Maingi v Republic (Miscellaneous Criminal Application E019 of 2024) [2025] KEHC 5468 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5468 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2024

EN MAINA, J

APRIL 24, 2025

BETWEEN

DANIEL WAMBUA MAINGI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This application comes by way of an undated Chamber Summons which seeks orders for reduction/ review of the Applicant's sentence for reason "that the sentence of 20 years is manifestly harsh and excessive."

2. The Applicant has also urged this court to invoke Section 35 of the *Penal Code* and Section 329 of the *Criminal Procedure Code*;

   The Applicant further contends that it is within his Constitutional right to be heard under Article 168(3)(b) and 22 (1), 23 of the *Constitution* and that the court be pleased to impose any other orders it may deem fit and just.

3. The application was heard by way of oral submissions. The Applicant submitted that his application was for review of his sentence so as to take into account the time spent in remand custody; that he was sentenced to serve 20 years for the offence of Robbery with Violence for which he appealed but which appeal was dismissed.

4. He prayed that in addition this Court takes into account the period he spent in remand custody.

5. However, Learned Counsel for the Respondent submitted that this court is functus officio as the issue of the Applicant's sentence was heard and determined by this court, differently constituted, on appeal; that the sentence is within the law and is not excessive in view of the circumstances of the case. Counsel placed reliance on the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No 253

of 2003(unreported) where it was reiterated that sentencing is an exercise of the trial court and for an appellate court to interfere it must be shown that the trial court took into account an irrelevant factor or ignored a relevant factor or applied a wrong principle of law.

6. Counsel urged that the Applicant has not provided sufficient grounds to warrant review of his sentence and if he so wishes could appeal in the Court of Appeal.

Analysis and determination.

7. The Applicant was arraigned before the Senior Principal Magistrate's Court at Kangundo in Criminal Case No. 335 of 2017, for the offence of Robbery with violence contrary to Section 296 (2) of the *Penal Code*. In a judgment delivered on 7th August 2019 the Trial Magistrate convicted him and subsequently sentenced him to 20 years imprisonment.

8. I have perused the record of the lower court and noted that the Learned Magistrate did not comply with Section 333(2) of the *Criminal Procedure Code*. I have also noted the Applicant preferred an appeal against the conviction and sentence in High Court Criminal Appeal No 74 and 75 of 2019 which appeal was heard by Odunga J, as he then was, but who dismissed the appeal in its entirety and upheld both the conviction and sentence of the trial court. It appears that the issue of Section 333(2) of the *Criminal Procedure Code*, as now raised, was not raised in that appeal as Odunga J did not pronounce himself on it.

9. The issue that then arises is whether the omission is a bar to raising it in this application. It is instructive that this issue was only raised in the submissions but not in the Chamber Summons. In the application what is sought is a reduction of the sentence which this court finds it is incapable of granting as its power does not extend to revision of a sentence of a court of concurrent jurisdiction.

10. This court finds that it can consider the issue of Section 333(2) of the *Criminal Code* which was not complied with by the lower court. However, before so doing let me first deal with the issue of Section 35 of the *Penal Code*. The section states-

> " Absolute and conditional discharge
>
> (1) Where a court by or before which a person is convicted of an offence is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the *Probation of Offenders Act* (Cap. 64) is not appropriate, the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein.
>
> (2) Before making an order discharging a person subject to the condition referred to in subsection (1), the court shall explain to the offender in ordinary language that if he commits another offence during the period of conditional discharge he shall be liable to be sentenced for the original offence.
>
> (3) Where an order discharging an offender under this section is made, the court may order him to pay the whole, or any part, of the costs of and incidental to the prosecution, and of any compensation adjudged under Section 31."

11. The above section refers to sentencing by the trial court, in this case the magistrates court, and the Applicant is clearly not entitled to a review of his sentence under that section. As for Article 168(3) of the *Constitution*, the same is not relevant to this application as it relates to the removal of a judge.

12. Further and strictly speaking the accused does not have an automatic right for review of his sentence by this court, his appeal having been heard and determined by a court of concurrent jurisdiction and as such a review can only be by a higher court as provided in Article 50(2)(q) of the *Constitution*. Indeed Article 165(3)(e) of the *Constitution* provides that the High Court only has any other original or appellate jurisdiction as conferred on it by legislation. That jurisdiction would certainly not extend to sitting on appeal against the judgment of a judge with concurrent jurisdiction.

13. That said and as I had stated earlier neither the trial magistrate nor Odunga J, as he then was, dealt with the issue of Section 333(2) of the *Criminal Procedure Code*. The Section is couched in mandatory terms. The Applicant remained in remand custody from the time he was arrested (22nd March 2017) to the time he was convicted and sentenced (7th August 2019) and hence his sentence as affirmed by this court shall be counted to run from 22nd March 2017. His application succeeds to that extent only otherwise it should have been dismissed. For the avoidance of doubt the sentence has not been reduced. It still remains as meted by the trial court and affirmed by the High Court; only the date of commencement of the sentence has been clarified so as to comply with the law.

    Orders accordingly.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF APRIL, 2025.

E. N. MAINA

JUDGE

In the presence of:

Miss Nyauncho for the state

Applicant online from Naivasha Maximum Prison

Geoffrey - Court Assistant/Interpreter