subsequently, by a notice of motion application dated 1st November 2023, the Petitioners sought to have this Court review its re-sentencing ruling to include the period served in custody by the Petitioners prior to their convictions for sentences emanating from Bungoma High Court Criminal Case No. 16 of 2012.
2. The application was unopposed by the State.
3. Vide directions issued on 18th March 2024, this Court directed that the application dated 1st November 2023, be canvassed by way of written submissions. Learned counsel for the Petitioners filed submissions dated 7.5.2024.
4. Article 50 of the *constitution* of Kenya provides for the rights of an accused person as follows: -
 - (2) Every accused person has the right to a fair trial, which included the right-
 - (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law. (emphasis mine).



5. The Petitioners had earlier approached this Court seeking re-sentencing hearing vide a notice of motion application filed on 31st October 2022. This Court dispensed with the same application vide ruling issued on 30th June 2023 reviewing the Petitioners' death sentence to a 30-year jail term.
6. I have considered the application and the submissions made by the Petitioners in support thereof. It is my considered view that the issue to be determined is whether the Petitioners prayer for review of sentence they are currently serving is merited.
7. The prayer by the Petitioners herein is that the time they spent in custody be considered pursuant to the provisions of Section 333(2) of the [Criminal Procedure Code](#). The said section provides that: -

“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 (emphasis mine).”
8. This duty is further buttressed under clauses 7.10 and 7.11 of the [Judiciary Sentencing Policy Guidelines](#) and in the cases of [Abamad Abolfathi Mohammed & Another v Republic](#) [2018] eKLR and [Bethwel Wilson Kibor v Republic](#) [2009] eKLR].
9. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced ought to be taken into account by the trial court in meting out sentence unless it is hindered by other provisions of the law.
10. I have perused the record in Bungoma High Court Criminal Case No.16 of 2012 and confirmed that Ali Aroni, J (as she was then) vide the Judgment delivered on 24th March 2016 did sentence the Petitioners herein to death for the offence of murder contrary to section 204 of the [Penal Code](#). The Petitioners proceeded to file their respective notices of appeal to the Court of Appeal against the conviction and sentence.
11. Vide its judgement dated 27th May 2022, the Court of Appeal remitted this matter back to this Court for re-sentencing hearing in light of the Supreme Court decision in [Francis Karioko Muruatetu & Another v Republic](#) [2017] eKLR.
12. This Court duly determined the re-sentencing application and proceeded to issue orders that each Petitioner shall serve Thirty (30) years' imprisonment and that the said prison term shall consider the time they have already served.
13. It is trite law that a court of law can only exercise jurisdiction as conferred upon it by the [constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. As i have indicated, the sentence which the Petitioners wish to have revised was passed by this Court upon application for resentencing under the principles of the [Muruatetu case](#) (*supra*). As such, the Petitioners are basically seeking that this Court to review its own decision regarding sentence of Thirty (30) years' imprisonment and further invoke the provisions of Section 333(2) of the [Criminal Procedure Code](#).
14. The jurisdiction of this Court is provided for under Article 165 and pursuant to that article, this Court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; jurisdiction to interpret the [constitution](#) and supervisory jurisdiction over



subordinate courts and any other jurisdiction, original or appellate, conferred on it by legislation. In my opinion, this Court in the said petition in resentencing considered all the issues in relation to the matters before it and came up with the sentence of Thirty (30) years' imprisonment. Further, this Court noted that the prison term shall consider the time they have already served. Upon perusal of the Court proceedings, the Petitioners were in custody from the date of their arrest namely 19th April 2012, and as a result of which their sentence was subsequently reviewed under the Muruatetu decision. The Petitioners will now only serve the remaining period which may be further reduced by remission that may be given by the Commissioner of Prisons under Section 46 of the Prison's Act.

15. As such, it is my considered view that this Court is bereft of jurisdiction to entertain the application herein as the same is tantamount to review of its own orders for resentencing. In my considered view, the only time this Court can review its own decision is in exercise of the resentencing jurisdiction pursuant to Muruatetu decision which this court has already accomplished when it was directed to do so by the Court of Appeal.
16. From the application, the Petitioners cited Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act (CAP 21) as being some of the provisions under which the application was brought. However, the said provisions are not applicable to the facts of this application since the applicant seeks to review the decision of the High Court. It is my considered opinion that this Court lacks jurisdiction to revise its own orders regarding sentence.
17. In the result, it is my finding that the Petitioners' application dated 1.11.2023 lacks merit. The same is hereby dismissed.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF JULY 2024.

D. KEMEI

JUDGE

In the presence of:

Miss Minyua for Petitioners

Miss Kibet for Respondent

Kizito Court Assistants

