Jona v Republic (Miscellaneous Criminal Revision E129 of 2024)
[2025] KEHC 10598 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CRIMINAL REVISION E129 OF 2024

RC RUTTO, J

JULY 17, 2025

BETWEEN

VINCENT SILA JONA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for sentence review arising from Machakos Criminal Case No. 14 of 2011)

RULING

1. By way of a notice of motion application under Articles 50(2)(p) and 165(6) of the *Constitution*, and Sections 362 and 333(2) of the *Criminal Procedure Code*, the applicant seeks the following orders;

    a. Spent

    b. That the Court be pleased to revise the sentence meted (sic) upon the applicant and consider the eight-year period served in remand custody pending the hearing and disposal of the trial.

    c. Spent

2. The application is premised on the grounds on the face of the application and supported by the applicant's supporting affidavit. The applicant states that he was charged with the offence of murder contrary to section 203 as read together with 204 of the *Penal Code*, convicted, and sentenced to serve twenty five (25) years imprisonment. That at the time of sentencing, the trial court failed to consider the 8 years, being time spent in remand custody during the pendency of the suit. That he appealed the conviction and sentence *vide* Court of Appeal Criminal Case No. 46 of 2021, but the same was dismissed without considering the time spent in custody.

3. On this basis the applicant now seeks that sentence be reviewed to consider the time spent in custody. In arguing his application, the applicant states that there was non-compliance with section 333(2) of the *CPC*. That the failure to explicitly deduct the time spent in custody is a violation of his statutory right.

To buttress his argument, he sought to rely on the cases of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR and *Vincent Sila Jona &87 others v Kenya Prison and 2 others* (2021)eKLR.

4. The applicant states that he was arrested on 28th February 2011 and remained in custody for 8 years until his conviction on 16th January 2019. Thus, he urges that nothing bars this Court from considering this period, not withstanding that the Court of Appeal had made its determination. In support of this argument he relied on the case of *Vincent Sila Jona & 87 others v Kenya Prison and 2 others* (2021)eKLR, as well as the case of *Protus Buliba Shikuku v Attorney Generak* (2012) eKLR, where the courts considered the time spent in custody notwithstanding the exhaustion of their appellate remedies.

5. In addition, the applicant urged the Court to exercise its supervisory jurisdiction under Article 165 of the *Constitution* and section 362 of the *CPC*. He contended that since the sentence imposed by the Court of Appeal was never substituted or varied the decision on sentencing remains that of the trial court and any illegality in sentencing including non-compliance with section 333(2) of the *CPC* remains subject to revision by the High Court. Thus, he urged that an appeal to the Court of Appeal does not bar the High Court from exercising its constitutional and statutory jurisdiction to review the applicant's sentence.

6. The applicant further submitted that the principle of functus officio does not apply to the present case since the issue pertains to illegality arising from the omission of the time spent in custody. He pleaded that the Court declares the failure to gives full effect to section 333(2) of the *Criminal Procedure Code* in computing the applicant's sentence amounts to an illegality, rendering the sentence unlawful to the extent of the omission; that the Court orders that the period spent in remand, custody (from 28th February 2011 to 16th January 2019), be credited towards the applicant's sentence in strict compliance with section 333(2) of the *CPC*; and that the Court to direct the relevant prison authorities to revise the applicant's sentence accordingly by issuing an updated committal warrant reflecting the adjusted sentence.

7. In response to the application, the prosecution counsel opposed the application by stating that, in the current application, the applicant had already approached the Court of Appeal which addressed itself to the issue and that this Court cannot review the decision of the Court of Appeal. It urged that this court is functus officio and that the application lacked merit. Counsel urged the Court to find that it did not have the jurisdiction to determine the application.

8. The High Court (trial court) in its judgment delivered on 16th January 2019, in sentencing the applicant, rendered itself as follows:

> " taking into account the mitigation and aggravating factors and also factoring the time the accused persons have been in remand, I hereby sentence each to imprisonment for a period of twenty five years from the date hereof."

