



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL REVISION NO. E003 OF 2020

MICHAEL NTHENGE KISINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. **MICHAEL NTHENGE KISINA**, the Applicant herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He pleaded not guilty and the case proceeded to full hearing. He was convicted and ordered to serve 20 years' imprisonment.

2. The Applicant was aggrieved by that decision and did file a notice of appeal on 7.10.2020 with intention to file an appeal against the decision of the High Court to the Court of Appeal. I have also seen the memorandum of appeal indicating to the Court of Appeal dissatisfaction with the decision of this court. In addition, the applicant has filed the present application in which he seeks revision of sentence pursuant to the provisions of section 333(2) of the Criminal Procedure Code.

3. It is trite law that this court has no jurisdiction to revise its own decisions. It can only exercise supervisory jurisdiction over subordinate courts. The enabling law for revision is **Article 165(6) and (7) of the Constitution** and section **362** as read together with section **364 of the Criminal Procedure Code**.

4. Be that as it may, section 333(2) of the Criminal Procedure Code provides that:

(2) Subject to the provisions of section 38 of the Penal Code 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.

5. It is therefore clear that the foregoing provision imposes an obligation on the trial court to take into account the period an accused has spent in remand in the determination of an appropriate sentence. Failure to comply with the foregoing provision renders the subsequent sentence a contravention of the law.

6. I have noted that in paragraph 7 of the ruling on sentence dated 20.9.2018 this court noted that the accused had been in custody since July 2014 to the date the sentence was to be meted which period was taken into account in sentencing the applicant to 20 years of imprisonment which period ostensibly was to commence from the date of conviction as the period spent in remand custody had been factored into account. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016 (2018)eKLR** held thus:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “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. It must be remembered that the proviso to section 333(2) of the Criminal

Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

7. The revision was on a point of law only as it was in respect of section 333(2) of the Criminal Procedure Code. This court in paragraph 7 of its ruling on sentence dated 20.9.2018 did take into account the period the appellant spent in remand though it did not indicate when the sentence was to run but obviously from the date of conviction as the period spent in custody had already been factored into account. The Learned Justices of the Supreme court of Uganda in the case of **Bukenya v Uganda (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013)** stated that;

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement.

8. Considering the jurisprudential range of sentence for the same offence, it would be disturbingly inappropriate to let the applicant have the luxury of serving 16 years for an offence of murder by granting him a further reduction of his 20 year sentence by 4 years; it seems that his intention is to gain a further reduction on the pretext of “taking into account the period in custody” yet that period has been taken into account already. It seems that the meaning that the applicant has attached to the word “take into account” is to earn himself a lesser sentence and this would be contrary to the intention of statute; the intention of the statute was restated in the case of **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016 (2018) eKLR** as “to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

9. In the South African case of **Bothma-Batho Transport v Bothma & Seun Transport (2014) (2) SA 494 (SCA)** at Paragraph [10] Wallis JA:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.”

10. For the avoidance of doubt, in view of jurisprudential trends, I wish to point out that the intention of the court when meting the 20 year sentence on the applicant was to sentence the applicant to 24 years, however because the court took into account the time spent in remand custody a sentence of 20 years was passed on the applicant which incidentally was to start from the date of conviction namely 22.3.2018. This court clearly considered the time that the applicant was in custody and therefore it satisfactory met the requirement under section 333(2) of the Criminal Procedure Code. There is no doubt that the period spent in custody was duly considered by this court when it passed the sentence and that the same cannot now be stretched any further. This court is already functus officio and the applicant should proceed to the higher court which has jurisdiction to deal with the issue of conviction and sentence. I find no merit in the application.

11. On the other hand, because the matter is already in the Court of Appeal, if this court ventures into handling the application on its merits would be tantamount to concurrent consideration of the same matter in two different courts and a disregard for the hierarchy of courts. This court has no jurisdiction to supervise a superior court. As noted above, this court has already discharged its duty and became functus officio. I do not understand why the applicant having lodged his appeal to the higher court comes back to this court unless he is intent on abusing the court process. He is advised to proceed to the Court of Appeal.

12. In the result it is my finding that the applicant’s application lodged on 30.9.2020 lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at **Machakos** this 21st day of **January, 2021.**

D. K. Kemei

Judge