



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**MISC. CRIMINAL APPLICATION NO. 39 OF 2019**

**BONIFACE MUGENDI KINYUA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Intended Appeal from Conviction(s) and Sentence(s) of the Chief Magistrate's Court at Chuka in Criminal Case No.1891 of 2004).**

**R U L I N G**

1. **BONIFACE MUGENDI KINYUA**, the Applicant herein was charged at **Chuka Chief Magistrate's Court Criminal Case No.1891 of 2004** with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He appealed vide **Meru HCCCA No.104 /2008** but the appeal was not only dismissed but the sentence was enhanced to death sentence. His subsequent appeal to Court of Appeal was disallowed.
2. The Applicant thereafter following the recent Supreme Court's decision in the **Muruatetu's** case, filed for revision/resentencing in this court and this court allowed his application by revising his sentence from death sentence to 25 years imprisonment.
3. The Applicant has now in his application filed on 23<sup>rd</sup> October 2019 moved this court asking for a further revision of his custodial sentence imposed by this court to run from 20<sup>th</sup> October 2004 when he claims he was arrested rather than on 2<sup>nd</sup> July 2008 when he was convicted. He reasons that he spent 4 years in custody during trial and that the said period should be taken into consideration as provided under **Section 333(2)** of the **Criminal Procedure Code**.
4. The Applicant has argued that this court is obligated to take into consideration the time he spent in custody when passing a custodial sentence. He has relied on several cases to buttress that position.
5. In his oral submissions in court, the Applicant cited an adverse report regarding his conduct while in custody and denied the same stating that there was no formal report filed in court and that there was no action taken against him. He termed the allegations baseless.
6. The State through the Office of Director of the Public Prosecution has opposed this application through a Replying Affidavit sworn on 27<sup>th</sup> January 2020 by Erick Momanyi, the learned counsel for State. The main basis of the opposition is that this court lacks jurisdiction to review its own revision. He points out that this court rendered itself vide Criminal Revision No.9 of 2018.
7. The Direction of Public Prosecution contends that the only avenue open for the Applicant is to prefer an appeal to the Court of Appeal.
8. The Respondent has also termed this application frivolous contending that this court took into consideration the 14 years period the Applicant had spent while meting out the 25 years prison sentence.
9. This court has considered this application for revision and the opposition by the State/Respondent. The main issue in this matter revolves around the application of **Section 333(2)** of the **Criminal Procedure Code** and whether this court can revise its own revision.
10. It is true that **Section 333(2)** of the **Criminal Procedure Code** mandates a trial court to include the period or take into consideration a period in which an accused person has spent in custody awaiting trial. The provision provides.

**" (2) subject to the provision of Section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from and to include the whole 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,"

11. The above provision means that a trial court when imposing a custodial sentence is required to reduce the sentence proportionally to the period an accused person has already spent in custody during trial. This is the position well captured by Court of Appeal decision in **Ahmed Abolfathi Mohammed & Another -vs- Republic [2018] eKLR** who *inter alia* observed as follows:-

**" 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 the accused person..... "**

12. In this matter the Applicant herein was sentenced by the trial court on 2<sup>nd</sup> July 2008. He was arraigned on 26<sup>th</sup> October 2004 as per the proceedings from the lower court. As observed above the trial court meted out a custodial sentence of 12 years which period was enhanced to death sentence by the 1<sup>st</sup> appellate court on 29<sup>th</sup> October 2010 and upheld by the Court of Appeal on 28<sup>th</sup> November 2013. The Applicant applied for revision of the death sentence which was allowed by this court on 24<sup>th</sup> April 2019 when it revised the sentence to 25 years imprisonment.

12. This court while it does not agree with the Respondent's contention that this court lacks jurisdiction to revise its own decision particularly when it comes to re-sentencing, it does agree with the Respondent's view that this court in its ruling dated 24<sup>th</sup> April 2019 certainly took into consideration the roughly 14 year period the Applicant had spent from the time he was arraigned in court on 24<sup>th</sup> October 2004 to 24<sup>th</sup> April 2019 when the court re-sentenced the Applicant to 25 years period in custody. If the Applicant was dissatisfied or aggrieved by the finding of this court that the 14 years period he had spent in custody appears not to have fully reformed him and hence the need for a further 25 years, then the option opened to the Applicant was to appeal because **Section 364(5) of the Criminal Procedure Code** bars him from re-approaching this court again.

This court having rendered itself on the period the applicant should spend in custody for purposes of reforming and keeping the society safe, it cannot again be asked to relook at the correctness or propriety of the sentence meted out having taken into consideration mitigating factors like the seriousness of the offence and the remorsefulness of the Applicant. To that extent, this court finds no merit in this application. The same is disallowed. The Applicant has 14 days Right of Appeal.

**Dated, signed and delivered via skype this 28<sup>th</sup> day of April 2020.**

**R.K. LIMO**

**JUDGE**

**28/4/2020**

Ruling signed and delivered via skype connecting both Mr. Momanyi for State and Accused person.

**R.K. LIMO**

**JUDGE**

**28/4/2020**