Rugendo v Republic (Miscellaneous Criminal Application E074 of 2024) [2025] KEHC 11660 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11660 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

MISCELLANEOUS CRIMINAL APPLICATION E074 OF 2024

RL KORIR, J

JULY 29, 2025

BETWEEN

ERICK MUTUGI RUGENDO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Erick Mutugi Rugendo (Applicant) was charged in Chuka CM Criminal Case No.169 of 2024 with two counts namely; threatening to kill contrary to Section 223; and malicious damage to property contrary to Section 339 of the *Penal Code*. The victim of his unlawful actions was one Margaret Gacheri.

2. The Applicant was tried and convicted by Hon. Gandani, Chief Magistrate. He was sentenced to serve eighteen months imprisonment for each count and the two sentences to run concurrently.

3. The Applicant has now filed a Petition to this Court styled Notice of Motion seeking the period he spent in pre-trial custody to be included in his sentence and the sentence to be reduced proportionately.

4. In his Supporting Affidavit, he states that failure to deduct the pre-trial custody period will lead to an excessive sentence. He cites Section 333 (2) of the *Criminal Procedure Code* and Article 27 (5) of the *Constitution* to support his Application.

5. The Application is opposed by the Respondents. Learned Prosecution Counsel Ms Rukunga filed submissions dated 14th July 2025 in which she urged that failure by the trial court to specifically state that it had deducted the 9 months' pre-trial custody did not vitiate the sentence. Counsel submitted that the very lenient sentence awarded by the trial court was a demonstration that the pre-trial custody had been taken into account. Counsel relied on the case of *DS .v. Republic* [2022] KEHC 2502 (KLR).

Analysis and Determination

6. The Application is grounded in Section 333(2) of the *Criminal Procedure Act* which provides:-

> (2) where the person sentence has prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

7. This Court's revisionary jurisdiction is exercised under the provisions of Section 362 of the *Criminal Procedure Code* which states:-

> " 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."

8. In the case of *Joseph Nduvi Mbuvi vs Republic* (2019) eKLR, Odunga J. (as he then was) expounded the exercise of the revisionary jurisdiction thus:-

> " In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in *Public Prosecutor Vs. Muhari Bin Mohd Jani And Nother* [1996] 4 LRC 728 at 734, 735:-
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> > "The powers of the High Court in revision are amply provided under Section 325 of the *Criminal Procedure Code* subject only to subsection (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice..... If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion..... This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case."

9. I called for and examined the trial court record. The record shows that the Applicant (then Accused) was charged and went through his trial where at the conclusion the court found him guilty as charged. Prima facie there was nothing irregular about the trial that would attract this court's interference. Indeed the Applicant has not challenged his trial.

10. With respect to the sentence, it is true as urged by the Applicant that the trial court did not state that it had considered the pre-trial custody. However, I agree with the Respondent that the lenient sentence of 18 months demonstrates that the court must have given time effect to the pre-trial period. I am persuaded by the holding in *DS .V. Republic* [2022] KEHC 2502 KLR, where the court stated:-

> " The Court of Appeal in *Ahamad Abolfathi Mohammed & Another -v. Republic* [2018] eKLR. (see also *Bethwel Wilson Kibor vs. Republic* [2009] eKLR) has also explained and buttressed the absolute need for the court to give real-time effect of Section 333(2) of

the *Criminal Procedure Code* in sentencing. And, that merely stating that you have taken account of time spent in custody is not sufficient if the sentence does not show that the period which an accused has been held in custody prior to being sentenced had been taken into account." [Emphasis added]

11. I have looked at the circumstances of the case. The trial court observed in its judgement that the Accused and the complainant had an acrimonious relationship. The court recorded the evidence of the Investigating Officer who stated that the Accused had been attacked by two Prosecution witnesses who were the brothers of the complainant and had been hospitalized but no charges were pressed against them with only the Accused being charged.

12. The pre-sentence Probation Report showed there was an acrimonious relationship between the Accused and the complaint after their 5 month marriage disintegrated; and that the Accused's attempts to have his assailants charged failed. The Probation officer had recommended a non-custodial sentence in view of the fact that the Accused had been in pre-trial custody for 9 months.

13. Having reviewed the circumstances of the case as stated above, I am satisfied that the Application is merited.

14. The 18 months' sentence shall be deemed to run from 20th February 2024 being the date he was charged and remanded. The effect of this revision means that the Applicant has, or was about to complete sentence. Whichever the case, I consider the period served sufficient.

15. The Applicant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 29TH DAY OF JULY, 2025.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant acting in person and Ms Rukunga for the State; Muriuki (Court Assistant).