



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Karugumi v Republic (Criminal Revision E127 of 2021)
[2022] KEHC 3252 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION E127 OF 2021
RM MWONGO, J
JUNE 22, 2022**

BETWEEN

SAMUEL MURIMI KARUGUMI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant was convicted with murder in HCCRC No 11 of 2016, and sentenced to imprisonment for ten (10) years. Three years of the sentence were to be served on probation at the tail end of the sentence.
2. The brief facts were that on the Night of 26th and May 27, 2016 at Mutithi Village within Kirinyaga County jointly with others not before the Court murdered John Gichobi Karugumi. He denied the charge and the matter proceeded to full trial where the Prosecution called a total of ten witnesses.
3. He has now approached the court seeking the following orders:
 - That the sentence of ten (10) years, three (3) years of which was to be served on probation be commuted to a sentence of 3 years' probation only.
 - That the period the applicant was in remand to be considered when computing his sentence as provide for in provisions of section 333(2) of *Criminal Procedure Code*.
4. His application is grounded upon his affidavit and supplementary affidavit, in which he essentially says that: the trial judge did not consider the period he was in remanded the period before he was discharged on bond and period before sentencing; that he was recently diagnosed with diabetes; that he had a medical condition that was highlighted during mitigation and that can only be managed out of prison; that he seeks the court's leniency; left his leg has since imprisonment developed arthritis as it is yet to be treated appropriately; that he has signs of pneumonitis and a chest x-ray was suggested; that probation



- officer has recommended a probation sentence for him; and generally that he prays that the court would review his sentence.
5. The prosecution does not oppose the application. The DPP in his replying affidavit states:
- 1) That the Applicant was convicted and sentenced to serve Ten Years imprisonment of which the last three years is to be served on probation.
 - 2) That the Applicant prays to serve the entire term on probation for reason that:
 - a) He was involved in a fatal accident that left him with severe injuries.
 - b) That he is diagnosed with diabetes that requires special attention.
 - c) That he has signs of Pneumonia and a chest X-Ray is suggested.
 - d) That he suffers a swollen abdomen with signs of hepatomegaly that require medical attention.
 - e) That he is a first offender and remorseful for the offence committed.
 - f) That his condition requires extensive medical treatment and procedure that can only be managed while out of Prison.
6. Attached to his Further Affidavit filed on April 21, 2022, the applicant filed a bundle of medical papers from Kirinyaga County Department of Health and Kerugoya District hospital that support his plea that he has several medical conditions, and bearing out the situation he has lived with.
7. In line with the directions of the court, the Probation Officer filed a sentence review report on November 2, 2021. It confirms that the applicant had a leg fracture that required advanced treatment and his family was ready to cater for it. He is the sole bread winner to his daughter and mother who is currently ailing. The officer recommended a probation sentence subject to the discretion of the court.
8. The prosecution submits that this Court has Revisionary powers pursuant to Article 165(1) (e) of *the Constitution*, Section 362 through Section 367 of the *Criminal Procedure Code*; that the applicant was tried and convicted by this Court in Kerugoya High Court Criminal Case Number 11 of 2016 and this revision emanates from this court's decision ; that in the prevailing circumstances, extensive medical treatment and procedure cannot be accessed while in custody; that this Court should exercise its discretionary powers and take into account all relevant factors that did not manifest during sentencing.
9. The prosecution also submits that the objective of a sentence in Kenya is, primarily to punish the accused for an offence and to reform the accused in an appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blameworthiness of the accused, the prevalence of the crime and the situation of the accused himself. This was held in Philip Muthiani [2015] eKLR. The prosecution submits that the applicant has to demonstrate that his medical conditions are of such nature that it can only be managed out of Prison.
10. Further, the prosecution pointed out that applicant has not demonstrated that he suffered a fracture of the left leg and there is nothing to prove that he has developed arthritis. There is nothing on record to support the averment made by the applicant that he has signs of pneumonia that requires a chest X-ray neither has the applicant tendered any document to support the fact that he suffers a swollen abdomen a sign of Hepatomegaly that may require a CT-Scan.
11. The prosecution finally submits that this Court should, additionally, be guided by Section 333(2) of the *Criminal Procedure Code*.



