



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO.E161 OF 2021

DICKSON MWANGI MUNENE.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant, **Dickson Mwangi Munene** approached this court vide a **Notice of Motion** dated **17th August, 2020**, seeking for an order that the court be pleased to review the meted sentence and invoke the provisions of **Section 333(2)** of the **Code** and consider the time spent in custody.

2. In the grounds supporting the Motion, the Applicant averred that he is an inmate at **Kitengela G. K. Prison** serving twenty (20) years imprisonment for the offence of Murder: that he was in custody during trial from the date of his arrest on **24th January, 2009**; that during the time he has been in custody he has been an exemplary inmate and has learned new skills in prison; that the time spent in custody was not factored in the sentence substituted by the High Court.

3. The application was canvassed through oral submissions whereby the Applicant's advocate **Mr. Kaberia**, submitted that the Applicant was sentenced to death for the offence of murder. However, the same was substituted to 20 years imprisonment upon re-sentence which sentence was to run from the date of his conviction instead of the date of his arrest. He further submitted that this court has jurisdiction to order the officer in charge of Prison to compute the Applicant's sentence to run from the date of his arrest. He cited the cases of **Ahmed Abulfadhi Mohammed & Another[2018]** and **Vincent Sila Jonah & 87 Others, Petition No.15 of 2020**. It was his submission that if the review is not done as per **Section 333(2)** of the **Criminal Procedure Code**, then the applicant's rights as provided for under **Articles 27 and 50(2)(p)** of the **Constitution of Kenya, 2010** will be violated and the Applicant will end up serving a longer sentence than prescribed by law.

4. The learned prosecution counsel, **Mr. Chebii** opposed the application and submitted that the sentence the Applicant was serving is lenient. Further, the issues raised in the application were already considered in the **Miscellaneous Criminal Application No.319 of 2018**, hence the reduction of sentence from death to 20 years imprisonment, therefore this court has no jurisdiction to entertain the application. He thus urged the court to dismiss the application.

5. In response, **Mr. Kiberia** reiterated that the Applicant is not seeking

for a change of sentence but is seeking for implementation of **Section 333(2)** of the **Criminal Procedure Code** which was not taken into consideration during resentencing thus this this court is not *functus officio*.

6. I have considered the application and the submissions made by both parties in support and in opposition thereof. I have also read through the trial court's record and **Judgment** of Hon. Kimaru, J in **Misc. Criminal Application No.319 of 2018**.

7. The record shows that indeed the Applicant was convicted for the offence of **Murder contrary to Section 203 as read with Section 204** of the **Penal code** and was sentenced to suffer death in accordance with the law on **12th October, 2011**. As he was aggrieved by his conviction and sentence, he preferred an appeal to the Court of Appeal being **Criminal Appeal No.314 of 2011**, which was heard and dismissed in its entirety. The death sentence was later commuted to life imprisonment by the President.

8. Following the Supreme Court's decision in the case of **Francis Karioko Muruatetu & 5 Others -vs- Republic[2017]eKLR**, the Applicant filed an application for resentencing and in his determination,

Hon. Judge Kimaru set aside the sentence of life imprisonment and substituted it with a sentence of 20 years imprisonment. When substituting the sentence, the Hon. Judge stated as follows:-

“...the Applicant to serve 20 years imprisonment with effect from 12th October, 2011 when the Applicant was sentenced by the trial court. The court has taken into consideration the period of 2 years the Applicant was in custody”.

9. It is this Ruling that the Applicant is now urging this court to review and consider the time he had spent in custody pursuant to Section 333(2) of the Criminal Procedure Code, so that his sentence can run from the date he was arrested and not from the date of sentence as ordered by Hon. Kimaru, J.

10. From the above, it is clear that the Applicant has invoked this court revisional jurisdiction as provided under Section 362 as read with Section 364 of the Criminal Procedure Code. Section 362 states as follows:-

“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”.

11. Section 364 then states:-

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned”.

12. From the above statutory provisions, it is clear that, this court’s revisional jurisdiction can only be exercised over orders or decisions made by su above is bestowed upon the High Court pursuant to the provisions of Article 165(6) of the Constitution of Kenya, 2010. The subject provisions give the High Court ‘supervisory jurisdiction over inter alia subordinate courts’ and stipulates as follows:-

(6) “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”.

13. Article 50(2) of the Constitution which guarantees the right to a fair trial also stipulates that:-

“(2) Every accused person has the right to a fair trial, which includes the right-

a) ..

b) ...

q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law”.

14. As noted above, both the Constitution and the Criminal Procedure Code do not give the High Court power to exercise supervisory jurisdiction over decisions made by courts of concurrent jurisdiction or other superior courts, as to do so would amount to it sitting on appeal over the decision of such court.

15. In the case of Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others, Application No.2 of 2011, the Supreme Court held that:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court 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....”

16. In the present application, the Applicant seeks to review the sentence which was meted against him by a court of concurrent jurisdiction upon an application for resentencing pursuant to the **Muruatetu** decision under the guise of the provisions under **Section 333(2)** of the **Criminal Procedure Code**.

17. Therefore, this court lacks jurisdiction to review the sentence which was meted against the Applicant by Hon. Justice Kimaru. The application dated **17th August, 2020** is hereby found to be without merit and dismissed.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2022

D. O. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

MR. KABERIA (INTERMEDIARY)

M/S AKUNJA COUNSEL FOR THE RESPONDENT

COURT ASSISTANT - QUINTAS