Kyende v Republic (Criminal Revision E003 of 2021)
[2022] KEHC 13032 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13032 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL REVISION E003 OF 2021

GMA DULU, J

SEPTEMBER 20, 2022

BETWEEN

MAKAU KYENDE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before me is a Notice of Motion filed on March 3, 2021brought by the applicant in which the main prayer is as follows –

> " That this court exercises its discretion in revision of the sentence under the powers conferred by article 50(q) of *the Constitution* of Kenya (2010), section 362 of the *Criminal Procedure Code* in Criminal Case No 277 of 2011 in the PM's Court at Makindu".

2. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the applicant and those filed by the Director of Public Prosecutions.

3. In his submissions, the applicant has asked that this court considers the period he was in custody during trial and relied on the provisions of section 333(2) of the *Criminal Procedure Code* to plead that this court reviews the sentence of 20 years imprisonment imposed by the trial court, which was upheld by the High Court on appeal, in Machakos High Court Criminal Appeal No 212 of 2011. He has relied on a number of decided court cases.

4. I note that article 50(2)(q) of *the Constitution* relied upon by the applicant is in the following terms –

> " 50(2) Every accused person has the right to a fair trial which includes the right –

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law".

5. It follows from the above provisions of *the Constitution* that the rights of the applicant herein is in the alternative, either to appeal or apply for review; not both.

6. In the present case, the applicant has already appealed through Machakos High Court Criminal Appeal No 212 of 2012 which has been determined and thus is strictly not entitled under the above constitutional provisions, to come to this court again on revision.

7. Courts have however, in the recent past, considered requests for revision of sentence in certain cases following the directions issued by the Supreme Court in Petition No 15 of 2015 – *Francis Karioko Muruatetu & another v Republic* – relating to cases of mandatory death sentences, imposed for murder. This not being a conviction and sentence for murder, the applicant cannot strictly so speaking, benefit from the request for review of sentence.

8. I note that the applicant has also highlighted the Judiciary Sentencing policy Guidelines 2015, under which, section 333(2) of the *Criminal Procedure Code* (cap 75) is highlighted and obligates the court to take into account the time already served in custody during trial by convicted persons and states that failure to do so makes the sentence imposed to be excessive.

9. The Director of Public Prosecutions, on his part, contends that the sentence imposed herein, having been upheld by the High Court on appeal, the only option available to the applicant is to file a further appeal to the Court of Appeal if he so wishes, and not to come again to this court for exercise of discretionary revision powers, after having failed on appeal.

10. Having considered this matter in its totality, I am of the view that the application for revision of sentence herein is not merited, since the High Court on appeal considered the sentence imposed by the trial court substantively and made its decision upholding the sentence, taking into account all relevant factors. It was known by the High Court at that time that the appellant had been in custody during trial.

11. In particular, in regard to upholding the sentence imposed, and after citing section 354 of the *Criminal Procedure Code* on the discretion conferred on the appellate court to either increase or reduce sentence, the High Court herein noted that the trial court had found that the grievous harm herein was brutal and amounted to torturing the complainant, and on re-evaluating the evidence, the High Court found that the sentence was not excessive. I find no new mitigating factors that were not known by either the trial court or the High Court disclosed herein, that would persuade me to exercise this court's discretion to interfere in sentencing.

12. I thus find no merits in the application for review of sentence. I dismiss the request for review of sentence herein.

DELIVERED, SIGNED & DATED THIS 20TH DAY OF SEPTEMBER, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE