



**Mwangi v Republic (Miscellaneous Criminal Application
E040 of 2024) [2024] KEHC 13034 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CRIMINAL APPLICATION E040 OF 2024**

**DKN MAGARE, J
OCTOBER 29, 2024**

BETWEEN

GEOFFREY MBIRI MWANGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling over a Notice of Motion application by the Applicant seeking a reconsideration of sentence in Nyeri CMCR 677 of 2016.
2. The application is supported by the affidavit of the Applicant and it was deposed in material as follows:
 - a. The Applicant was convicted on all eight counts and sentenced to serve 3 years imprisonment on the first count and one-year imprisonment for each of the other seven counts, to run concurrently.
 - b. The Applicant seeks the Court to invoke Section 333(2) of the *Criminal Procedure Code* and deduct the periods served in custody since his arrest.
 - c. The Applicant is not challenging conviction.
3. The Respondent did not file a response to the application. The parties did not file submissions. The Respondent argued orally that from the record, the Applicant was arrested on 30/6/2016 and released on 6/7/2016, a period of 7 days.
4. The Surety withdrew on 7/7/2017, exactly one year later. The Applicant was remanded in custody until 23/1/2020, when a second surety was gotten, a period of 931 days. Subsequently the Applicant has been in custody from 30/5/2024, a period of 152 days. (My calculation shows 153 days).



5. The Respondent stated that the Applicant has thus been in custody for a total of 1,090 days. These should be removed from the days he was to serve.

Analysis

6. The issue is whether this court should interfere with or have regard to the days in custody. The court sentenced the Applicant to an aggregate of 3 years in custody. The court did not indicate the time the sentence was to commence.
7. The Applicant lamented that the trial court did not consider the time spent in custody. I have perused the lower court record and note the Applicant was arrested on 30/6/2016 and was released on bond on 6/7/2016. He was rearrested and remanded for more than 2 and a half years in custody. A period of 6 days was considered in sentencing.
8. There is therefore no record that the period in custody was taken care of. In the circumstances Section 333(2) of the *Criminal Procedure Code* provides 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 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.
9. The Applicant now seeks that the sentences be reviewed to a lesser sentence taking into consideration the time spent in custody, and be allowed to bring further mitigation.
10. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. However, that detention must and ought to be mathematically included in the sentence. It is not enough to state that the period is considered. Further, there must always be an indication that the sentence runs from the date of arrest. A period a prisoner was in custody must wholly be taken out. The Supreme Court referred to the case of *Vinter and others v. the United Kingdom* (Applications nos. 66069/09, 130/10 and 3896/10) in which the Court held that:

“ 111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in *Bieber* and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater



with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in *Wellington* – a poor guarantee of just and proportionate punishment.

11. The discretion that this Court enjoys in sentencing permits a balanced and fair sentencing, which is also the hallmark of enlightened criminal justice. As was stated in *State vs. Tom, State v. Bruce* (1990) SA 802 (A), Smalberger, JA:

“The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to these principles. (I use the term “mandatory sentence” in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court’s normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts.”

12. Therefore, it is the duty of the courts to ensure that sentences so prescribed are imposed in accordance with the *Constitution*. As was elaborated by the persuasive Constitutional Court of Uganda in *Susan Kigula & 417 Others vs. Attorney General*, Const. App. No. 3 of 2006:

“The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *Constitution*.”

13. I therefore have no doubt that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 *Sentencing Guidelines* are as follows: -

- “1. Sentences are imposed to meet the following objectives. There will be instances
3.1 in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
 - i. Retribution: To punish the offender for their criminal conduct in a just manner.
 - ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.



- iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
 - iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community
 - v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
 - vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
 - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - viii. Reintegration: To facilitate the re-entry of the offender into the society”
14. There are no circumstances that were left out in mitigation. It is thus unnecessary to deal with aspects of mitigation in this matter.
15. Regarding days in custody, it is my finding that inclusive of today, the number of days the Applicant has been incarcerated are 1091. This translates to 2 years, 10 months and 2 days. The prisoner has virtually completed his sentence. Less than 40 days are remaining. In the circumstances, given the decongestion exercise that is ongoing, it will serve no purpose to remain in custody when he may still be released on his right to remission. In the circumstances, noting that the number of days served are almost equivalent to the sentence meted out, I reduce the sentence to the period served and direct that the Applicant be released forthwith, unless otherwise lawfully held.

Determination

16. In the upshot I make the following orders: -
- a. Noting that the number of days served are almost equivalent to the sentence meted out in Nyeri CMCR No. 677 of 2016, I reduce the sentence to the period served and direct that the applicant be released forthwith, unless otherwise lawfully held.
 - b. The file is closed.

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

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Pro se Applicant

Mr. Mwakio for the State

Court Assistant – Jedidah

