Terer v Republic (Miscellaneous Criminal Application E058 of 2023) [2024] KEHC 5207 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5207 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

MISCELLANEOUS CRIMINAL APPLICATION E058 OF 2023

JK SERGON, J

MAY 16, 2024

BETWEEN

KIPYEGON VINCENT TERER ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was convicted and sentenced to twenty (20) years imprisonment for the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code* by Lady Justice Mumbi Ngugi (as she then was) vide Criminal Case No. 12 of 2017.

2. The Applicant being dissatisfied with the sentence meted out filed the instant application for sentence review. The applicant deemed the sentence as harsh and excessive in light of the facts and the circumstances of the case. The Applicant highlighted the fact that this Court has competent jurisdiction to hear and determine the application for sentence review and therefore urged this Court to grant him a lenient and definite sentence.

3. The application for sentence review is pegged on article 165 (3) (b) of *the Constitution* and article 50 (2) (p) (q) of *the Constitution*.

4. The Applicant filed written submissions which this Court has duly considered.

5. The Applicant submitted that he had spent six (6) years serving a custodial sentence. The Applicant maintained that he has reformed and rehabilitated. The Applicant submitted that through the programmes offered in the correctional facilities he has achieved various accolades and that the said programmes have offered him an opportunity to lead a morally upright life.

6. The Applicant cited the High Court decision at Narok in Sammy Wanderi Kugotha v Republic where the court observed that; " The need to rehabilitate and reintegrate offenders into society to eke

meaningful life after imprisonment is one of the objectives of punishment; it should never recede to the background in sentencing."

7. The Applicant therefore urged this court to exercise leniency and order that he serve the remaining part of his sentence under community service order or probation or any other reprieve the Court may deem fit.

8. The Applicant contended that he had spent one year and six months in remand and the time spent in remand was not included during sentencing contrary to section 333 (2) of the *Criminal Procedure Code*. The Applicant cited the landmark case of *Vincent Sila Jona and 87 Others v Republic* [2021] eKLR, Constitutional and Human Rights Petition No. 15 of 2020 where Odunga J. (as he then was) made a declaration enjoining the trial courts to consider time spent in custody during sentencing with an exception to the death sentence.

9. The Applicant therefore urged this Court to have the sentence meted on him, computed from the date of arrest by dint of section 333 (2) of the *Criminal Procedure Code.*

10. The matter came up for inter partes hearing on 27th February, 2024. The prosecution opposed the application. The prosecution submitted that the application was premature and that the applicant ought to have preferred an appeal. The applicant urged this Court to exercise leniency and that the instant application for resentencing should be favourably considered.

11. I have noted that the instant application has two limbs; firstly, sentence review and secondly, the inclusion of the time spent in remand in the computation of the sentence thereby forming the issues for this court's determination.

12. On the first issue of resentencing, the following legal provisions empower this Court to entertain sentence review applications; Article 165 of *the Constitution* which clothes the High Court with jurisdiction to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights as well as Article 50 (2) (p) (q) as read with Article 50 (6) (a) and (b) of *the Constitution*.

13. This Court is cognisant of the fact that it is the right of a person who has been convicted and sentenced for a criminal offence, to appeal or apply for review by a higher court as prescribed in law. The right is part of the larger right to a fair trial as is provided in Article 50 (2) of *the Constitution*.

14. It is clear from the instant application that the applicant has invoked this Court's revisionary jurisdiction, however, section 364 (5) of the *Criminal Procedure Code* provides that; "When an appeal lies from a finding, sentence or order and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. " In the circumstances, this Court cannot entertain the application for sentence review. Furthermore, in the present application, I find that there is no new and compelling evidence that has become available to entertain the issues on review of sentence.

15. On the second issue on the inclusion of the time spent in custody, I find the assertion that the applicant spent one year and six months in custody to be false. I have perused the original record and I find that the applicant was arrested on 14th May, 2017, arraigned in court 15th May, 2017 the plea deferred and was consequently remanded to custody soon thereafter. The applicant was subsequently released on a bond of Kshs. 200,000/= and one surety on 14th November, 2017, he therefore spent six months in remand. The six months spent in custody should be included in the sentence by dint of section 333 (2) of the *Criminal Procedure Code*.

16. For those reasons, I find that the instant application succeeds partially, the six months spent in remand to be included in the sentence. The Applicant's sentence of twenty (20) years should be adjusted and reduced to 19 years 6 months to run from the date of sentence i.e. 21st November, 2018.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 16TH DAY OF MAY, 2024.

.....

J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Prosecutor – Mr. Musyoki

Applicant – Present in Person