



**Kambo v Republic (Criminal Miscellaneous Application  
9 of 2020) [2024] KEHC 8340 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8340 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL MISCELLANEOUS APPLICATION 9 OF 2020**

**PN GICHOHI, J**

**JULY 11, 2024**

**BETWEEN**

**DUNCAN KARIUKI KAMBO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Duncan Kariuki Kambo (Applicant) was arraigned High Court in Criminal Case No. 60 of 2006 where he was charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Particulars were that on the 11<sup>th</sup> day of July ,2006 at Mairo Inya Trading Centre in Nyandarua District of Central Province murdered Charles Gitau Ndungu
3. In the judgement dated 9<sup>th</sup> Day of December 2016, Maureen A. Odero J found him guilty of Murder and sentenced him to death on 13<sup>th</sup> December 2016 .
4. Aggrieved by both conviction and sentence, the Applicant moved to the Court of Appeal Nakuru vide Criminal Appeal No. 3 of 2017. While that Appeal was still pending, he filed this application dated 5<sup>th</sup> February 2019 seeking re- sentence hearing. He urged the Court to consider an appropriate sentence. He finally elected to withdraw the appeal and proceed with this application pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another v Republic [2017]eKLR which declared death sentence in murder cases unconstitutional.
5. On 31<sup>st</sup> October 2022, the Court of Appeal marked the appeal as withdrawn paving way for hearing of this application.
6. In its Replying Affidavit sworn on 14<sup>th</sup> May 2024 by James Kihara, the Respondent deponed that they were not opposed to the application but urged the Court to consider a determinate sentence



commensurate with the circumstances of the offence. He also stated that he was not opposed to period spent in custody being considered.

### **DETERMINATION**

7. This Court has perused the Original Record. In the detailed mitigation, the Applicant stated that his wife had died leaving him with two (2) children. That his father had died leaving his (Applicant's) mother. The Applicant also told the trial Court that he had been law abiding citizen doing business and was remorseful. He sought a non-custodial sentence.
8. While sentencing, the trial Court considered the mitigation but noted that the only sentence provided for upon conviction was death. It is therefore clear that the trial Court's discretion was removed by the mandatory sentence and therefore, its hands were tied so to speak.
9. The Supreme Court in Francis Karioko Muruatetu case (supra) has now settled the law that mandatory death sentence in murder cases unconstitutional.
10. In regard to the circumstances under which the offence was committed, the trial Court had this to say:-

“In this case the intention of the accused is very clear from his actions. The accused stormed into the plot, armed with a knife, went directly to the house of the deceased, stabbed him and left. This attack on the deceased was totally unprovoked. It was a pre-meditated attack. The accused went to the plot ready and armed. He knew exactly who the target was. I have no doubt that the attack was preconceived. It was not an act done at the spur of the moment or due to any provocation.

It was alleged that the accused may have harboured anger against the deceased because his “Peris” (His wife) had left him and moved to cohabit with the deceased. This is not an excuse to launch an unprovoked attack on the deceased. The accused did not find the deceased and Peris together in the house. I find the accused's clear intention was to kill or cause grievous harm to the deceased...”

11. In those circumstances, this Court is satisfied that a determinate deterrent sentence is appropriate. This Court is also mandated by Section 333(2) of the Criminal Procedure Code to take into account the period an accused person spent in custody as emphasised by the Court of Appeal in *Ahamad 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(2) 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.”[Emphasis added]

12. In conclusion, this Court makes the following orders:-

1. The death sentence be and is hereby set aside and substituted with a sentence of 30 years imprisonment.
2. In computing that sentence, the period spent in custody, that is from 11<sup>th</sup> July 2006 being the date he was arrested , until the date he was sentenced on 13<sup>th</sup> December 2016 be taken into account.

Dated, signed and delivered at Nakuru this 11<sup>th</sup> Day of July, 2024.

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

**Duncan Kariuki Kambo - Applicant**

**Mr. Kihara for Respondent**

**Ruto - Court Assistant**

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