Kamau v Republic (Miscellaneous Criminal Application 11 of 2020) [2024] KEHC 4198 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4198 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION 11 OF 2020

PN GICHOHI, J

APRIL 9, 2024

BETWEEN

GEOFFREY MACHARIA KAMAU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Geoffrey Macharia Kamau (Applicant) was the 2nd Accused in High Court in Criminal Case No. 48 of 2009 where he and another were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Both denied the charge and after full trial, the 1st Accused was acquitted while the Applicant convicted as charged and was sentenced to death on 07/10/2016.

2. Aggrieved, he filed a Notice of Appeal to the Court of Appeal in Nakuru. While the appeal was pending, the Applicant moved this Court vide a Notice of Motion filed on 05/02/2021, seeking resentence hearing on the grounds that he was not accorded a fair hearing when he was sentenced to death. That Application is supported by his Affidavit where he has cited

3. When he appeared before High Court on 11/05/2020, in regard to this Application, Joel Ngugi J (as he then was) directed him to make an election whether to proceed with his appeal at the Court of Appeal or withdraw it and proceed with his application for resentencing pursuant to Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR that death penalty for an offence of murder was unconstitutional to the extent that it prescribed a mandatory death sentence and denied the accused person a chance to mitigate. He elected to withdraw the appeal and filed a Notice of withdrawal of the Appeal.

4. Upon being served, the Respondent filed a Replying Affidavit sworn on 18/01/2024 by James Kihara . While acknowledging that death and life sentence has since been declared unconstitutional, and further acknowledging the sentencing guidelines, he deponed that

> " this Court has no jurisdiction to review a sentence handed by a Court of similar status ... That the Applicant's option is to file a review or appeal in the Court of Appeal....That it was ill advised of the Applicant to withdraw his appeal in the Court of Appeal and file this Application in the High Court."

5. He further deponed that he does not concur with the sentiments by the Applicant that he (Applicant) was not accorded fair trial arguing that if he was dissatisfied with the manner the trial was conducted, the Applicant's recourse was to appeal to Court of Appeal.

6. In regard to submissions, the Respondent opted no rely on the Replying Affidavit.

7. The Applicant filed submissions on 08/02/2024 declaring his remorse for the offence he committed, taking personal responsibility for the offence of murder as he was charged , and basically emphasizing his prayer for resentencing, backed by annextures to demonstrate the journey he has walked towards reform while in prison and that his entire family wholly depends on him.

8. Further, the Applicant urged for a declaration of a sentence of time already served in custody from the date of arrest on 11/05/2009 as envisaged under Section 333 (2) of the *Criminal Procedure Code*.

9. In the alternative, he urged the Court to hand him a sentence it deems fair, just and reasonable in the circumstances while promoting and appreciating the Applicant's rehabilitation and transformation while in custody.

Determination

10. This Court has heard both parties and is alive to the fact it is not sitting on an appeal against the sentence passed by a Court of concurrent jurisdiction but on issue of resentence. In this case, the Applicant was sentenced to death on 07/10/2016, which was before the Supreme Court's decision in *Francis Karioko Muruatetu* (*supra*).

11. This Court has accessed the original record and the judgment and noted that after conviction, the Court set a mention date for 10/10/2016 for mitigation. On behalf of the Applicant, Mr. Mongeri Advocate stated in mitigation:-

> " Accused is 29 years. He has been in custody for 7 years. He seeks leniency."

12. While sentencing the Applicant, the Judge stated:-

> " Mitigation is noted. The accused action led to the loss of life of a fellow human being . I sentence him to death as required by law."

13. The fact that trial Court reserved the matter for mitigation itself an indicator that he was accorded a chance to prepare his mitigation. Further, he did mitigate before sentence. That is an element of fair hearing.

14. There is no dispute that the Applicant was sentenced to death. That sentence was however lawful in that it was the mandatory sentence provided for under Section 204 of the *Penal Code*. Indeed, the Court has confirmed from the record that a committal warrant dated 10/10/2016 was issued

authorising the Officer in Charge GK Prison Nakuru to receive the accused in the said jail and to carry out the sentence in accordance with the law.

15. The Court has confirmed that indeed the Applicant's Notice of withdrawal under Rule 68 (1) of the Court of Appeal Rules was duly received by the Court of Appeal Nakuru on 30/03/ 2022. Upon receipt of the said Notice, the Court of Appeal made an Order on 31/10/2023 marking the Appeal as withdrawn.

16. Having been directed by this Court differently constituted that he should elect whether to proceed with the appeal before the Court of Appeal or to proceed with this Application, the Applicant cannot be faulted in electing to withdraw and the Appeal as he did and such election cannot be termed as ill-advised as put by the Respondent.

17. Bearing in mind the Supreme Court ruling dated 6th July 2021 in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR, the Respondent's argument that this Court lacks jurisdiction to re-sentence is not sound. Paragraph 18 (vi) on the guidelines by the Supreme Court in the above ruling are that:-

> " Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn."

18. At the opening of guidelines at paragraph 18, the Supreme Court gave directions clearly that the decision of Muruatetu and the guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*. This Court's understating is that an accused who was sentenced to death by High Court on account of mandatory sentence provided for by the law can approach the same Court, that sentenced him, with an application for resentencing. If the accused will have filed an appeal to Court of Appeal, he will have to withdraw it first if resentencing can proceed otherwise, he cannot have both.

19. This Court is therefore properly seized of jurisdiction to re-sentence the Applicant in the circumstances notwithstanding, that the Application is not being made before the trial Judge. In any event, the said judge has long been transferred from this station.

20. On the appropriate sentence, this Court notes from the original record that the deceased was a 60-year-old father to the Applicant and that the deceased was unarmed. The deceased was quarreling with the 1st accused not the Applicant herein. Without provocation by deceased, the Applicant attacked and hit the deceased with an iron bar using extreme force.

21. Whereas the trial Court did not explicitly state that its hands were tied, it is apparent that despite the mitigation, the Applicant was sentenced to death in accordance with the law which may imply the application of the mandatory death sentence. It is however borne in mind that death is lawful considering that the Supreme Court held it to be still applicable as a discretionary maximum penalty.

22. Having considered the material before this Court, together with the annextures to this application, there is no doubt about the Applicant's remorse and that he has reformed. The Court also considers the Applicant's age at the time he committed this offence. Ultimately, this Court is satisfied that a custodial determinate sentence is the most appropriate in the circumstances.

23. The Applicant is correct in seeking application of Section 333 (2) of the *Criminal Procedure Code* which provides that the Court takes into account the period the accused spent in custody while computing the sentence.

24. While discussing Sec. 333 (2) of the *Criminal Procedure Code*, the Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR had this to say:-

> " The appellants have been in custody from the date of their arrest on June 19, 2012. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "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(s) 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 on June 19, 2012."

25. In the circumstances, the Court determines the Application herein as follows:-

    1. The death sentence is therefore substituted and the Applicant re- sentenced to serve a term of Twenty-Five (25) years imprisonment.

    2. The period the Applicant spent in custody, that is from 11/05/2009 when he was arrested to 10/10/2016 when he was convicted and sentenced, shall be taken into account while computing the Twenty-Five (25) years imprisonment.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF APRIL , 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Applicant Present

Mr. Kihara for Respondent

Ruto; Court Assistant