Rono v Director of Public Prosecutions (Criminal Miscellaneous Application E030 of 2024) [2025] KEHC 536 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 536 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION E030 OF 2024

SM MOHOCHI, J

JANUARY 17, 2025

BETWEEN

BENARD KIBET RONO ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

RULING

1. The brief background of this case is that the Applicant Benard Kibet Rono was charged, tried and convicted before the Nakuru High Court in Criminal Case No. 52 of 2015 for the offence of Murder contrary to Section 204 of the Penal Code.

2. The Applicant mitigated that he was young having committed the offence at the age of thirty-one (31) years old and was thirty-six (36) years at the time of sentencing, he sought leniency that he had in pre-trial remand custody for five years.

3. The Applicant was on the 3rd June 2020 sentenced to an imprisonment for a period of thirty (30) years.

4. He preferred an undisclosed Appeal against the sentence and conviction in Kenya Court of Appeal which her claims in submission he withdrew on advise of an unnamed judge to prefer this Application.

Application

5. By way of an undated Notice of Motion application filed on the 24th February 2024 pursuant to Article 22(1), 27,163(7),165 of *the Constitution* of Kenya, the Applicant herein now seeks: -

    a. That, the application be certified urgent and be heard on priority basis.

    b. That, the Honorable Court be pleased to order that his sentence in Criminal 52 of 2015 to run from the date he was remanded.

c. That, the Honorable Court be pleased to receive mitigation from the Applicant herein for consideration of an appropriate sentence.

d. That, the Honorable Court be pleased to substitute his current sentence to probation/Non-Custodial sentence

e. That, the Honorable Court be pleased to issue any other order it may deem fit for interest of justice.

Applicant's Case

6. The Application was supported by the grounds on its face and the supporting unsworn affidavit of the Applicant filed on the same day wherein he deposed that he is seeking a review of the Sentence imposed by Mulwa J, that this Honorable Court is bound by the decision of the supreme Court under Article 163(7) of *the constitution* and this Honorable Court has jurisdiction to hear re-sentencing and met out appropriate sentence in line with Article 165 of Kenya Constitution 2010.

Applicant's Submissions

7. The Applicant submitted that the Court is with sufficient jurisdiction to review sentence and include the time of four years eleven months, spent in pretrial remand reliance was placed on the case of *Elizabeth Mwiyathi Syego Vs Republic Misc. Appl. No. 62 of 2018* on the principles in application of Section 333 in sentencing.

8. It was the Applicant's contention that the Court has to factor in the period so far spent and he is qualified to benefit from the above law. That it is on record that, the Applicant withdrew his appeal from the Court of Appeal Kenya and is not interested in prosecuting the same.

   In the case of *Ahamad Abolfathi Mohammed & Another Vs Republic Criminal Appeal No. 135 of 2016*, the Court of appeal held that.

   > " taking into account the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the Court to merely state that, it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. 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 to the accused person. We find that the first appellate Court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest." Emphasis mine

9. Further Reliance was placed on the case of Vincent Sila Jona and 87 others Vs Republic (2011) RL, Comilla and Human Rights Petition No. 15 of 2020, Where the Court held that:

   > " 53. In the result Issue the following orders:
   >
   > (a) A declaration that trial Courts are enjoined by section 333(2) of the Code, in imposing sentences, other than sentences of death to take account of the period spent in custody

(b) A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences,

(c) A declaration that section 333(2) applies to the original sentence as well as the sentence imposed during re-sentencing.

(d) A declaration that in determining "admission" by the prisons authorities for the purposes of section 46(2) of the *Prisons Act*, the relevant date is the date when the prisoner was first admitted to prison upon conviction and not the date of resentencing

(e) That any revision of the sentences be considered on a case-to-case basis. Emphasis mine".

10. The Applicant contends that, he was a first-time offender, he was very remorseful to what transpired he has learnt his lesson and promise never again to engage himself in any criminal activities and be a law-abiding citizen if given another chance.

11. Further reliance is placed on the case of Dakle Hussein Vs Republic Criminal Appeal Na. 1 of 2015 [2015) eKLR elaborating the principles of sentencing.

12. That, his stay in prison has been very helpful as he has acquired extra skills to benefit him in life as he is training as a welder.

13. The Applicant thus submits that the judge did not consider Section 333 (2) of the Criminal Procedure Code and that the Court should accordingly review the sentence and afford him a non-custodial sentence.

Respondents Case

14. The Application is opposed. The Respondent has argued that this Court is a Court of concurrent jurisdiction as the Court that sentenced the Applicant on the 3rd June 2020, and that the Court lacks jurisdiction to entertain the Application, the Sentencing Court did consider the Pre-trial detention period and that he was not sentenced in mandatory terms.

