



**Enock v Republic (Miscellaneous Criminal Application 07(E007) of 2022)
[2023] KEHC 24649 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION 07(E007) OF 2022
PN GICHOHI, J
OCTOBER 31, 2023
COURT OF APPEAL NO. 193 OF 2007 AT NAIROBI
HCCRA APP. NO. 157 OF 2000 KISII
ORG. CR. CASE NO. 1923 OF 1999 AT KISII**

BETWEEN

LAWRENCE ONYANGO ENOCK APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, Lawrence Onyango Enock, moved this Court on 11th October 2022 vide a Notice of Motion seeking review of the sentence imposed against him. The Application is supported by an Affidavit sworn by the Applicant. He deponed that he was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* and sentenced to death on 24th July 2000. The sentence was later commuted to life imprisonment by the President on 23rd September 2009.
2. Relying on Article 165 (3) (b) of the *Constitution of Kenya* and several cases starting with the Supreme Court decision in *Francis Karioko Muruatetu and another v Republic* [2017] eKLR, he stated that at the time he was sentenced to death, the court held that there was no other sentence apart from the mandatory death sentence provided for by the law.
3. That he filed an Appeal before this Court which was also dismissed. He proceeded to appeal to the Court of Appeal in Court of Appeal Criminal Appeal No. 193 of 2007. He stated that he wishes to withdraw that Appeal. He urged the Court to hold the decisions, directions and remedy awarded by the Supreme Court and accordingly proceed to consider his Application for rehearing and resentencing.



4. He further stated that he is now remorseful and having spent 25 years in prison, he has taken advantage of the rehabilitation programs offered at the correctional facilities. He has obtained a Diploma and has since been promoted to a Trustee due to his discipline. He urged the Court to consider and be persuaded by the case of *Peter Maina Kimani v Republic* [2019] eKLR where during resentencing, the Court set aside life imprisonment and sentenced the Appellant to serve 20 years imprisonment.
5. He also urged the Court to consider the period he has spent in custody prior to his conviction in accordance with Section 333 (2) as read together with Section 38 of the *Criminal Procedure Code*.
6. The Respondent opposed the Application on the grounds that this Court lacks jurisdiction to review its sentence as prayed. That separately constituted, this Court had upheld the sentence in Criminal Appeal No. 157 of 2000 and therefore , the only available avenue for the Applicant is an appeal to Court of Appeal.
7. In response to the grounds of opposition by the Respondent, the Applicant stated that the Respondent is misleading the Court as this Court has unlimited jurisdiction in civil and criminal matters under Article 165 (3) of the *Constitution*.
8. On the issue that the only avenue is an appeal, the Applicant stated that this Court confirmed receipt of a copy of the Court of Appeal Withdrawal Application. He states that Supreme Court had in a ruling delivered on 6th July 2021 had clearly stated that where an appeal is pending before the Court of Appeal , the High Court will entertain an application for resentencing upon being satisfied that the application has been withdrawn.
9. He urged the court to consider that the appeal before the Court of Appeal has been dormant in the Court of Appeal for more than 20 years and therefore have mercy on him, facilitate Article 27(1) and (2) to be applicable to him so as to give him equal right as those who have been resentenced and either set free or about to finish their new sentences.

Determination

10. This Court has considered the Application , the response by the Respondent, the submissions by both parties and considered the Court record. It is clear that vide Kisii Chief Magistrates Court Criminal Case No. 1923 of 1999, the Applicant was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* and forgery contrary to Section 349 of the *Penal Code*.
11. He was also charged with an alternative count of handling stolen property contrary to section 322(2) of the *Penal Code*. He took plea before the Magistrate’s court on 9th July 1999 and denied the charges. After the conclusion of the case, the trial magistrate found him guilty of the two counts and he was sentenced to death for Count 1 and 3 years for Count 2.
12. Aggrieved, he appealed to this Court on 9th August 2000 against Trial Court’s decision on the conviction and sentence vide High Court Criminal Appeal No. 157 of 2000. This Court, differently constituted, rendered its judgment on 8th June 2004 and dismissed the Applicant’s Appeal.
13. Still dissatisfied with that decision, the Applicant appealed to the Court of Appeal vide Court of Appeal Criminal Appeal. No 193 of 2007. He subsequently withdrew that appeal vide a Notice of Motion filed on 20th February 2023.
14. He now seeks resentencing before this Court while relying on the Supreme Court ruling dated 6th July 2021 in *Muruatetu & another v Republic; Katiba Institute & 4 others* (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) *Francis Karioko Muruatetu & another*



v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR. In particular, he relies on the guidelines paragraph 18 (vi) thereof that:-

Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.”

15. Unfortunately, he has not considered that at the opening of guidelines at paragraph 18, the Supreme Court gave directions clearly that the decision of *Muruatetu* and the *guidelines* apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*.
16. This Court’s understanding is that an accused who was sentenced to death by High Court on account of mandatory sentence provided for by the law can approach the same Court, that is the same Judge that sentenced him, with an application for resentencing. In those circumstances, paragraph 18 of the *Muruatetu guidelines* will come to play. If those circumstances the accused will have filed an appeal to Court of Appeal, he will have to withdraw it first if resentencing can proceed otherwise, he cannot have both.
17. In this case, the Applicant having been convicted and sentenced to death by the trial court for the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*, he exercised his right of appeal before this Court. This Court differently constituted, that is Fred A. Ochieng and M.S. Makhandia Ag. Judges (as they then were), dismissed the appeal and upheld the sentence by the trial magistrate.
18. No doubt, he was aggrieved by that decision and filed a second appeal before the Court of Appeal which he has withdrawn. That is not material to this Court and paragraph 18 (vi) of the *Muruatetu Directions* by the Supreme Court does not apply here. This Court lacks jurisdiction to revisit the decision in the first appeal by this Court differently constituted.
19. The Applicant is correct in his argument that the period spent in custody should be considered when sentencing an accused person. Sec. 333 (2) of the *Criminal Procedure Code* is couched in mandatory terms and to the effect that:-

“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.”

20. Section 38 of the *Penal Code* provides that;

“When sentence is passed under this Code on an escaped convict, that sentence –

- (a) if of death, or fine, shall, subject to the provisions of this Code, take effect immediately;
- (b) if of imprisonment, shall run consecutively or concurrently, as the court shall order, with the unexpired portion of the sentence which the convict was undergoing when he escaped.”



21. While discussing Sec. 333 (2) of the *Criminal Procedure Code* in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR had this to say:-

“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.”

22. This Court has perused the charged sheet before trial court record in Kisii Chief Magistrates Court Criminal Case No. 1923 of 1999 and it shows that the Applicant was arrested on 28th June 1999 and arraigned in court for plea 9th July 1999. He was placed in custody and remained in custody throughout during trial until sentenced to death on 24th July 2000. This Court’s view is that the period would have been put into consideration if the sentence was any other but not death sentence.
23. The Applicant’s death sentence was said to have been commuted by the President to a life imprisonment. However, going by the circumstances of this case , this Court is of the view that all these factors are material for consideration before the Court of Appeal and not before this Court.
24. In the upshot, the Applicant’s Notice of Motion filed on 11th October 2022 is devoid of merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 31ST DAY OF OCTOBER, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A Applicant

N/A for Respondent

Court Assistant; Aphline

