Kamais v Republic (Criminal Miscellaneous Application E004 of 2021) [2024] KEHC 13018 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13018 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION E004 OF 2021

PN GICHOHI, J

OCTOBER 29, 2024

BETWEEN

JAMES KAMAIS ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. While this matter is strictly registered as High Court Misc. Application No. E004 of 2021, this Court notes that there is an application placed in this file by same Applicant (James Kamais) and registered as High Court Misc. Application No. E003 of 2020.

2. In that application titled High Court Misc. Application No. E003 of 2020 filed on 13th January2021, the Applicant seeks sentence review under Article 165 (3) (b) of the *Constitution* and Section 262 and 364 of the *Criminal Procedure Code*.

3. He states that he was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* in Nakuru HCCR Case No. 115 of 2008 and sentenced to serve fifty -six (56) years imprisonment.

4. While citing Article 50 (2) (b) of the *Constitution* and Section 216 of the *Criminal Procedure Code*, he urges this Court to

> " accord us lenience and overturn the sentence with lenient sentence."

5. In High Court Misc. Application No. E004 of 2021, the Applicant states that after he was convicted for murder and sentenced to 56 years imprisonment in HCCR Case No. 115 of 2008, he appealed to the Court of Appeal Nakuru in Criminal Appeal No. 340 of 2012 and the sentence was upheld.

6. He is now aggrieved that the time he spent in custody was not computed in that sentence and therefore urges this Court to consider the time spent in custody pursuant to Section 333 (2) of the *Criminal Procedure Code* as it has jurisdiction to do so under Article 165 (3) (b) of the *Constitution*.

7. In his response, the Respondent filed on 25/03/2024 a Replying Affidavit sworn by James Kihara in his capacity as the Prosecution Counsel in the Office of the Director of Public Prosecutions.

8. He states that Applicant did not seek court's intervention in the Court of Appeal to have the time spent in custody considered. As a consequence, he states he has no objection that going by the new jurisprudence which allows High Court to re- open a case especially where a convict has exhausted appeal options.

Applicant's Submissions

9. In submissions filed on 15/02/2024 filed in response to the Respondent's Replying Affidavit, the Applicant submits that the Respondent did not dispute that the Applicant has brought this matter under Article 22 of the *Constitution* which provides that: -

> "(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

10. He therefore urges the Court to hear and determine the application bearing in mind the nature of the sentence which he says is harsh and excessive.

11. Further, he submits that the order sentencing him to 56 years imprisonment to run from 27/01/2008 and that the Applicant be considered for parole after serving 30 years term is a cruel decision. His reason is that the sentence itself was severe and the issue of parole is not practical in our laws hence prejudicing the Applicant.

12. It is his further submissions that the new development in law suggests that a 30 years' imprisonment is sufficient punishment to rehabilitate the offender. He cited several cases including Kisumu Court of Appeal decision in *Evans Nyamari Ayako v Republic* Criminal Appeal No. 22 of 2018 where the Court allowed the appeal on sentence to the extent that it ordered life imprisonment imposed to translate to 30 years imprisonment.

13. As a consequence, he urges this Court to consider revising sentence of 56 years imprisonment and consider giving an appropriate sentence bearing in mind the mitigating factors including that he was a first offender, is now aged 54 years, that he is remorseful and has already spent 16 years in custody.

Determination

14. This Court has considered the two applications herein, the response to the same and the submissions by the Applicant.

15. The issues for determination are whether: -

    1. This Court has jurisdiction to review the sentence herein.

    2. Whether this Court should apply Section 333(2) of the *Criminal Procedure Code*.

16. The record shows that in Nakuru High Court Criminal Case No. 115 of 2008, the Applicant herein was among the seven (7) accused persons charged with murder contrary to section 203 as read with Section 204 of the *Penal Code*.

17. The Applicant herein 2nd accused in that case and in the judgement delivered on 11/11/2011, the Applicant together with the 1st, 3rd, 4th and 7th Accused were convicted for the offence of murder.

18. While sentencing the five Accused persons, M. J. Anyara Emukule J delivered a detailed ruling on 26/11/2012 where he finally held: -

> "...Taking the above considerations into account, and considering that the accused never expressed any remorse for the offence they committed, and further considering the submissions by counsel for the accused, that the court should impose a determinate sentence, I think the proper sentence to pass against the five accused is only one. A long imprisonment term. I therefore sentence each of the accused to fifty-six years imprisonment and I further order that the accused shall not be eligible for parole until each of them has served not less than 30 years of the term hereby imposed.
>
> There shall be orders accordingly."

19. From the above reasoning, it is clear that the said sentence handed against the accused persons therein was discretionary. Further, it is a fact that the Applicant herein proceeded to the Court of Appeal and the sentence was upheld.

20. In the circumstances then, the Applicant's lamentation before this Court that the sentence was excessively harsh and that the issue of parole is not practical in our laws hence prejudicing the Applicant herein is tantamount to not only asking this court to interfere with the discretion of the trial Court but also to act as an appellate court against the High Court and the Court of Appeal. Under no circumstances can that be tenable. This Court lacks jurisdiction to review or otherwise interfere with that sentence.

21. In regard the second issue, 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 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."

22. This was emphasised by the Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR

> "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. It must be remembered that the proviso to section 333(s) of the

Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

23. In this case however, it is this Court's considered view it cannot purport to review or correct any perceived inadvertent error or omission by the two so as to apply Section 333 (2) of the *Criminal Procedure Code* as sought herein.

24. In conclusion, both Misc. Applications No. E003 of 2020 and Misc. Application No. E004 of 2021 be and are hereby dismissed in entirety.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF OCTOBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:-

James Kamais- Applicant

Mr. Kihara for Respondent

Ruto- Court Assistant