15. That the Court that heard and determined Nakuru High Court Criminal Case No. 52 of 2015 was a Court of concurrent jurisdiction as this Court and the law has not conferred jurisdiction upon This Court to review decisions or sit as an appellate Court to another Court of equal jurisdiction. Also, Article 50 (2) of *the Constitution* of Kenya, 2010 guarantees the right of a person if convicted, to appeal to, or apply for review by a higher Court as prescribed by law. This Court not such higher Court. Reliance was placed on the decision in Daniel Otieno Oracha - Republic [2019].

16. It was further submitted that following the recent shift in jurisprudence in the law on mandatory death sentences introduced by the Francis Karioko Muruatetu case where the Supreme Court held that, mandatory death sentences without Court's discretion were unconstitutional, the Applicant has sought for resentencing through this application.

17. However, the Applicant herein was not sentenced in mandatory terms to death as provided under Section 204 of the Penal Code.

18. That the trial Court considered the above provision, the holding in the Francis Kioko Muruatetu case, the Applicant's mitigation as provided for under Section 329 of the Criminal Procedure Code and the

circumstances of the case in sentencing him to 30 years' imprisonment. His right to fair trial under Article 50 (2) (p) was thus not violated.

19. That the Pretrial period in remand was considered at sentencing.

20. That the Applicant had been in custody since July, 2015. He was sentenced on 3rd June, 2020, the trial Court was categorical that the presentence detention period had been factored and considered when he was sentenced and therefore the provision of Section 333 (2) of the Criminal Procedure Code was also not violated.

21. The Applicant ought to have filed an appeal against his sentence as opposed to applying for resentencing as this Court lacks the jurisdiction to entertain the application and he has failed to demonstrate how the trial Court violated his right to fair trial at sentencing.

22. That the Applicant's application lacks merit and should be dismissed.

Analysis and Determination

23. I have considered the application herein and the written submissions and the Record before Court. It is my considered the only issue is whether the Applicant has demonstrated that his rights were infringed at sentencing and thus his Application is merited.

24. The Applicant has come to this Honourable Court by way of review provided for under Sections 333(2) 362 and 367 of the Criminal Procedure Code.

25. The Applicant has sought review of the Imprisonment sentence of thirty years imposed by the Trial Court, the Applicant now calls upon the Court to review of his sentence to a non-custodial sentence while factoring the time he spent in custody during the trial proceedings. He also calls upon to consider the evolution of sentencing principles following the principles under the famous Muruatetu case.

26. For the avoidance of doubt, on 6th July 2021 the Supreme Court in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (Practice Directions) the Supreme Court set out guidelines on resentencing. It stated that: -

> " 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below as follows: -
>
> i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the Penal Code.

27. Form the above, the Supreme Court clarified that their decision only related to the mandatory death sentence for murder cases under Sections 203 and 204 of the Penal Code, and not robbery with violence which attracts a mandatory sentence. The Supreme Court made a similar pronouncement in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR.

28. Similarly, the Court in Were v Republic [2024] KEHC 15110 (KLR)

> " Again, the convict is here applying for resentencing. For avoidance of doubt, the Supreme Court has since declared that the minimum sentences under the *Sexual Offences Act* are lawful and constitutional and it has also clarified that the Francis Muruatetu & Another V Republic (2017) eKLR decision only applied to murder cases and not Sexual Offences or robbery with violence which have mandatory sentences. In other words, the Supreme

Court has clarified in no uncertain terms that its decision in the Muruatetu Case I does not invalidate the mandatory or minimum sentences in the Penal Code or the *Sexual Offences Act* or any other statute. This pronouncement was made in the recent Supreme Court of Kenya Petition No. E018/2023 Republic versus Joshua Gichuki Mwangi [2014] eKLR.

29. The fact that the Applicant was remorseful and had undergone several rehabilitation programs while in prison is immaterial. The Muruatetu case is inapplicable and cannot suffice in the circumstances.

30. Nonetheless, jurisprudence overtime has argued that mandatory sentences limit the Court's discretion to impose appropriate sentences.

31. Be that as it may, the Applicant was charged with the offence of murder and upon conviction was sentenced to an imprisonment of thirty years as per the law which carries a death sentence.

32. In this instance Hon Lady Justice Mulwa did consider the period the Applicant has been in remand awaiting trial, the gravity of the offence committed and the age of the Applicant as per Paragraph 7 of the judgment. It is this Courts considered view that the Judge was conscious of the sentence she imposed. Its noteworthy that the judge observed that the Applicant decapitated the Victims head owing to the deceased rejecting the Applicant's marriage overtures and it was the sentencing Court's view that an appropriate sentence for gender violence shall suffice.

33. The Applicant's application for review of his sentence dated 29th February 2024, is not merited and the same is hereby dismissed.

It is so ordered.

DATED SIGNED AND DELIVERED ON THIS 17TH DAY OF JANUARY 2025

MOHOCHI. S. M.

JUDGE