REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

MISC. CRIMINAL APPLICATION NO. E024 OF 2021

RONALD KIBET ROTICH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant Ronald Kibet Rotich was charged before this court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that he murdered one Geoffrey Kipkirui Ngeno at Kembumbur village, Boito on 18th March, 2016.

2. At the conclusion of the trial, the court (Muya J.) applied the provisions of Section 179 of the Criminal Procedure Code and convicted the Applicant with the lesser offence of manslaughter contrary to Section 202 of the Penal Code. The learned Judge called for and considered a Probation Officer's report, and submissions in mitigation by both the Accused and the Prosecutor. He sentenced the Applicant to 9 years imprisonment.

3. The Applicant has now applied to this court seeking that his sentence be reconsidered. The application was presented to this court vide a certificate of urgency dated 5th February 2021 and filed on 16th February 2021. The Applicant stated his prayer thus:-

> ***"I the undersigned most humbly beg leave of this court to tender my application for consideration of the duration I spent in remand prison (20 months) be included in the final computation and reduction of the sentenced passed on me upon conviction pursuant to Section 137 (i) Sub Section 2 (a) of the Criminal Procedure Code. I also request that the court invoke Section 333 of the Criminal Procedure Code and direct the prison department to comply with court directive if so ordered."***

4. The Applicant stated in his supporting Affidavit that he was charged with murder, which was later reduced to manslaughter and prayed for a non-custodial sentence.

5. In his oral submissions, during the hearing, the Applicant stated that he spent 20 months in remand during the pendency of his trial. He submitted that the court did not consider that period. He prayed that the court considers his plea so that he can re-unite with his family. That he had acquired useful skills in prison.

6. Mr. Murithi for the State submitted that the sentence of 9 years was extremely lenient in the circumstances of the case and that the court should not interfere. Counsel submitted that the case did not qualify for resentencing under the Muruatetu Case as the Applicant had not been convicted of murder and sentenced to death.

7. In response, the Applicant reiterated that his only issue was whether the period served in remand was taken into account.

8. I have considered the Application and respective submissions. I discern two issues for my determination being whether this court has jurisdiction to entertain the application; and if so, whether the sentence factored in the 20 months' pre-conviction custody.

9. The Applicant has urged this court to relook his sentence and factor in the period he spent in custody pursuant to Section 137 (I) 2(a) and Section 333 of the Criminal Procedure Code.

10. The Applicant has relied on Section 137 (I) 2 (a) of the Criminal Procedure Code, which deals with sentencing upon plea agreement. I have perused the judgment of Muya J. It is clear that the Applicant was not convicted pursuant to a guilty plea following a plea agreement but that the learned Judge having tried the case convicted the Applicant of the lesser offence of manslaughter as allowed by Section 179 (2) of the Criminal Procedure Code. Section 137 (I) 2 (a) is therefore not relevant to this case.

11. **Section 332 (2)** provides:-

> ***"(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."***

12. From the above, it is clear that the Applicant would be entitled to have the period he spent in custody taken into account in his sentence at the time of sentencing. In this case however, the Applicant was sentenced in the High Court by Muya J.

13. The orders sought by the Applicant amount to a revision of sentence. The revisionary jurisdiction of this court is donated by Article 165 (6) of the Constitution and is restricted to decisions of subordinate courts, persons or authority exercising a judicial or quasi-judicial function. The manner in which the court exercises its criminal revision powers is outlined in Section 362 to 366 of the Criminal Procedure Code.

14. It is clear from the provision above that this court does not have jurisdiction to reconsider the sentence meted out by Muya J, a court of equal jurisdiction. I agree with the reasoning of Lesiit J. (now JA) in **Moses Otieno Dola V. R, Criminal Revision Case No. 193 of 2019, (2021) eKLR** where on considering a similar application held that:-

> ***"The sentence in this case was imposed by Lagat-Korir, J, a court of parallel jurisdiction, which was the trial court in this matter. That means that if the Applicant was aggrieved in the manner in which the period he spent in custody before sentence was considered, or not, his recourse is not before this court. His grievance should be addressed on appeal before the Court of Appeal.***
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> ***He cannot return back to this same court to consider his grievance, for two reasons. First and foremost, it is this court which passed the impugned sentence. Having delivered itself on the matter, this court is functus officio. Secondly, the grievance he now has should be a ground of appeal which can only be considered on appeal before the Court of Appeal."***

15. In the final analysis, I find that the Applicant's recourse is to the court of appeal. The application is thus struck out.

16. Orders accordingly.

RULING DELIVERED DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant, Mr. Murithi for the Respondent and Kiprotich (Court Assistant)