12. The only issue for determination is: Whether the Court has jurisdiction to determine the revision application before it and consider the applicant for a non-custodial sentence as sought.
13. The *Probation of Offenders Act* provides as follows at Section 4:
 - “(2) Where any person is convicted of an offence by the High Court and the Court is of the opinion that, having regard to the age, character, antecedents, home surrounding, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the Court may, in lieu of sentencing him to any punishment, make a probation order”.
14. The court has taken into account the provisions of the Act aforesaid. It has also taken into consideration the various documents availed by the applicant and the submissions of the parties. Pursuant to Article 165(1) (e) of *the Constitution*, Section 362 through Section 367 of the *Criminal Procedure Code*, this Court has revisionary powers.
15. The Applicant in his notice of motion dated September 21, 2021 and further affidavit dated February 4, 2022 pray to serve the entire term on probation for reasons that:
 - a) He was involved in a serious accident that left him with severe injuries.
 - b) That he is diagnosed with diabetes that requires special attention.
 - c) That he has signs of Pneumonia and a chest X-Ray is suggested.
 - d) That he suffers a swollen abdomen with signs of hepatomegaly that require medical attention.
 - e) That he is a first offender and remorseful for the offence committed.
 - f) That his condition requires extensive medical treatment and procedure that can only be managed while out of Prison.
16. In the case of *Alexander Wanyaga Were v Republic* [2020] eKLR the Applicant was convicted of murder and after full trial was sentence to 7 years’ imprisonment. Through his application dated February 11, 2019 he has prayed that he be released on medical grounds and be allowed to serve the rest of the sentence under probation. He said that he has been unwell and he has attached medical documents to exhibit the same... For the above medical condition of the Applicant as well as the fact that he has behaved well in prison and that he has served close to three years in prison, this court finds the application meritorious. The application is hereby allowed; the Applicant is hereby set free unless lawfully held. The Applicant shall however serve a Probation period of one year under the relevant probation officer.
17. In *Ndunda Wambua v Republic* [2021] eKLR the convict who was sentenced to serve 20 years imprisonment and was riddled illness since committal to prison, was discharged from prison. Dulu J held that:
 - “The convict herein having been sentenced to 20 years imprisonment under section 20(1), which was the minimum sentence imposed by the *Sexual Offences Act*, and now that there have arisen serious health considerations on his continued stay in prison which have been brought to the attention of this court, and the prison authorities themselves asking for such review of sentence, in my view this court can exercise its review Jurisdiction under section 362 to 367 of the *Criminal Procedure Code*. I will add that each case has to be considered on



its own peculiar facts and circumstances and on the peculiar facts and circumstances of this case, in my view justice will be served better by relieving the prison authorities the burden of caring for the ailing old convict, and the convict's health will also be cared better by his relatives when released by this court."

18. Section 333(2) of the *Criminal Procedure Code* provides that:

"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."

19. Here, the applicant was arraigned in court on June 22, 2016 and the plea was taken, and spent 79 days in remand. He was then bonded until he was sentenced on July 29, 2021. he has been in prison for

20. I am of the view that the applicant's sentence may be reviewed and that it should take into account the 79 day period of time he spent in prison custody

21. Accordingly, the appropriate orders are as follows:

- a. In lieu of the sentence term, the applicant shall with effect from July 30, 2022, be placed on probation for a period of three (3) years in a programme designed by the Probation Officer and at an institution selected by the said Officer;
- b. The record of the applicant's attendance at the probation programme shall be kept in a record maintained held by the Probation Officer and availed to the Court on demand;
- c. Should the offender fall afoul of the law and be convicted of any crime, the reviewed sentence shall automatically be revoked and he shall be liable to serve his original sentence term.

22. Orders Accordingly.

DELIVERED AT KERUGOYA ON THIS 22ND DAY OF JUNE, 2022

R MWONGO

JUDGE

Delivered in the presence of:

Ms. Kiragu for the Applicant

Samuel Karugumi in Person - Applicant

Murage Court Assistant

