



REPUBLIC OF KENYA



**Ngethe v Republic (Revision Case E218 of 2022)
[2023] KEHC 27491 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 27491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
REVISION CASE E218 OF 2022
DO CHEPKWONY, J
NOVEMBER 23, 2023**

BETWEEN

ISAAC NDUNGU NGETHE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before court for determination is the undated Chamber Summons application filed on 9th November, 2022 in which the Applicant is seeking for:-
 - a. Spent;
 - b. That, I was arrested for the offence of Murder on 25th July, 2014, after a full trial, convicted and sentenced to serve an imprisonment of nine (9) years;
 - c. That, the Honourable Court has powers under Articles 259c), 50(2)(q) of the Constitution and Section 364 of the Criminal Procedure Code to interfere with sentence imposed from the subordinate court;
 - d. Spent;
2. The Application is based on the grounds set out in the unsworn and undated Supporting Affidavit and filed the Applicant, Isaac Ndungu Ngethe. According to the Applicant, he was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code on 6th August, 2004 at Milimani High Court in Nairobi. The matter was transferred to Kiambu High Court for hearing and determination in 2016 as Kiambu High Court Criminal Case No.7 of 2016. The matter was heard and concluded in 2022 whereby the Applicant was convicted and sentenced to serve nine (9) years imprisonment.



3. The Applicant also states that he was sentenced to serve four (4) years imprisonment for the offence of handling stolen contrary to Section 322 (1) and (2) of the Penal Code where he was charged and convicted vide Kibera Criminal Case No.3511 of 2014 which offence emanated from the same circumstances and in the course of the same transaction with the offence of Murder for which he was convicted of in Kiambu High Court Criminal Case No.7 of 2016.
4. According to the Applicant, he applied for revision of sentence imposed in Kibera Criminal Case No.3511 of 2014 vide High Court Revision No.853 of 2018 at Nairobi and in a ruling delivered on 25th November, 2014. Hon. Justice G. W. Ngenye - Macharia stated that:-

“...the sentence in Criminal Case No.3511 of 2014 was not proportionate to the offence in that the issue of the goods was not so high as to attach the stringent sentence.”
5. That the court viewed that the period he, the Applicant had served in remand custody, that is, from 25th July, 2014 to 28th August, 2018 was sufficient and ordered that he be set free forthwith unless otherwise lawfully held.
6. It is the Applicant’s prayer that the ruling by the Justice Ngenye-Macharia invalidated the sentence imposed in the Kibera Criminal Case No.3511 of 2014 his prayer was that this Court reviews the sentence of nine (9) years imposed in Kiambu High Court Criminal Case No.7 of 2016 to run from 28th August, 2018.
7. In the response, the Respondent filed submissions dated 15th June, 2023 wherein it has been confirmed that the Applicant had been charged vide two Criminal cases, being Kibera Criminal Case No.3511 of 2014 where he was charged, tried, convicted and sentenced for the offence of Handling Stolen Property contrary to Section 322(1) of the Penal Code and Kiambu High Court Criminal Case No.7 of 2016 where he was charged, tried, convicted and sentenced for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
8. According to the Respondent, though not expressed, the Applicant’s prayer is founded on the provision under Section 322(2) of the Criminal Procedure Code where he seeks that the court considers the period he served in remand from 28th August, 2018 at the conclusion of the four (4) year sentence in Kibera Criminal Case No.3511 of 2014 pending the hearing and determination in the Kiambu High Court Criminal Case No.7 of 2016. It is the Respondent’s argument that the court’s power under Section 333(2) of the Criminal Procedure Code is discretionary and it is required to consider the nature and gravity of the offence, the accused person’s mitigation and demeanor, including any other aggravating circumstances as stated in the Judiciary Sentencing Policy Guidelines 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”.
9. It is the Respondent’s contention that the offence of Murder is serious as it attracts a death penalty under Section 204 of the Penal Code, so that in meting out a sentence of nine (9) years imprisonment, the court was lenient.

The Respondent pointed out that although the court did not record that it had taken into consideration the time the Applicant has spent in custody, it gave the accused an opportunity to mitigate, considered the recommendation by the Probation Officer in the pre-sentence report on the accused. The Respondent’s argument is that with a nine (9) year sentence, the Applicant got off very



easily for an offence that attracts a death sentence and it is therefore disingenuous for him to assume that nine (9) years sentence was excessive. The Respondent has urged that the court not to review the said sentence.

Determination

10. To determine the application herein, this Court has read through the submissions filed by either party and the proceedings and Judgment/Rulings in Kibera Criminal Case No.3511 of 2014, Nairobi High Court Criminal Revision No.853 of 2018 and Kiambu High Court Criminal Case No.7 of 2016 and finds the only issue for determination being whether the nine (9) years sentence meted against the Applicant in Kiambu High Court Criminal Case No.7 of 2016 should be reviewed.
11. The power to determine an application of this nature is made in exercise of the supervisory jurisdiction of the High Court in criminal cases as provided under Sections 362 to 366 of the [Criminal Procedure Code](#). Section 362 provides that:-

“[362]. The High Court may call for and examine the record of any criminal proceedings 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”.
12. Having read through the proceedings in Kiambu High Court Case No. 7 of 2016, the court has established that justice vide a Judgment delivered on 10th March, 2022 convicted the accused person for the offence of Murder. She then proceeded to sentence the accused to serve nine (9) years imprisonment vide a ruling delivered on 7th July, 2022.
13. In a further Ruling on Sentence delivered on 31st October, 2022 the Judge directed the sentence against the accused to start running from the date they complete serving the sentence issued in Kibera Criminal Case No. 3511 of 2014, which meant that the sentence of nine (9) years was to start running from 29th August, 2022.
14. This Court has read through the record of Kibera Criminal Case No.3511 of 2014, and established that the Judgment therein was delivered on 23rd April, 2018 and sentencing done on 28th August, 2018 whereby the Applicant was sentenced to four (4) years imprisonment after a consideration of the facts and principles of sentencing. This sentence was to start running from 28th August, 2018 until 28th August, 2022. Therefore, the reason the Judge’s verdict in Kiambu High Court Criminal Case No.7 of 2016 was to run from 29th August, 2022.
15. The court has also read through the Nairobi High Court Revision No. 853 of 2018 where Justice Ngenye held that the sentence imposed against the Applicant in Kibera Criminal case No.3511 of 2014 was excessive owing to the value of the goods stolen and in considering the period the Applicant had been in custody, set him free vide a Ruling delivered on 25th November, 2019, hence he stood released on this day.
16. From the record, the court notes that in Kiambu High Court Criminal Case No.7 of 2016, the Applicant was given a chance to mitigate where he spoke under oath on his own behalf and also called one Patrick Chege Kariuki, who is an elder in the area, his mother, Sarah Njugi Kamau, and his brother, Morris Kamau. It is at this point that the Applicant should have informed the court of the orders in the High Court Revision Case No.853 of 2018 in Nairobi for consideration in sentencing, but he did not.



17. The court has considered the grievous nature of the offence where an innocent one and a half year old was murdered in a bid to steal house-hold goods and finds the sentence of nine (9) years very lenient considering the law prescribes a penalty of death for the offence of murder. However, considering there was a ruling delivered on 28th November, 2019 where the Applicant was set free but could not be released due to the case where he was facing a murder charge, it then follows that the sentence of nine (9) years imprisonment should run from 26th November, 2019 and not 28th August, 2018.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 23RD DAY OF NOVEMBER, 2023.

D. O. CHEPKWONY

JUDGE

