



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL REVIEW NO. E169 OF 2021

MARY WANJIKU GITONGA...APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Brief Facts

1. This application was filed on 21st September 2021 seeking orders for review of sentence under **Section 333(2) of the Criminal Procedure Code** to include the time spent in custody during the pendency of the trial.
2. The applicant was convicted by the High Court Nyeri in Criminal Case No. 8 of 2005 with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code** and sentenced to death. He states that the sentence of death was later commuted to life imprisonment in 2009 by His Excellency the President. The petitioner subsequently appealed to the Court of Appeal vide Criminal Appeal No. 83 of 2007 where the court upheld the conviction on 29th October 2010. The applicant later filed a petition in the High Court being Criminal Petition No. 19 of 2018 seeking to have her sentence reviewed to a lesser term. The application was successful and the court reduced applicant's sentence from life imprisonment to thirty (30) years in prison.
3. The applicant now seeks for orders for review of sentence and also the court to invoke the provisions of Section 333(2) of the Criminal Procedure Code to take into account the period spent in custody during the pending of the trial. It is argued that the applicant is a first offender and is deeply remorseful. She prays for a further reduction of her sentence and intends to use the skills she has acquired while in prison to integrate into society in the event that she is released.
4. The respondent filed submissions to support its arguments.

Respondent's Submissions

5. The respondent submits that the High court was alive to the provisions of section 333(2) of the Criminal Procedure Code during resentencing. The court was lenient in exercising its discretion under the principles of the Muruatetu Petition, and reduced the applicant's sentence from life imprisonment to 30 years. Therefore, this court has already reviewed the sentence from life to 30 years imprisonment. This court is thus *functus officio* on the issue of review of sentence. The respondent further states that applicant ought to have filed an appeal at the Court of Appeal against the High Court ruling on resentencing.
6. Nevertheless, it is very clear from the judgment in Criminal Petition No. 19 of 2018 that the Highcourt in sentencing the applicant, considered the time already served. As such, the respondent prays that this honourable court do dismiss the instant application and uphold the sentence.

Issues for determination

7. On perusal of the application, the affidavits and the submissions, the issues for determination herein are twofold:-
 - a) Whether this court has jurisdiction to hear and determine this petition;
 - b) If so, to determine whether the applicant is entitled to the orders sought herein.

The Law

8. It is not disputed that the applicant filed an application for review of sentence being Criminal Petition No. 19 of 2018 on 18th July 2018 seeking for resentencing orders under the **Muruatetu** petition. The court heard the petition and reduced the applicant's sentence from life imprisonment to thirty (30) years. The applicant has now filed an application based on **Section 333(2) of the Criminal Procedure Code** stating that the court did not into account the time spent in custody. Section 333(2) provides:-

“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.”

9. It is important to note that the applicant in Petition No. 19 of 2018, did not include the prayer herein that the time she spent in custody be considered by the High Court. However, this is what the applicant ought to have done so that the same court would address the all issues on sentence review together. In my considered view, the applicant lost her chance to apply for review under Section 333(2). Filing this particular application in this court after another high Court addressed review amounts to a multiplicity of applications which courts must discourage.

10. If this court was to determine this application it would in essence be reviewing the sentence imposed by the Judge in Petition No. 19 of 2018. The applicant cannot appeal against the ruling in the earlier petition because she did not specifically present the prayer in the current application to that court. As such, the right of appeal does not arise.

11. The principle of *res judicata* which is applicable to both civil and criminal cases is alive to issues that were not pleaded and which ought to have been pleaded in the court that was competent to determine those issues. The applicant herein cannot be accorded another opportunity for review of sentence that has already been reviewed by a competent court and a court of equal status.

12. Consequently, I find this application incompetent due to offending the principle of *res judicata*. The fact that this court lacks jurisdiction also renders this application incompetent.

13. This application is hereby struck out for being improperly before this court.

14. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 16TH DAY OF DECEMBER, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 16th day of December, 2021.