REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 1 OF 2020

MARY MUTHONI MUTURI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on an application dated 13/01/2020 brought under Section 362 and 364 of the Criminal Procedure Code Cap 75 Laws of Kenya and where the applicant pleaded that she was convicted in Embu High Court Criminal Case No. 18 of 2013 with the offence of murder contrary to Sections 203 as read with 204 of the Penal Code and sentenced to serve seven (7) years imprisonment. The application seeks to review of the sentence downwards.

2. The applicant further pleaded that she was the sole breadwinner to her child who lived with her mother and who was elderly and not under gainful employment. She further stated that there was an outside factor as she was allegedly intimidated at the time of the commission of the crime which made it difficult for her to control herself. She further stated that the period she spent in remand be considered with a view of reducing her sentence. It was further contended that in prison, she had undertaken vocational skills which would be useful to her outside prison. As such prayed that the application be allowed and this court do consider giving her a less harsh sentence as well as taking into account the time she spent in custody.

3. The applicant in her oral submissions reiterated her prayers in the application. The applicant prayed for leniency and said that she was 32 years old and pleaded that she be released to start a new life. She further said that her child was staying with her mother after her husband died following her conviction and subsequent sentencing.

4. Ms. Mati for the respondent submitted that the applicant was charged with murder and which was later reduced to manslaughter and as such the sentence of seven (7) years was reasonable as the offence was of serious in nature and someone lost her life in the commission of the crime.

B. Issues for determination

5. The instant application is premised on Section 362 and 364 of the Criminal Procedure Code. Section 362 gives the High Court the jurisdiction to call for and examine the record of any criminal proceeding before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. Section 364 on the other hand provides for the powers of the High Court on revision.

6. However, the prayer sought by the applicant is basically that the time she spent in custody be considered and subtracted from the sentence meted against her. This is basically the jurisdiction of the court under section 333(2) of the Criminal Procedure code. The said section provides that: -

> ***"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."***

7. The powers are of the Court under Section 333(2) of the Criminal Procedure Code and the proviso thereto were explained in the Court of Appeal case of **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR.** The court while applying this provision held that by dint of section 333(2) of the Criminal Procedure Code, the courts during sentencing ought to take into account the period that they had

spent in custody before they were sentenced. The ***Judiciary Sentencing Policy Guidelines*** *further buttresses this legal position as it provides that: -*

> ***"The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."***

8. The record shows that the applicant was arrested on 16/09/2013 and released on bond on 6/08/2014. She therefore spent a period of one (1) year in custody.

9. However, I have perused the trial court record and I note that upon being convicted of the offence of murder and upon the applicant having put forward her mitigation, the trial court stated as follows:

> ***"I have heard the plea of the defence for a non-custodial sentence. I don't find it appropriate to grant the request given the serious nature of the offence and its implication in the society. However, the court will exercise some leniency in sentencing the accused given the other factors raised in mitigation."***

The court then proceeded to sentence the applicant thus: -

> ***"to serve seven (7) years imprisonment which has taken into consideration the period of one year spent in custody."***

10. It is clear from the above that indeed the court did consider the period the applicant had spent in custody being one year. It was pursuant to this consideration and bearing that in mind that the court proceeded to sentence the applicant to seven (7) years imprisonment.

11. It is important to note that the offence of murder carries a maximum of death sentence which is still lawful. The **Muruaetu petition** only outlawed the mandatory nature of the death sentence. Depending on the circumstances of each case, the mitigation of the accused and the sentencing guidelines in place, a convict in a murder case could still be sentenced to death.

12. The mitigation of the applicant at the time of sentencing was that she lost her three (3) year child while in custody and that she was the sole breadwinner of her family that included her surviving child aged 14 years at the time and her aged mother. This same mitigation is replicated in her application for review.

13. During sentencing, this court considered the mitigation factors and the circumstances under which the offence was committed. This is clear from the record that at the time of sentencing, the court expressly stated that it had taken into account the one (1) year spent in custody.

14. The period of one (1) year in custody as it is so expressly stated during sentencing was taken into account leading to a lenient sentence of seven (7) years. Considering the serious nature of the offence and that mitigation and the Sentencing Guidelines were considered, this court is not inclined to review the sentence.

15. The accused approached the court for revision under Section 362 and 364 of the Criminal Procedure Code. However, it is my considered opinion that review under these provisions of the Code is not applicable in this case given that the applicant was convicted by this court which has no power to review its sentence under the provisions relied on by the applicant. It is noted that the applicant did not attempt to argue this prayer for review in her submissions but emphasized on mitigation. In my view, this prayer for review is misplaced and misconceived.

16. As for Section 333(2) of the Criminal Procedure Code, I have already shown that the period of one (1) year the applicant spent in custody before being released on bond was considered as shown by the record and due consideration led to the lenient sentence meted out on the applicant.

17. For the foregoing reasons, I find no merit in this application and it is hereby dismissed.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JUNE, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant through Video Link