REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. 297 OF 2016

BERNARD MUNYAU NDUNGE....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was convicted in three (3) counts of robbery with violence contrary to Section 296(2) of the penal code. He was convicted alongside Francis Njogu Kabucho. They were both sentenced to suffer death. They appealed to the High Court and the appeals were dismissed. They further appealed to the Court of Appeal and the appeal on conviction was dismissed. However, their sentences were substituted with a sentence of serve 20 years imprisonment. The Applicant approached this court vide Certificate of Urgency dated 11th December, 2019. He sought to have the period he was in custody since the date of arrest considered and reduced from the sentence passed.

2. I am alive to the provisions of Section 333(1) and (2) of the Criminal Procedure Code that, in sentencing, a court ought to take into account the period the accused was in custody prior to the time the sentence is passed. And for that reason, the Applicant is not way out of the law in urging the court to apply this principle. My agony is, at what point is the provision applicable? Can this court be seized of jurisdiction whilst considering a resentencing application upset a sentence passed by the Court of Appeal without usurping the powers of the Court of Appeal and at this juncture therefore, purport to fill a gap that the Applicant thinks was omitted by the Court? Precisely stated, can this court revise a sentence passed by the Court of Appeal even when that Court considered the Supreme Court decision in the case of **Francis Muruatetu & Another (2017) e KLR?**

3. In attempting to answer this question, I bear in mind that the judgment of the Court of A ppeal in respect of the Applicant was delivered on 24th May, 2019, post the Muruatetu decision. In fact, the Court in substituting the death sentence with 20 years imprisonment had regard to the Muruatetu decision. It further considered mitigating factors as enunciated by the Supreme Court at paragraph 71, amongst them, age of the offender, being a first offender, whether the offender pleaded guilty, remorsefulness of the offender and possibility of reform and social re-adaptation of the offender. The Court delivered itself thus:

> **"The appellants were first offenders and were fairly young people at the time of conviction. The 1st appellant was remorseful and pleaded for leniency. Taking into account the mitigating factors, we hereby set aside the death sentence and substitute therefor, with imprisonment for a term of 20 years with effect from 27th November, 2009, when they were convicted by the Court."**

4. It is very clear that the Court of Appeal pronounced itself as regards to the time the sentence was to start running. No doubt the sentence was to commence from the date of conviction and not the date of arrest. I am certain in my mind that the Court had its own reasons for so pronouncing itself. This Court is of lower jurisdiction than the Court of Appeal. Our jurisdiction is governed by the law of precedence and a decision of a higher court binds that of a court lower to it. It is tantamount to sitting on an appeal of a court of higher jurisdiction if I were to vary the sentence passed by the Court of Appeal, more so, the said Court having categorically pronounced itself on the date the sentence was to commence.

5. For this reason, I differ with the Applicant that by virtue of the Court of Appeal having failed to state that the sentence ought to have commenced from the date of arrest, this court is seized of jurisdiction to correct the error. Far from it, for the afore stated reasons.

6. The Applicant referred this court to three decisions of concurrent jurisdiction to buttress his submission. One is a ruling of this court made in similar circumstances, namely **Peter Kariuki Manthi v Republic (2019) eKLR**. It is distinguishable from the current case. There Applicant therein had lost appeals both in the High Court and the Court of Appeal. The High Court only took issue with the learned magistrate's failure to take into account the mitigating factors spelt out in the Muruatetu Case that ought to be taken into account whilst

considering an application for resentencing. For this reason, the Court further reduced the sentence from 20 years to 15 years. It also, pursuant to Section 333(2) of the Criminal Procedure Code, ruled that the sentence starts running from the date of arrest.

7. In the **Peter Kariuki Case** (ibid), the Court of Appeal handled the case before the Muruatetu decision. Therefore, the Court was bound by the mandatory death sentence. Following the window opened by the Muruatetu decision, the Applicant applied for resentencing in the magistrate's court. The High Court, in reviewing the learned magistrate's ruling was merely exercising it revisionary jurisdiction whilst applying the principle enunciated in the Muruatetu decision. It never at all dealt with a sentence that had been considered by the Court of Appeal post the Muruatetu decision.

8. The same case applied to this Court's decision in its judgment in the case of **Samson Njuguna Njoroge v Republic (2018) eKLR**. It was the first time that the Appellant was appealing. The appeal was heard after the Muruatetu decision whose implication was that minimum mandatory sentences were declared unconstitutional by the Supreme Court. In that case, the Court was obligated to reconsider the sentence passed by the trial court whilst applying both the mitigating and the aggravating factors spelt out in the Muruatetu decision. The case therefore, has no similarity with the instant case.

9. I entirely agree with, as already disposed here above, with the Court of Appeal decision in the case of **Ahamad Abolfathi Mohammed & Another v Republic (2018) e KLR** which stated that while applying **Section 333(2) of the Criminal Procedure Code**, alongside its proviso, the sentence of imprisonment ought to run from the date of arrest. My point of departure from the Applicant herein is my view that once the Court of Appeal has pronounced itself as regards to the time the sentence should commence running, this court becomes *factus officio* in further determining on it.

10. As regards the decision in the ruling in the case of **David Gatembu Mbeti v Republic H.C (Nairobi) Misc. Criminal Application No. 68 of 2019,** being a case of resentencing, the court took into account that since the arrest of the Applicant, he had served sufficient punishment of seven years imprisonment imposed by the Court of Appeal since the date of his arrest. I add that the decision was of a court of concurrent jurisdiction which this court is not bound by. This court would have regard to circumstances of the case at hand and consider whether or not those circumstances warrant the upsetting of a sentence. I nevertheless entirely agree with the holding in that case to the extent that in sentencing, courts ought to apply **Section 333 (2) of the Criminal Procedure Code** and its proviso.

11. In sum, I find this application unmeritorious and I dismiss it. The Applicant is at liberty to revisit the Court of Appeal and make the request there. It is so ordered.

Dated and Delivered at Nairobi This 29th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.

2. Miss Nyauncho for the Respondent.