Mwove v Republic (Miscellaneous Application 105 of 2019)
[2024] KEHC 4376 (KLR) (15 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4376 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

MISCELLANEOUS APPLICATION 105 OF 2019

JN ONYIEGO, J

APRIL 15, 2024

BETWEEN

JAMES MUSEE MWOVE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant herein was tried and convicted of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars were that he together with Peter Muthui Mutinda and Johnson Muthusi Mutinda on 09.03.2009 at Makutano village Mwalali sub location Mbuvu location Nguni division in Mwingi District within Eastern Province, being armed with dangerous or offensive weapons namely, knives robbed Theophillus Mutinda Sua of cash Kes. 325,700/- and mobile phone make Motorola valued at Kes. 2,600/- all valued at Kes. 328,300/- and at or immediately after the robbery stabbed (wounded) the said Theophillus Mutinda Sua.

2. The matter proceeded to full trial and the applicant together with his co- accused were convicted and sentenced to suffer death.

3. Together with his co-accused, they preferred an appeal against their conviction and sentence and by a judgment delivered on 22.11.2013, the same was dismissed.

4. The applicant together with his co-accused preferred a second appeal at the Court of Appeal vide Criminal Appeal No. 13 of 2018 and by a judgment delivered on 22.11.2019, their conviction was upheld while the death sentence was set aside and, in its place, a 20-year sentence was meted out. The said sentence was to run from the date of conviction.

5. Un deterred, he filed the current application on 10.12.2019 under certificate of urgency seeking for orders that this Honourable Court be pleased to consider the time already spent in lawful custody and

thus review his sentence in the same manner pursuant to section 333(2) of the *Criminal Procedure Code.*

6. Directions were taken that the application be canvassed by way of written submissions.

7. The applicant in his written submissions filed on 08.02.2021 argued that after conviction, he was not given an opportunity to mitigate and even if he were to mitigate, the nature of punishment of the offence he was charged with is mandatory in nature. That in reference to the finding in the case of *William Okungu Kittiny v Republic* [2018], the court held that jurisdiction to hear mitigation lay with the trial court. It was his argument that his state was further exacerbated by the fact that the Court of Appeal failed to consider the period spent in remand which was 3 years and 4months.

8. He contended that if the order sought herein is not allowed, he stands to serve excessive sentence. That under article 165 (3) of the *constitution*, this court is possessed of powers to ensure that the applicant's mitigation is not only heard but also, the violation of his rights avoided. Reliance to that end was placed on the cases of *Daniel Gichimu and Another v Republic* (2018) Criminal Appeal No. 27 of 2009 and *Martin Bahati Makhoha v Republic* [2018] eKLR where the court held the view that, having found the appellants guilty of robbery with violence, it convicted the appellant to the time already served, which was ten years and two days.

9. He urged that despite the Court of Appeal's failure to consider the time spent in lawful custody, it is clear that fundamental human rights if violated, then, substantive justice ought to prevail over the procedural technicalities. That this court therefore ought to allow the application herein in furtherance of his fundamental rights. He urged this court to allow the prayer sought.

10. Mr. Kihara, the learned counsel for the prosecution via his written submissions dated 10.05.2021 submitted that the application was underserved as the same had already been determined by a court of equal jurisdiction to this court. Additionally, that the applicant challenged the High Court's finding at the Court of Appeal wherein conviction was upheld as the death sentence was substituted with a 20-year imprisonment to commence from the date of conviction. Counsel urged that the court in sentencing the applicant was aware that the case commenced way back from the year 2009.

11. That in reducing the said sentence, the Court of Appeal rightly considered the time already spent by the applicant in lawful custody. That there was nothing to demonstrate that the Court of Appeal was oblivious of the period of time spent in custody. As a consequence, this court was urged to dismiss the application for the same was in want of merit.

12. I have considered the application herein together with the submissions by both parties. The issue for determination is whether the applicant is entitled to review of sentence under Section 333(2) of the *Criminal Procedure Code.*

13. The court is alive to the provisions of section 333(2) of the *Criminal Procedure Code* which provides: -

> " Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

14. From the record, it is outright that the applicant together with his co-accused preferred a second appeal before the Court of Appeal *vide* Criminal Appeal No. 13 of 2018 and by a judgment delivered on

22.11.2019, conviction was upheld while the death sentence was set aside and, in its place, a 20-year sentence was meted out. The said sentence was to run from the date of conviction.

15. In the case of *Vincent Sila Jona & 87 Other v Kenya Prison Service & 2 Others* the Court stated that:

> What then is the position where as a result of the failure to apply the said provisions, a person has exhausted his appellate options. In my view unless the sentence was substituted by the appellate court, the same position applies. Where the appellate court considered the appeal and disallowed the same without interfering with the sentence, it is clear that the sentence remains that of the trial court and if that sentence was imposed in contravention of the said provision of section 333(2) of the *CPC*, nothing bars this court in exercise of its constitutional mandate pursuant to article 165 of the *constitution* from redressing the situation...".

16. As already noted, the Court of Appeal having set aside the death sentence and in its place substituted with a 20-year sentence to run from the date of conviction, it is my considered view that the same was appropriate in regards to the nature of the offence committed.

17. As such, I am in agreement with the prosecution that in reducing the said sentence, the Court of Appeal rightly considered the time already spent by the applicant in lawful custody. That there was nothing to demonstrate that the Court of Appeal was oblivious of the period of time spent in custody.

18. In the premises the application fails and the same is dismissed.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF APRIL 2024

J.N.ONYIEGO

JUDGE