



**Solomon v Republic (Criminal Miscellaneous Application
E124 of 2023) [2024] KEHC 4807 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E124 OF 2023**

PN GICHOHI, J

MAY 9, 2024

BETWEEN

JOYCE KATHAMBI SOLOMON APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant (Joyce Kathambi Solomon) appeared with other two accused persons in High Court Criminal Case No. 20 of 2013 where they were charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. She was the 2nd accused .
2. The Particulars were that on the night of 6th/7th February 2010 at Githima area of Nakuru District within Rift Valley province jointly with another not before court murdered Peter Njogu Gachigi. After the prosecution case, the 3rd accused was acquitted while the 1st accused and the Applicant were placed on their defence.
3. In the judgement dated 22nd day of September 2017, Maureen A. Odero J acquitted the 1st accused but found the Applicant guilty of Murder and sentenced her to death.
4. Aggrieved by both conviction and sentence, the Applicant moved to the Court of Appeal vide Court of Appeal Nakuru Criminal Appeal No. 82 of 2017.
5. However, on 20th December 2019, the Applicant filed a Notice of Withdrawal of the said appeal and on 1st May, 2022, the Court finally made an Order marking the appeal as withdrawn.
6. The Applicant then moved to High Court at Nakuru vide Misc. Criminal Application No. 133 of 2018 seeking re- sentencing on the grounds that:-
 1. The death sentence was too harsh and excessive.



2. The death sentence as provided for under the law was not mandatory.
7. The Respondent opposed the application and sought dismissal of the same. While citing the guidelines issued by Supreme Court on 6th July 2021 on the factors to consider when dealing with applications for re-sentencing, the Respondent highlighted that the Applicant vehemently denied committing the offence and showed no remorse for her action.
8. The Respondent therefore termed the sentence lawful, fair and based on the evidence presented by the parties before the High Court. The Court was urged to dismiss the application for resentencing.
9. In the Ruling dated 14th day of June 2023, H.K. Chemitei J held:-

“Having taken into consideration all the circumstances of the case this court finds the above mitigating factors plausible and hereby sets aside the death sentence imposed against the applicant and substitutes it with a custodial sentence of 20 years from 22nd September 2017.”
10. The Applicant has now moved this by way on a Notice of Motion dated 24th July 2023 brought under a certificate of urgency urging the Court to consider the years spent in custody during her remand from 8th February 2010 to 22nd September 2017 be taken into account in the sentence of 20 years imprisonment.
11. In reply, the Respondent filed an Affidavit sworn on 1st February 2024 by Mr. James Kihara, the learned Prosecution Counsel. Confirming that death sentence was substituted with 20 years imprisonment through the Applicant’s application for resentencing, Counsel deponed that the Court must have been aware of the period spent in custody in passing that sentence. Further, he deponed that the Court must have been motivated by the gravity of the offence and therefore ignored the time spent in custody. He urged this Court not to review the judgment of a Court of concurrent sentence.

DETERMINATION

PARA 12.

It is a fact that courts are mandated by Section 333(2) of the Penal Code to take into account the period an accused person spent in custody as emphasised by the Court of Appeal in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR thus:-

“The appellants have been in custody from the date of their arrest on 19th June 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 19th June 2012.”



13. Even though there is nothing to specifically show that the Honourable Judge did put into consideration the said provision of the law or the case law, this Court has no reason to believe that the Judge was unaware of the same.
14. This Court cannot speculate on any error or inadvertent omission by the Court of a concurrent jurisdiction and purport to correct it in the circumstances herein.
15. The Applicant ought to have pursued her appeal to the Court of Appeal. Having chosen to withdraw it, she has to face the consequences that this Court cannot now review the said sentence as it lacks jurisdiction to do so.
16. In the upshot, the Applicant's application dated 24th July 2023 be and is hereby dismissed.

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

PATRICIA GICHOHI

JUDGE

In the presence of:

Joyce Kathambi Solomon - Applicant

Mr. Kihara for Respondent

Oleperon - Court Assistant

