



**Dokota & 3 others v Republic (Criminal Miscellaneous Application  
E249 of 2021) [2022] KEHC 12412 (KLR) (Crim) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12412 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL MISCELLANEOUS APPLICATION E249 OF 2021  
DO OGEMBO, J  
JULY 26, 2022**

**BETWEEN**

**BURFA JARA DOKOTA ..... 1<sup>ST</sup> APPLICANT  
JARA DOKOTA ..... 2<sup>ND</sup> APPLICANT  
MOHAMED ALANGO DURBU ..... 3<sup>RD</sup> APPLICANT  
ISMAEL KALAMSO KARIBU ..... 4<sup>TH</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Originating from the High Court at Milimani Criminal Case No 27 of 2009.)*

**RULING**

1. The applicants Burfa Jara Dokota, Mohamed Alango Durbu and Ismael Kalamso Karibu filed this present application on July 23, 2021. The application seeks several prayers, mainly that;
  - i. That the period spent in custody be considered in the sentence herein.
  - ii. That the sentence imposed on application for resentencing be ordered to run from the date when arraigned in court of January 2010.
  - iii. That this court do correct the error on the face of the record and to indicate that the sentence do relate to Burea Dakota (1<sup>st</sup> applicant) and not Mohamed Gamicha Gamo (deceased).
2. The prosecution, in a short response, did not object to time spent in custody being accounted for in the sentence.



3. I have perused this application, the affidavit in support of the same and also the submissions made by the respective applicants. I have also considered the short response of the prosecution.
4. It is important to first bring out the history of this matter. The applicants were first tried and convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code vide HCCC Criminal Case No 27 of 2009. They were convicted and sentenced to suffer death (Lesiit, J.). This was on January 28, 2010. They thereafter appealed to the Court of Appeal vide Criminal Appeal No 79 of 2015, which appeal was itself dismissed on June 3, 2016 and the sentence of death confirmed.
5. Following the decision of the Supreme Court in the case of Francis Karioko Muruatetu & another, the applicants applied for resentencing vide High Court Miscellaneous Criminal Application No 276 of 2018. The Hon Justice Kimaru, in a ruling on May 21, 2019, resentenced the applicants to serve 10 years imprisonment. The sentence was ordered to run from the date of that sentence. It is this sentence that now forms the basis of this present application.
6. I have considered the resentencing proceedings of the court of May 21, 2019. At page 2 of the ruling, it is clear that the mitigation of the applicants were captured by the court, including their declared ages and state of health. The court noted at page 4;
 

“The court has considered the applicants’ mitigation on resentencing. The court has noted that the applicants are elderly. The court has also considered that they suffer from various ailments which are not uncommon for people of their age. The applicants have not complained that their medical conditions are not being managed or catered for while in prison..... However, this court has not lost sight of the fact that human life was needlessly lost.... They cannot therefore use their age as an overriding mitigating factor to persuade the court to resentence them to a lesser term in prison.”
7. The court went on to note.
 

“This court has taken into considered that the applicants have been in lawful custody both in pre-trial and pest-trial for a period of 12 years.”
8. In the said ruling, the honourable judge made a considered finding that the sentence of 10 years imprisonment do take effect from the date of resentencing ie May 21, 2019.
9. The above findings of the court clearly confirms that in resentencing the applicants, the court duly considered the period taken in custody as required by section 333(2) of the Criminal Procedure Code. To this extent therefore, the plea made by the applicants under section 333(2) of the Criminal Procedure Code lacks merit and must fail. I so find.
10. On the 2<sup>nd</sup> issue that the sentence ought to run from the date of arraignment in court, this is an issue that hinges on the jurisdiction of this court. This court’s jurisdiction flows from article 165 of the Constitution. Nowhere that constitutional provision is this court granted any jurisdiction to revise any order or finding of a court (judge) of concurrent jurisdiction. That would be illegal and unconstitutional in as much as that would be tantamount to this court sitting on appeal on a decision of a judge of concurrent jurisdiction. Also no legislation confers such jurisdiction to this court. The upshot of this therefore, is that for lack of jurisdiction, this order as sought cannot issue from this court. This prayer fails and is accordingly dismissed.
11. Lastly, is the issue of the error on the resentencing ruling to the extent that the same ought to refer to 1<sup>st</sup> applicant, Burea Dokota and Mohamed Gamicha Gumo (deceased), this court is convinced that this



is an error on the face of the record curable under the slip rule. I get guidance on this on the Supreme Court decision in *Fredrick Otieno Outa v Jared Odoyo Okello and 3 others* [2017] eKLR, that:

“By its nature, the slip rule permits a court of law to correct errors that are apparent on the face of the judgment, ruling or order of the court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the judgment or decision of the court. By the same token, such errors must be of such nature that their correction would not change the substance of the judgment or alter the clear intention of the court. In other words, the slip rule does not confer upon a court any jurisdiction or powers to sit on appeal over its own judgment, or, to extensively review such judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior court demonstrates, this is the true import of the slip rule.”

12. If the honourable court ordered that the sentence do apply to Mohamed Gamicha Gamo, deceased at the time, while leaving out Burfa Jara Dokota, the 1<sup>st</sup> applicant, it must have been in error. And this court is convinced that the error by its nature, can be cured under the slip rule principle. To this end, I allow this ground of this application and order that the resentence of the court as ordered on May 21, 2019 be revised only to the extent that the resentence do apply also to Burfa Jara Dokota, the 1<sup>st</sup> applicant. It is so ordered.

**RULING READ OUT IN COURT IN PRESENCE OF THE APPLICANTS, AND MS CHEGE FOR THE STATE.**

**DO OGEMBO**

**JUDGE**

July 26, 2022

Court:

**DO OGEMBO**

**JUDGE**

July 26, 2022

‘O’

From: High Court Appellate Side

To: @G.K. Nairobi Remand and Allocation Maximum Prison

Info: PHQ.

July 27, 2022

HCCR REVISION NO E249 OF 2021

High Court Criminal Revision No E249 of 2021 originating from the High Court at Milimani Criminal Case No 27 of 2009. Burfa Jara Dokota applicant I allow this ground of this application and order that the resentence of the court as ordered on May 21, 2019 be revised only to the extent that the resentence do apply also to Burfa Jara Dokota, the 1<sup>st</sup> applicant. It is so ordered.

**DEPUTY REGISTRAR**

