



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO E022 OF 2021

FREDRICK SUMBA WAMEYO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant herein was tried and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was sentenced to death.
2. Being dissatisfied with the said decision, he lodged a Petition for review of sentence in this Court being, **Petition No 75 of 2019** which, on 5th March 2020, Cherere J reduced his death sentence to ten (10) years imprisonment. She directed that the sentence was to run from 9th August 2016.
3. On 16th February 2021, the Applicant filed the present application for review of the sentence. The said application was supported by his Affidavit in which he stated that during the judgment of the Petition, the Trial Judge noted that the accused had been in custody for eight (8) years but did not order for the pretrial period spent in custody be included in the sentence.
4. In his Written Submissions, he invoked Section 333(2) of the Criminal Procedure Code and urged this court to consider the period he had spent in custody during pretrial (**sic**). He stated further that he was arrested on 18th April 2008 and stayed in remand until 29th June 2016 when he was sentenced, which was a total of thirteen (13) years. He prayed that his sentence commences from 18th April 2008.
5. He pleaded with this court to consider that he was arrested at the age of twenty-four (24) years and was now thirty-seven (37) years of age. He urged the court to consider granting him an opportunity of shaping up his future which would otherwise be ruined by the long incarceration as he was a young man having left a vulnerable family overwhelmed with the burden of taking care of his siblings. He added that his health had deteriorated as he had now been diagnosed with ulcers.
6. He asserted that he was a first offender and very remorseful for having engaged in a criminal activity. He submitted that he had undergone various transformation programs and acquired skills and attained Diploma in Emmaus Bible School, Biblical Studies, The Prisoners, Prison Fellowship Kenya. He believed that the skills he had acquired would enable him integrate well back to society.
7. The State opposed his said application on the grounds that there was overwhelming evidence against him and that is why his conviction was never set aside. It asserted that the ten (10) years imprisonment that was imposed on him was lenient, sufficient and very reasonable considering the magnitude of the offence.
8. It added that his application was an abuse of the court process because his sentence was reviewed from death sentence to ten (10) years imprisonment. It pointed out that Cherere J considered the time spent in prison before revision of the sentence. It therefore urged the court to dismiss his present application.

LEGAL ANALYSIS

9. Notably, the Applicant's application was based on Section 333(2) of the Civil Procedure Code Cap 75 (Laws of Kenya). Notably, Section 333 (2) of the Criminal Procedure Code provides as follows:-

“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. A reading of the aforesaid Judgement by Cherere J showed that she did not take into consideration the time the Applicant spent in remand before conviction and sentencing. Having said so, the learned judge was of equal and competent jurisdiction as this court. Consequently, this court could not purport to review and/or vary her decision and/or sit on appeal on her decision.

11. This court’s hands were tied by the pronouncement of Cherere J of when the Applicant’s sentence was to commence. As she had since left the jurisdiction of this court, the only option that was left to the Applicant herein was for him to appeal her decision of at the Court of Appeal.

DISPOSITION

12. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Application for review of sentence that was lodged on 16th February 2021 was not merited and the same be and is hereby dismissed.

13. It is so ordered.

DATED and DELIVERED at KISUMU this 22nd day of February 2022

J. KAMAU

JUDGE