



**Chepkwony v Republic (Miscellaneous Application E016 of 2024)
[2024] KEHC 12753 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E016 OF 2024
SM MOHOCHI, J
OCTOBER 18, 2024**

BETWEEN

BENARD KIPKEMOI CHEPKWONY APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is an application for criminal revision, contesting the correctness, legality or propriety of the then learned trial magistrate's Hon. H. M. Nyaga (PM)'s Sentence made on the 19th July 2013 at Molo, who sentenced Benard Kipkemoi Chepkwony to an imprisonment sentence of Thirty (30) years having been found guilty and convicted for the offence of manslaughter contrary to section 202 as read together with section 204 of the Criminal Penal Code in Molo Chief Magistrate's Criminal Case No. 19 of 2012.
2. Benard Kipkemoi Chepkwony subsequently Appealed the against the conviction and sentence in HCRA No 161 of 2013 and appeal that was heard and dismissed on the 18th July 2014, with the court dedicating substantive and extensive space in dissecting and analyzing the probity of the sentence imposed and arriving at a firm finding that, the sentence was sound and appropriate without any basis to disturb.
3. Benard Kipkemoi filed a Constitutional Petition E001 OF 2021 before this court on resentencing which petition was dismissed on the 28th July 2021.
4. Benard Kipkemoi Chepkwony subsequently Appealed to the Court of Appeal in COA Cri Appeal No. E023 OF 2022 which he withdrew on the 4th July 2023.
5. He now moves this court arguing that, the trial magistrate erred in failing to take into consideration that he remained in remand custody for eighteen (18) months which period he ought to benefit from a reduction on his sentence, he invokes the provisions of section 333 of the Criminal Procedure Code.



6. In his submissions the Applicant argues that his constitutional rights have been gravely infringed upon and that by reopening his case for re-sentence he would get the opportunity to mitigate.
7. That his sentence was harsh and excessive citing the case of Edward Otieno Vs Republic 2009 where a convict of manslaughter was allowed to mitigate in re-sentencing.
8. He then proceeds to mitigate evidencing over six tradecraft-based certification he has earned from the prison system.
9. He further argues that he was entitled to the least server form of punishment in line with *the Constitution*.
10. The Application was opposed by the State through the filed written submissions of Jakline Kisoo Snr Prosecution Counsel who contends that “We submit that this court does not have jurisdiction to entertain the application.”
11. That the trial court exercised its discretion in imposing the sentence of 30 years imprisonment. Further, the sentence imposed by the trial court was not issued in mandatory terms as the Sentence for the offence of manslaughter is provided under section 205 of the Penal Code;

“any person who commits the felony of manslaughter is liable to imprisonment for”
12. The phrase is liable to does not prescribe a minimum and mandatory sentence. It only specifies the maximum sentence and the court has discretion to impose a sentence up to, but not beyond the maximum. Further Section 26 (2) of the Penal Code provides that;

“... a person liable to imprisonment for life or any other period may be sentenced to a shorter term.”
13. That the trial court therefore had the powers and duly exercised its discretion in imposing the appropriate sentence upon considering the circumstances of the case as against the applicant's mitigation and the same was upheld by the High Court on appeal.
14. That the jurisdiction of this court is provided for under Article 165 of *the Constitution*. Pursuant to the said Article, this court has unlimited original jurisdiction in criminal and civil matters, jurisdiction to enforce bill of rights, appellate jurisdiction, jurisdiction to interpret *the Constitution* and supervisory jurisdiction over subordinate courts and any other jurisdiction, original or appellate, conferred on it by legislation.
15. That Article 165 (3) (b) of *the Constitution* provides that;

“the High Court shall have jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”
16. That Article 50 (2) (p) of *the Constitution* provides that;

“every accused person has the right to a fair trial which includes the right to the benefit of the least severe of the prescribed punishments for an offence...”
17. That the applicant has not demonstrated how the trial court violated his right to fair trial as stated above. The trial court considered the circumstances of the case in sentencing him to 30 years imprisonment. His right to fair trial under Article 50 (2) (p) was thus not violated.



18. That the applicant's application therefore lacks merit and should be dismissed forthwith.

Analysis and Determination

19. The Power of High Court to call for records is provided for under Section 362 of the Criminal Procedure Code.

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.

20. Section 364 of the Criminal Procedure Code provide for the Powers of High Court on revision as follows;

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
- (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (c) in proceedings under section 203 or 296(2) of the Panel Code, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the Prevention of Organized Crimes Act, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.



- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

21. Sentencing is a discretion of the trial court. In *Bernard Kimani Gacheru Vs Republic* (2002) eKLR, the Court of Appeal stated that:-

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

22. This court must be reluctant to interfere in the exercise of judicial discretion in a lower court, unless it is convinced that doing so would be in furtherance of the administration of justice. This principle was clearly stated by the court of appeal in *Mbogo v. Shah* (1968) EA 93 thus:-

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

See also *Mwangi vs. Wambugu* (1984) KLR.

23. In this instance the Appellant did Appeal against the Sentence, the High Court considered the sentence on Appeal finding fort not disturbing the same agreeing with the sound reasoning of the Trial magistrate further indicating that the Applicant may only be eligible for early release after serving at least twenty (20) years.

24. The Applicant further filed a constitutional petition before this very court that was dismissed for want of jurisdiction.

25. In the case of *Prosecutor v. Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a court when examining the issues pertaining to section 362 of the Criminal Procedure Code as follows: -

- a. Where the decision is grossly erroneous;
- b. Where there is no compliance with the provisions of the law;
- c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- d. Where the material evidence on the parties is not considered; and
- e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.



26. The Applicant has not showcased how the trial magistrate failed to exercise his discretion judiciously, he has failed to show case how he was deprived off if at all his right to mitigate before he was sentenced.
27. On the same vein his Appeal did subject the sentence to scrutiny and evaluation with the same being upheld.
28. This being a criminal revision, the onus was on the Applicant to demonstrate the sentence as imposed was illegal, that its imposition was grossly irregular and that the trial court did not exercise its discretion in a judicious manner.
29. This Court notes the aggravating factors that informed sentencing and as such the issue of section 333 of the criminal procedure would be inapplicable. The sentence imposed was a deterrent sentence.
30. In the upshot this court finds that it cannot re-open the sentencing that has been determined on appeal by this very court.
31. This court finds this Application to lack merit and the same is dismissed.
33. The Court notes that the Applicant may by industry and good conduct earn a remission of one-third of his sentence from the Prison Remission program.

It is so Ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 18TH OCTOBER, 2024.

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MOHOCHI S.M

JUDGE

