

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS APPLICATION NO. 25 OF 2017

PETER NGIGE WERU.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicant Peter Ngige Weru was on the 31st July 2017 in High Court Criminal Appeal no. 67 of 2016 sentenced to 5 years' imprisonment to run concurrently for the four counts of attempt to extort c/s 300(1) of the Penal Code. This followed his successful appeal against the main charge which was robbery with violence c/s 296(2) of the same code, in Nyeri CM Criminal case no. 212 of 2013 and for which he had been convicted and sentenced to death.

He feels that the court failed to take into account the fact of the period he had already spent in custody. His application is brought under section 362 and 364 of the Criminal Procedure code seeking an order from this court to the effect that his sentence to run from the date he was arraigned before the CM's court and remanded in custody. That appears to have been some time in 2013.

He has referred me to other cases where courts have, in meting out sentences, taken into consideration the period the accused person / appellant remained in custody pending trial, for instance, Nyeri HCCC no 24 of 2009 R v Gregory Kiboi Gathura (Ngaah J). CR. Appeal no. 402 of 2009 (Nyeri) Ephantus Mutahi Karegi vs. R where the court of appeal (Visram, Koome, Odek JJA) allowed the appellants appeal and in addition that the sentence he was to serve to be *'effective from ...when he was arraigned before court and taken into custody.*

Section 362 of the CPC provides for the power of High Court to call for records;

The High Court may call for and examine the record of any criminal proceedings 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.

This speaks to the supervisory powers of the High Court over the subordinate courts. The judgment the applicant is complaining about did not emanate from the sub ordinate court but from this court (Ng'etich J).

Section 364 provides for the powers of High Court on revision in the following terms;

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

Once again the reference is about the revision of orders issued by a subordinate court.

From the foregoing it is clear that the orders the applicant seeks cannot be issued by this court as it is of the same jurisdiction as the court that heard and determined his appeal, and upheld the sentences he is complaining about *apparently*, without taking into consideration the fact of his having been in custody for long. I would not know whether the judge considered it or not, but what I know is that it is not in my place to review or revise her orders as prayed.

I agree with the submissions by the state that the forum available for the applicant is the court of appeal. This court lacks the requisite jurisdiction under sections 362 and 364 of the criminal Procedure Code.

For the above reasons the application filed on 19th September is dismissed.

Dated, delivered and signed this 25th Day of January 2018 at Nyeri.

Teresia M Matheka

Judge