There is no doubt that the trial court considered the period spend in remand in exercising its discretion to mete out the 25 years prison sentence.

9. I agree with the respondent that upon delivering its judgment, the trial Court became functus officio. Hence, the only option available to the applicant was to move to the Court of Appeal on appeal.

10. Indeed, being aggrieved by the conviction and sentence, the applicant appealed to the Court of Appeal *vide* Nairobi Court of Appeal No 46 of 2021. Upon hearing the appeal, the Court of Appeal set out the

issues for determination one of which was: whether the sentence was excessive. The Court of Appeal at paragraphs 63- 66 of its judgment held as follows:

> " 63. On sentencing, the 2nd appellant submitted that the period he had been in custody be taken into account which was from 28th February 2011. The learned Judge when meting out the sentence noted the following;
>
> > " "I have taken into consideration all the factors necessary in assessing the appropriate sentence to mete upon the accused persons in this case as set out in the above case. All these factors have been elaborated within this ruling. I must however mention that it has not escaped my mind that the offence in this case was a gender-based violence. It was a violence against the deceased person by virtue of being a woman who had no man to her side. She was an elderly woman who lived alone and could not therefore defend herself under the prevailing circumstances.
>
> I find that the accused persons deliberately hit the deceased with clear intention to cause her pain, suffering and death going by the manner in which they executed the injuries and by the choice of the areas of the body that were hit with the mortar. I have taken into account that the accused committed the offence outside the house and dragged the body inside the house and even locked it. The body was later discovered by neighbours after it had decomposed. She must have died a very painful death.
>
> Taking into account the mitigating and aggravating factors and also factoring the time accused persons have been in remand, I hereby sentence each accused to imprisonment for a period of twenty five (25) years from the date hereof."
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> 64. The learned Judge is very clear in his ruling on sentencing that in imposing the 25 years' sentence, he had considered the mitigation by the appellants. Therefore, the argument by the 2nd appellant that the period that he was in custody was not taken into account in the sentence flies in the face of the ruling. We hasten to add that the maximum sentence for offence of murder, upon conviction is death. *Francis Karioki Muruatetu* (2017) eKLR did not abolish the death sentence but only declared section 204 of the *Penal Code* unconstitutional as it had taken away the discretionary power of the Court to mete out appropriate sentences on case to case basis. Where circumstances justify, accused persons ought to get stiff sentences.
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> 65. In our view, in the case before us, the appellants assaulted an innocent aged woman to death and were lucky to get a light sentence in the circumstances. To try to further reduce the sentence of 25 years through a plea for leniency or judicial craft is stretching their luck too far. We are satisfied that in imposing the 25 years, the court took into account the period, that the appellants had spent in custody during trial.
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> 66. We are satisfied, on the basis of the applicable law, that the trial court was entitled to arrive at the conclusions it did and we have no reason to disturb

them. This appeal is therefore lacking in merit and we order that it be and is hereby dismissed in its entirety."

11. From the above holding of the Court of Appeal, it is evident that the applicant's argument that the trial Court failed to consider the period he spent in custody was duly addressed. The Court of Appeal affirmed that the trial Court had indeed taken into account the time spent in custody, along with the relevant mitigating and aggravating factors, before sentencing the accused to 25 years' imprisonment.

12. The argument by the applicant that since the Court of Appeal did not disturb the 25 years imprisonment, that sentence is open for review by this High Court is misinformed. The Court of Appeal having affirmed that sentence, it now becomes a sentence of the Court of Appeal, which sentence/order/ruling/judgment, this Court lacks jurisdiction to disturb.

13. Consequently, in light of the established judicial hierarchy, this court lacks jurisdiction to reconsider or review an issue already determined by the Court of Appeal. Accordingly, the present application is dismissed for want of jurisdiction.

14. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF JULY, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Selina Court Assistant