Rono v Republic (Criminal Revision E329 of 2024) [2025] KEHC 6918 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6918 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E329 OF 2024

E OMINDE, J

MAY 22, 2025

BETWEEN

KIPKENO RONO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein, Kipkeno Rono with others not before Court, was charged with the offence of Gang Rape contrary to Section 10 of the *Sexual Offences Act*.

2. In a judgment delivered by the trial Court on 30/01/2023, the Applicant was found guilty of the said offence of Gang Rape after which he was convicted and sentenced to serve fifteen (9) years imprisonment. In sentencing the Applicant, the trial Magistrate considered the period spent by the Applicant in remand custody during the trial. The trial Court cited Criminal Appeal No 84 of 2015, *Joshua Gichuki Mwangi v Republic* and then went ahead to note that the Applicant has spent (6)years in remand custody before sentencing him to (9) years imprisonment.

3. Through the application filed on 14/08/2024, the Applicant as stated seeks a review of his 9 years sentence under Section 362 as read with Section 364 of the *Criminal Procedure Code* and in reliance to Article 50(2)(q) of the *Constitution* for reasons that the said sentence is a violation of his rights under the *Constitution*. The court is seeking this reduction of his sentence in consideration of mitigation factors, and the new and old personal circumstances of the case. He therefore seeks that his sentence be reviewed to the time already served as being sufficient punishment or alternatively place him on probation under the Probation acts(sic)

Determination.

4. The relevant provision of Section 362 of the *Criminal Procedure Code* provides as follows;

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.

5. The relevant provisions of Section 364(5) provides as follows;

Powers of High Court on revision

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—

   a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354 and 358, and may enhance the sentence;

   (b) in the case of any other order other than an order of acquittal, alter or reverse the order.

   (c) .....

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

5. When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

6. Whereas Section 362 of the *CPC* as herein reproduced Section restricts any application made under this section to the revisionary jurisdiction of the High Court where no appeal has been filed, Section 364(5) on the other hand provides that an appeal must have been first have been filed by any party seeking to invoke the provisions of this section and expressly prohibits the invocation of Section 364 where an appeal has not been filed as underscored in the relevant excerpt of the said section herein above. in the following terms:

7. These provisions of the *Criminal Procedure Code* on the revisionary jurisdiction of the High Court in furtherance of its supervisory jurisdiction over the subordinate courts are further crystalized and buttressed by the provisions following of the *Constitution*. Article 165(6) which provides that:

> '(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

8. And Article 165 (7) which provides that

'(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

9. The scope and application of these provision were widely discussed in the case of *Abraham Wafula v Republic* [2013] eKLR (Bungoma, HCCR Rev. No 21 of 2013) as follows:

> "(11) Under Article 50(2) (q) of the *Constitution*, Appeal and Revision are part of the right to fair trial in a criminal proceeding. Both are constitutional processes for enforcement of legal relief. Except, the court must consider an Appeal as a matter of right whilst Revision under Article 165 (6) and (7) of the *Constitution* is a matter for the discretion of the court. In the new constitutional structure, Revision is a constitutional relief only that sections 362 to 367 of the CPC are merely the statutory expression of, and the procedural prescriptions attending the remedy of Revision. Therefore, the very nature of Revision as a discretionary remedy explains the policy underpinnings of section 364 (5) of the CPC; that Revision should not be a substitute for an Appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for.
>
> (12) Having said that, section 364(5) of the CPC is not intended to preclude the High Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of Appeal which he did not utilize, and is not intended at all to derogate from the wide powers conferred by Article 165 (6) and (7) of the *Constitution*, and section 362 and section 364 of the CPC. This should explain what the word "insistence" in section 364 (5) entails.

10. The above said however, the Court notes that the Applicant has in addition to Section 362 and 364 of the *Criminal Procedure Code* has also invoked the provisions of Article 50(2)(p) of the *Constitution* and the same provides as follows:

Fair hearing.

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. (2) Every accused person has the right to a fair trial, which includes the right—

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

11. In light of the provision under Article 50(2)(q) then, even assuming that a review is not available to the applicant herein by dint of the fact that no appeal has been proffered upon which a review under Section 364 can be proffered, the Court still has the latitude to consider the Applicant's application under the broader provisions of Article 165(5) and (7) of the *Constitution* and under Article 50(2)(q) herein invoked. From the foregoing then the issue that arises for determination then is;

Whether the applicants sentence merits a review.

12. The Supreme Court in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) had the following to say on the Constitutionality and validity of the minimum mandatory

sentences provided under the *Sexual Offences Act* in the same case where before the Court of Appeal the petitioner's sentence of life imprisonment imposed by the Magistrates' Court and affirmed by the High Court was commuted to a term sentence of 40 years imprisonment on the basis that life imprisonment being an indeterminate sentence is unconstitutional.

the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid.

13. Article 50(2)(p) of the *Constitution* provides as follows on the courts power to commute a lawful sentence meted out upon an applicant in an Applicant such as the one now before the court

    Every accused person has the right to a fair trial, which includes the right—

    (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; [Emphasis mine]

14. In light of the above decision of the Supreme Court, it is clear that the prescribed punishment for the offence of gang rape that the applicant was charged with has not at all changed to anything less than the sentences prescribed in the *Sexual Offences Act*. In this regard, the applicant cannot benefit from a reduction of his sentence whether it be under Sections 362 and 364 of the *Criminal Procedure Code* or under Article 50(2)(q) of the *Constitution* because there is nothing new to benefit from.

15. The Court further notes that in sentencing the applicant, the Trial Court considered the period of time that he had spent in remand custody throughout the trial and in conformity with the provisions of Section 333(20 of the *Criminal Procedure Code*, credited a total of six years so spent to the minimum mandatory sentence of 15 years' which is liable to be enhanced to life imprisonment as provided for under Section 10 of the *Sexual Offences Act*.

16. For the above reasons, the Application is devoid of merit and the same is accordingly dismissed. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDPORET ON 22ND MAY 2025

E. OMINDE

JUDGE