



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION No's 184 & 187 OF 2019

(Consolidated)

PHILLIP ANYANGA.....1st APPLICANT

STEPHEN MUREITHI MANGU.....2nd APPLICANT

VERSES

REPUBLIC.....RESPONDENT

(Being Review from conviction and sentence in Criminal Case No. 1716 of 2011 at the Chief Magistrate's Court Milimani by Hon. E. Nduva (Mrs) – SRM on 5th April 2012)

RULING

1. **Phillip Anyanga**, the 1st Applicant, **Stephen Mureithi Mangu**, the 2nd Applicant, respectively, seek review of the lower court order varying the sentence meted out in their case pursuant to **Section 333(2)** of the **Criminal Procedure Code (CPC)** and **Section 35** of the **Penal Code**.

2. The application is premised on grounds that the Applicants spent one (1) year, four (4) months in remand custody that was not taken into consideration at the time of sentencing.

3. The Applicants swore affidavits in support of the application where they deposed that: they were convicted in Criminal Case **No.1716/2011** for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to serve life imprisonment; during trial they were in custody for 1 year, 4 months, a period that was not considered during sentencing; their first and second appeals were dismissed, but, on sentence the life imprisonment term was set aside and substituted with **10 years' imprisonment**.

At the hearing, both Applicants, while seeking review relied on the decision of **Odunga J. in Vincent Sila Jona & 87 others Vs. Kenya Prison Services & 2 others (2021) eKLR (Petition No. 15 of 2020)**.

4. The Respondent, through Ms. Chege, learned State Counsel, opposed the application. She urged that this court is functus officio, the Appellants having filed **Appeal No. 59 of 2013** that was heard and determined by **Kimaru J.** who delivered judgment on the 13/3/2019 where he upheld the conviction but varied the sentence, substituting the life imprisonment sentence with ten **(10) years imprisonment**. That while dealing with the issue of sentence, the court took into consideration the period the Appellants were in custody.

5. I have carefully considered oral submissions of both Applicants and the Respondent/State. In **Petition No. 15 of 2020 (supra)** the Petitioners were persons whose sentences were meted out by various courts that did not consider time spent in custody as required by **Section 333(2)** of the **Criminal Procedure Code** which provides thus:

“.....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...”

6. Some of the petitioners complained against the date of re-sentencing not running from the date of conviction but, re-sentencing. **Odunga J.** who was seized of the matter declared that **Section 333(2)** of the **Criminal Procedure Code** applied to the original sentence as well as the

sentence imposed during re-sentencing.

7. As correctly pointed out by the learned State Counsel, the Applicants herein appealed to the High Court against the conviction and sentence in *criminal appeal No.59 of 2013(Stephen Mureithi Mangu & Anor. V Republic (2019) ekr* where **Kimaru J** stated as follows:

“...On sentence, the Appellants were sentenced to serve life imprisonment. This court has considered their mitigation on this appeal.....This court has also taken into consideration that the Appellants have been in lawful custody for a period of about seven (7) years since their arrest and subsequent conviction. This court formed the opinion that the sentence of life imprisonment imposed upon the Appellants was therefore excessive in the circumstances. That sentence is set aside and substituted by a sentence of this court. The Appellants are sentenced to serve ten (10) years imprisonment with effect from today’s date. For avoidance of doubt, this court has taken into consideration the period that the Appellants were in custody while awaiting trial. It is so ordered.....”

8. This is a decision by a court of concurrent jurisdiction, therefore, this court has no powers to review it as the court is functus officio. In the case of *Raila Odinga & 2 Others vs Independent Electoral 7 Boundaries Commission & 3 others (2013)eKLR* . The Court stated that:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

9. When the Applicants’ sentences were varied, if they were dissatisfied they should have appealed. Litigation must come to an end. Trying to exploit a window purportedly opened by a court of a similar jurisdiction is being opportunistic.

10. Therefore, I find the application unmaintainable, accordingly,

it is dismissed.

11. It is so ordered.

Dated, signed, and delivered virtually, this 25th day of March,2021.

L N MUTENDE

JUDGE