Macharia v Republic (Miscellaneous Criminal Application 4 of 2020)
[2023] KEHC 1466 (KLR) (Crim) (27 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION 4 OF 2020

JM BWONWONG'A, J

FEBRUARY 27, 2023

BETWEEN

SAMUEL NDICHU MACHARIA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for revision of the sentence imposed by Lesiit J (as she then was) on 18th April 2018 in Nairobi High Court Criminal Case No 21 of 2010 Republic v Samuel Ndichu Macharia)

RULING

1. The applicant was convicted and sentenced to serve ten years imprisonment for the offence of murder contrary to section 203 as read with 204 of the *Penal Code* (cap 63) Laws of Kenya.

2. He has now filed the present application seeking the revision of his sentence of ten years that was imposed by this court (Lesiit, J as he then was).

3. The grounds raised in his application and the sworn affidavit in support are as follows. That the trial court failed to consider the time spent in the pre-trial remand custody and that he is remorseful. Additionally, he has also informed the court that he has reformed.

The applicant's oral submissions

4. During the hearing of the application, the applicant submitted that he has acquired skills in farming, bible studies and entrepreneurship. Further, he has reformed and is ready to be reintegrated back into society. He submitted that he is the sole breadwinner in his family of four children. He also told the

court that he is asthmatic and has urged the court to consider the four years spent in remand custody during his trial.

The respondent's oral submissions.

5. Mr Kiragu learned prosecution counsel submitted that the sentence of 10 years imposed upon the applicant was very lenient. He submitted that the period of pre-trial remand custody was considered by the trial court during sentencing.

6. He therefore urged the court to dismiss the application for lack of jurisdiction.

Issues for determination

7. After considering the application, the rival submissions and the applicable law, I find that the issue for determination is whether this court has jurisdiction to hear and determine the application.

Analysis and determination.

8. The instant application is premised on sections 362 and 364 of the *Criminal Procedure Code* (cap 75). Section 362 gives the High Court the jurisdiction to call for and examine the record of any criminal proceeding before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. Section 364 on the other hand, provides for the powers of the High Court on revision.

9. However, the prayer sought by the applicant is basically that the time he spent in the pre-remand custody be considered and be subtracted from the sentence meted against him This is basically the jurisdiction of the court under 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."

10. The powers are of the court under section 333 (2) of the *Criminal Procedure Code* and the proviso thereto were explained in the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR*. The court while applying the said provision held that by dint of section 333 (2) of the *Criminal Procedure Code*, the courts during sentencing ought to take into account the period that the appellants had spent in custody before they were sentenced. The *Judiciary Sentencing Policy Guidelines* further buttresses this legal position as it provides that: -

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

11. However, I have perused the trial court record and I note that upon being convicted of the offence of murder and upon the applicant having put forward his mitigation, the trial court stated as follows:

> " it has not escaped my mind that the accused served four years of incarceration in the cause of the trial and just before his arraignment. Having said that and having taken everything into consideration as analysed above, I find the death penalty will be harsh to consider against the accused. A custodial sentence is called for, in all the circumstances of the case."

12. The court then proceeded to sentence the applicant to ten years imprisonment and his right of appeal was explained.

13. It is clear from the above that indeed the court did consider the period the applicant had spent in custody being four years. It was pursuant to this consideration that the court proceeded to sentence the applicant to ten (10) years imprisonment.

14. It is important to note that the offence of murder carries a maximum of death sentence which is still lawful. The decision in *Francis Muaruatetu & Another v Republic (2017) eKLR*, only outlawed the automatic imposition of the mandatory death penalty, upon an accused who is charged with murder. Depending on the circumstances of each case, the mitigation of the accused and the sentencing guidelines in place, a convict in a murder case could still be sentenced to death. During sentencing, this court considered the mitigation factors and the circumstances under which the offence was committed. This is clear from the record that at the time of sentencing, the court expressly stated that it had taken into account the four years spent in custody.

15. The period of four (4) years in custody as it is so expressly stated during sentencing was taken into account leading to a lenient sentence of ten (10) years. Considering the serious nature of the offence and that mitigation and the *Sentencing Guidelines* were considered, this court is not inclined to review the sentence.

16. The accused approached the court for revision under section 362 and 364 of the *Criminal Procedure Code*. However, I find that review under these provisions of the code is not applicable in this case, given that the applicant was convicted by this court which has no power to review its sentence under the provisions relied on by the applicant. In my view, this prayer for review is misplaced and misconceived.

17. I find that this court has no jurisdiction to entertain and determine this application.

18. In the premises, I find that the application is incompetent and is hereby struck out.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr Kinyua: Court Assistant

The applicant in person

Mr Otieno for the respondent