



**Ndungu v Republic (Criminal Revision E007 of 2024)
[2024] KEHC 10511 (KLR) (28 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E007 OF 2024**

**A MSHILA, J
AUGUST 28, 2024**

BETWEEN

JAMES GICHURU NDUNGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant has premised his application under the provisions of Articles 22(1), 23(1), 25(c), 27, 28, 50(2)(p)(q), 159(2), 160(1) and 165(3)(b) of the Constitution 2010; he was seeking a review of his Thirty-five (35) year sentence to a more lenient sentence pursuant to Article 50(2)(p)(q) of the Constitution; the application is also premised under the provisions of Section 333(2) of the Criminal Procedure Code on the grounds that the period spent in remand was not taken into consideration and his sentence was not in line with the decision rendered in Jona & 87 Others v Kenya Prison Service & 2 Others (Petition 15 of 2020) [2021] KEHC 457 (KLR);
2. The Applicant was charged and convicted for the offence of grievous harm Contrary to Section 234 of the Penal code in Criminal Case No. 907 of 2004 Githunguri Court. After a full hearing he was found guilty and convicted of the offence and the Githunguri trial court imposed a thirty-five (35) year sentence as opposed to a life sentence. Being aggrieved he lodged an appeal to the High Court vide HCRA No.175 of 2005 and lodged a second appeal to the Court of Appeal vide Court Of Appeal No.481 of 2007; both appeals were dismissed and the sentence was upheld.
3. The Applicant now seeks a review of the sentence to a lenient one. At the hearing the Applicant was unrepresented and relied on his supporting affidavit which he briefly highlighted; Mr Gacharia appearing for the State was not opposed to the application but requested that the Githunguri lower court trial record be availed to assist this court in determining the appropriate sentence to be considered.



Applicant's Case

4. The Applicant submitted that this court was seized of competent jurisdiction to hear and determine this matter under the provisions of Article 50(2)(p)(q) of the [Constitution](#) 2010; That he had been sentenced without due consideration of mitigation or the unique facts and circumstances of his case; he prayed to be granted a lenient sentence; and also prayed that the period spent in remand be taken into consideration pursuant to the provisions of Section 333(2) of the [Criminal Procedure Code](#);

Issues for Determination

5. After hearing the Applicant's submissions this court found the following issues for determination;
 - i. Whether this court has jurisdiction to hear and determine the application for review of sentence; and
 - ii. Whether the Applicant can benefit from Section 333(2) of the [Criminal Procedure Code](#).

Analysis

Whether this court has jurisdiction to hear and determine the application for review of sentence

6. The Applicant after being unsuccessful on appeal has opted to file an application for revision under the provisions of Article 50(2)(p)(q) of the [Constitution](#) 2010 which read as follows;
 - (p) 'Every accused person has the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
7. From the Applicants pleadings it is noted that upon conviction and sentence he was sentenced to thirty-five (35) years imprisonment. Section 234 of the [Penal code](#) prescribes a life sentence and the trial court in exercising its discretion did not dispense the prescribed severe punishment and instead gave him the benefit of a lesser definite sentence. Being aggrieved he filed an appeal to the High Court which appeal was dismissed. He moved to the Court of Appeal and lodged an appeal which was also dismissed; both appellate courts when determining the appeal must have considered the propriety of the sentence imposed and dismissed the appeal and upheld the Thirty-Five (35) year sentence.
8. The court notes that the sentence has already been reviewed by both the High Court and the Court of Appeal on appeal and the appellate courts upheld the lesser and definite sentence that was passed by the trial court; indeed in line with Article 50(2)(p) the prescribed punishment for the offence the applicant was charged with has since changed in that the Court of Appeal sitting in Malindi in the case of [Manyeso v Republic](#) [2023] KECA 827 declared that an indeterminate life sentence is not only inhumane, it also was a violation of the offenders rights and therefore it was unconstitutional.
9. The court's considered view is that the applicant had the benefit of mitigation which then informed the trial court to exercise its judicial discretion leading to a lenient and definite sentence as opposed to the then mandatory life sentence;
10. For those reasons this court is satisfied that this application for review of sentence to a more lenient one does not fit within the parameters of Article 50(2)(p) as envisaged in the Court of Appeal case of [Manyeso v Republic](#) (supra);
11. For those reasons this court is reluctant to interfere with the trial court's decision.



12. The second leg of the application relates to Article 50(2)(q) of the Constitution 2010 and Section 333(2) of the Criminal Procedure Code; Article 52(2)(q) which read as follows;
- “Every accused person has the right if convicted to appeal to, or apply for review by, a higher court as prescribed by law”.
13. The applicant seeks a review of the commencement date of the sentence under the aforesaid Article and Section 333(2) of the Criminal Procedure Code which reads as follows;
- “(2) 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 of which it was pronounced, except where otherwise it is 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”.
14. In his supporting affidavit and in his oral submissions the applicant does not specifically state the date of his arrest; he merely states at paragraph (11) that
- ‘I pray that the period spent in remand custody be computed into the eventual sentence to be awarded pursuant to the provisions of Section 333(2) of the Criminal Procedure Code’; at paragraph (6) he goes on to state that he has ‘spent twenty (20) years in lawful custody since the time he was arrested’;
15. Nothing in the form of any judgments from any of the three courts that handled the matters were attached to supporting affidavit that would have assisted this court in making its determination on whether the courts had taken into account the period the applicant had spent in custody.
16. This court can only exercise its powers of revision in cases of proceedings from subordinate courts. The scope of revisionary jurisdiction is limited to satisfying itself on the legality or propriety of the sentence that was passed by a subordinate court; This court reiterates that the applicant lodged an appeal to High Court and Court of Appeal and it is clear that both appellate courts considered the propriety of the sentence and their scope of consideration would include the application of Section 333(2) of the Criminal Procedure Code in that a court is obligated to take into account the period the accused spent in custody before the sentence was passed.
17. This court has no jurisdiction to review a sentence already reviewed by a court of concurrent jurisdiction; nor does this court have jurisdiction to review a decision of a higher court, which in this case is the Court of Appeal.

Findings and Determination

18. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds that the application does not fit within the parameters of Article 50(2)(p) and finds no good reason of interfering with the trial courts’ decision on sentence.
 - ii. The application for review of the Thirty-Five (35) year sentence is disallowed.
 - iii. This court finds that it lacks jurisdiction to review the commencement date of the sentence. For want of jurisdiction this application is not properly before this court and it is hereby struck out.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 28th DAY OF AUGUST, 2024.

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Gacharia for State

James – Present from Manyani Prison

