



**Otieno v Republic (Miscellaneous Criminal Application E130 of 2022)
[2023] KEHC 1115 (KLR) (Crim) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E130 OF 2022
DO OGEMBO, J
FEBRUARY 22, 2023**

BETWEEN

MOSES DOLA OTIENO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant Moses Dola Otieno, has moved this court by way of a Notice of Motion application dated 15.9.2022. The application is brought under a plethora of constitutional provisions including Articles 27(1), 28, 47(1), 48, 51, 259, 23(1)(3), 24, 50(2)(Q), 50(7), 159(1), 165(3) of *the constitution*, section 46 of the Prison Act, 2016 and section 333(2) of the *Criminal Procedure Code*. on its body, the application has raised and stated several issues of fact. The single and foremost prayer in the application, however, is that this court do revise the sentence meted out to the applicant to account for a period of 23 months that he spent in remand custody i.e 21 months before posting bail and an additional 2 months awaiting sentence.
2. This application is supported by an affidavit of the applicant, sworn on 15.9.2022. When the same came up for hearing on 22.11.2022, the applicant submitted that his application is based on the finding in the case of Timothy Chochi Kiboga Versus Republic (no citation), in which the court exercising revision powers gave account to the period of 2 years and 6 months that the applicant had spent in custody pending determination of his case. The applicant also relied on Criminal Application number 68/2019, David Gatembu Mbetu Versus Republic, in which the court of revision, revised the sentence to account for the 4 years that the applicant had been in custody.
3. In the affidavit in support of the application, the applicant further relied on the case of Ahmad Abolfathi Mohamed & Another Versus Republic (2018)eKLR, on thee same point. Also petition No. 16 of 2019, Sammy Musembi Mbugua and others Versus Attorney General and Kenya prison Service,



and Petition No. 15 of 2020, Vincent Jona Sila and 87 others Versus Attorney General and Kenya Prison Service.

4. Ms. Ntabo, counsel for the Respondent, opposed this application. Learned counsel submitted that the applicant had been convicted of manslaughter and sentenced to serve 10 years imprisonment on 29.11.2018. That the applicant filed for revision of the sentence vide Criminal Revisional Application No. 193 of 2019, in which he sought for reduction of the sentence and also a non-custodial sentence. That in the same application, he sought to have the period he had spent in custody be accounted for in the sentence.
5. That ruling on the matter, Lesiit J (as she then was) ruled that the sentence on the murder case by the Hon. Justice Korir was of a Court of concurrent jurisdiction and the only recourse of the applicant was to move to the Court of Appeal. That the present application is seeking the same prayers as those already ruled on by the Hon. Lesiit J.
6. It was therefore submitted that being a court of concurrent jurisdiction, this court lacks jurisdiction on this matter and is functus officio. It was pleaded that this application is incompetent and should be struck out or be dismissed.
7. In a short response, the applicant conceded that he had indeed filed the miscellaneous Criminal Application No. 119 of 2019, but that he has now relied on and used a different authority, the Gatembu case. And this court has powers to issue the said orders prayed for.
8. I have considered this application and the submissions made to it by the 2 opposing sides. This application basically seeks that this court do revise the sentence of the applicant so as to give account to the 23 months that the applicant spent in remand custody awaiting determination of his case. This is pursuant to section 333(2) of the Criminal Procedure Code. The proviso to section 333(2) of the Criminal Procedure Code, state'

“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 Court of Appeal, in the case of *Ahamad Abolfathi Mohamed and Another Versus Republic* (2018)eKLR, has emphatically pronounced itself on this matter of section 333(2) of the Criminal Procedure Code, by holding;

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they spent in custody before they were sentenced ... taking into account the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionally by the period already spent in custody... it must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give court the power to include the period already spent in custody in the sentence that it metes out to the accused persons.”
10. As already shown above, the applicant has in this application relied on the above case that directs on the application of section 333(2) of the Criminal Procedure Code. The Respondent has on the other hand, opposed this application on the basis of lack of jurisdiction. That this court lacks the jurisdiction to reconsider a matter that another court of concurrent jurisdiction has already ruled on. It is therefore important to consider whether indeed this issue has previously been ruled on by a court of concurrent jurisdiction. The applicant has conceded that he indeed file a miscellaneous criminal application No. 119/2019. The correct case number is Criminal Revision No. 193 of 2019, Moses Otieno Dola Versus



Republic, filed on 1.7.2019. In the affidavit sworn by the applicant in support of the said application, at paragraph 3, the applicant deponed;

“That I spent a period of 21 months in remand custody before posting bail and a further 2 months after judgment of my case awaiting for sentencing, cumulating to 23 months in custody.”

And at paragraph 5, the applicant deponed;

“That I now apply to the Honourable court to consider the time (23 months) spent in remand custody as part of my sentence.”

11. The prayer that the applicant made in Criminal Revision No. 193 of 2019 are clearly and unmistakably similar to the prayers in the present application. Ms. Kibathi, counsel for the state, opposed the application on the same ground as Ms. Ntabo has done herein. That the court lacked jurisdiction to entertain the application on grounds that the applicant had been tried by the Hon. Lagat Korir, a Court of Parallel jurisdiction and that it would be tantamount to the court (Lesiit J.) sitting on appeal on its own decision.
12. In deciding on the issue, the Hon. Lesiit J. relied on the decision in *Samuel Kamau Macharia and Another Versus Kenya Commercial Bank Limited and Another* (2013)eKLR, in which the Supreme Court held;

“A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
13. The Honourable Judge further relied on Article 165(6) of *the constitution*, that;

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.”
14. The Judge therein noted that the above constitutional provision expressly bars this court from exercising supervisory powers over itself. The court held therein;

“That means that if the applicant was aggrieved in the manner in which the period he spent in custody before sentence was considered, or not, his recourse is not before this court. His grievance should be addressed on appeal before the Court of Appeal. He cannot return to this same court to consider his grievance for 2 reasons. First and foremost, it is this court which passed the impugned sentence. Having delivered itself on the matter, this court is functus officio. Secondly, the grievance he now has should be a ground of appeal which can only be considered on appeal before the Court of Appeal.”
15. It is absurd that even after such a finding, the applicant has chosen to file yet another similar application before this court. I align myself with the persuasive decision of the Hon. Justice Lesiit in Criminal Revision No. 198 of 2019 and find that this court lacks the jurisdiction to entertain this matter. This application of the applicant dated 15.9.2022, being bad in law and incompetent is accordingly struck out. It is so ordered.

D. O. OGEMBO



JUDGE

22nd FEBRUARY, 2023

Court:

Ruling read out in court (online) in presence of the applicant (Naivasha prison), and MS. Joy for the state.

D. O. OGEMBO

JUDGE

22nd FEBRUARY, 2023.

