



**Muriithi v Republic (Criminal Revision 18 of 2020)
[2024] KEHC 13210 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION 18 OF 2020
RM MWONGO, J
OCTOBER 30, 2024**

BETWEEN

DAVID MWANIKI MURIITHI APPLICANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in S.O. No. 27 of 2018
of the SRM'S Court at Gichugu by Hon. L.W. Kabaria - SRM)*

RULING

1. The applicant was charged with the offence of rape Contrary to Section 3(1)(a)(b) as read with Subsection 3 of the Sexual Offences Act No 3 of 2006. The particulars of the offence are that on the 17th September, 2018 within Kirinyaga County unlawfully and intentionally caused his penis to penetrate the vagina of SWG without her consent.
2. He was arrested on 10th October, 2018, he pleaded not guilty and was taken through full trial. He was found guilty by the trial court, and convicted and sentenced on 3rd January, 2020 to 10 years' imprisonment. He filed an appeal under Criminal Appeal No 2 of 2020 and withdrew the same on 18th September, 2023 to seek re-sentence.
3. The parties were directed to file submissions.

Applicant's Submissions

4. There are no submissions on record.



Respondent's Submissions

5. The DPP made oral submissions to the effect that the applicant was convicted of rape and sentenced on 3rd January, 2020 and sentenced to 10 years' imprisonment. According to the DPP, the application for revision is premature, and the applicant has not shown any element of rehabilitation or reform. He was arrested on 10th October, 2018, and can seek to benefit from Section 333 (2) of the CPC but not resentencing in the circumstances. He can also seek remission of sentence.

Issues for Determination

1. Whether this court has jurisdiction.
2. Whether the applicant is entitled to re-sentencing

Analysis

Whether this court has jurisdiction

7. The applicant was charged with the offence of rape Contrary to Section 3(1)(a)(b) as read with Subsection 3 of the Sexual Offences Act No 3 of 2006. He was found guilty and convicted and sentenced on 3rd January, 2020 to 10 years' imprisonment. He now seeks resentencing of the life sentence to a definite sentence.
8. Article 23(1) of the Constitution provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine an application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights. Article 165(3)(b) of the Constitution of Kenya 2010 provides that;

"Subject to clause (5), the High Court shall have-

Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights had been denied, violated, infringed or threatened."
9. It is evident that this court has jurisdiction to entertain the present application. In addition, this court has general supervisory review powers under Article 165 (b).

Whether the applicant is entitled to re-sentencing

10. The applicant seeks re-sentencing of the imposed 10 years sentence. He seeks to have the sentence reduced or be released from prison. The respondent submits that his application for revision is premature. He has not shown any element of rehabilitation or reform.
11. In the exercise of its review powers this court is entitled to take into account factors such as mitigation, the period served in custody, Probation Officers Reports and Prisons Reports.

Mitigation

12. In his mitigation, the applicant, submits he is a first offender and is remorseful for the offence. He states that he has been rehabilitation and maintained a clean prison record.
13. The Probation Service Sentence Review Report filed on 5th December, 2023 indicates that the applicant is 34 years old, married and has one child currently in grade six. The report recommends that the applicant is suitable for Community Service Orders.



14. The Prison Service Report dated 30th November, 2023 indicates that the applicant has been rehabilitated and is ready to join the society.

Period served in custody

15. The law requires courts while sentencing, to take into account the period the accused spent in custody. Section 333(2) of the Criminal Procedure Code provides:

“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from, and 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.”

16. The applicant was arrested on 10th October, 2018. He was sentenced on 3rd January, 2020 to 10 years imprisonment. The applicant has been in custody for 6 years. This period must be considered during re-sentencing.

17. In *Kiyonga v Republic* (Criminal Appeal E008 of 2023) [2023] KEHC 18708 (KLR) (12 June 2023) (Judgment) Nyakundi J held:

“To determine this right in favour of the Appellant I exercise original jurisdiction within the ambit of section 333(2) to declare the 15 years in custody shall commence with effect from the date of arrest of the Appellant. In this respect the warrant of committal to prison be amended to reflect the credit due to the Appellant as from 31st May 2016.”

18. The respondent submitted that the applicant could also benefit from remission of sentence. Section 46 of the Prisons Act, on the other hand provides that:

“(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.”

(2) For the purpose of giving effect to the provisions of subsection (1) of this section, each prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.”

19. The applicant is therefore also entitled to be credited with the full amount of remission which would amount to 3 years and 4 months.

20. Accordingly, the accused would serve six (6) years and eight (8) months. Having been granted bail on 22.10.2018, his sentence commences on the date he was sentenced and should take into consideration the 12 days he was in remand custody.

Disposition

21. In light of the foregoing, I review the accused’s sentence and mete a non-custodial sentence for the remaining term of his sentence of two (2) years and eight (8) months.



22. Accordingly, the Accused shall serve the remaining two (2) years and eight (8) months of his sentence as a non-custodial sentence in community service at Thumaita Chief's Camp under the supervision of the Chief.

23. Orders accordingly.

DELIVERED AT KERUGOYA THIS 30TH DAY OF OCTOBER 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. David Mwaniki Muriithi - Accused in Person
2. Mamba for the State
3. Court Assistant, Murage

