



**Nyambura v Republic (Criminal Miscellaneous Application
48 of 2019) [2022] KEHC 10744 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL MISCELLANEOUS APPLICATION 48 OF 2019**

JN NJAGI, J

MAY 26, 2022

BETWEEN

CHARLES MWAI NYAMBURA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was convicted by Justice J. Ngaah for the offence of murder contrary to section 203 as read together with section 204 of the [Penal Code](#) and sentenced to serve 30 years imprisonment. He has now filed an application dated 12/5/2021 seeking for the following orders:
 - (1) That the sentence of 30 years imprisonment be reviewed.
 - (2) That the sentence commences on the date of arrest.
 - (3) That the court grants him remission of 5 years with supervised probation of 2-4 years.
2. The application was based on the ground that the trial court failed to take into account the time spent in custody as required by section 333(2) of the [Criminal Procedure Code](#). That the sentence should have been ordered to commence from the date of arrest. Further that the sentence of 30 years was harsh and that it was above the sentencing practice in similar cases.
3. The state opposed the application through written submissions. It was submitted that the applicant's version that he was in custody throughout the trial was not true as the record shows that he was in custody for a short time before he was released on bond pending trial. That the trial court during sentencing said that the time the applicant had spent in custody before he was granted bond was to be deducted from the sentence of 30 years. Therefore, that the court had taken into account the time spent



in custody. The state relied on the holding by the Court of Appeal in *Ahamad Abolfathi Mohamed & another v Republic* (2018)eKLR where it was held that:

“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”

4. The state submitted that the sentence imposed by the trial court was not harsh as the court considered all the relevant factors before it passed sentence and stated that:

“I appreciate that the accused persons are first time offenders and are remorseful
After considering all the factors, I am convinced to come to the conclusion that the death sentence will not be most appropriate in the circumstances”

5. It was submitted that the sentence of 30 years imprisonment is lawful and proper under the law. That it was neither harsh nor excessive. The state urged the court to dismiss the appeal.

6. Counsel for the applicant, Mr. Paul Ng`arua relied on the case of *Eliud Njire Gatura v Republic*, HC Revision No.4 of 2020 (unreported) where Mshila J reviewed a sentence of 20 years and held that:

“(i) This court finds that the trial court erred in failing to state the commencement date of the re-sentencing in its judgment; the sentence shall commence from the date of arrest as stated on the charge sheet being...”

(ii) The sentence of 20 years imprisonment is hereby reviewed with a sentence of fifteen years (15 years imprisonment... commencing”

(iii) Remission of 5 years with supervised probation of 2 years.”

7. I have considered the application, the court record and the written submissions by the parties herein. The issue for determination is whether the application is merited.

8. It is a well established principle of law that sentencing is a discretion of the trial court. In *Thomas Mwambu Wenyi vs Republic* (2017) eKLR the Court of Appeal cited the decision of the Supreme Court of India in *Alister Anthony Pereira vs State of Mahareshra* at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bear most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all



aspects including social interest and consciousness of the society for award of appropriate sentence.

9. In *Francis Karioko Muruatetu & another -vs- Republic* (12017) eKLR the Supreme Court stated the guidelines and mitigating factors in a re-hearing sentence for murder as:
 - (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;
 - (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the court considers relevant.
10. The evidence adduced against the applicant during the trial was that on 14th day of July 2009 at about 4.00 pm, the applicant was in a mob of about 50 people who invaded the home of the deceased at Solio Ranch in Nyeri County and attacked him with crude weapons and in the process the deceased sustained fatal injuries from which he succumbed to death immediately.
11. Upon perusal of the court record, it is evident that the trial court took into account all the circumstances of the case before sentencing the applicant. The court noted the mitigating factors adduced by the accused counsel and sentenced the accused accordingly. Further the court noted that the accused had been released on bond and therefore ordered that in calculating his sentence, the period he was in custody be considered in computation of his sentence as provided under section 333(2) of the *Criminal Procedure Code*.
12. In the premises, I find no merit in the application and the same is hereby dismissed.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF MAY 2022.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ngarua for Applicant

Mr. Mururu for Respondent

Applicant: present

Court Assistant- Kinyua

