Mwangi v Republic (Criminal Miscellaneous Application E004 of 2024) [2024] KEHC 12484 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12484 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL MISCELLANEOUS APPLICATION E004 OF 2024

DKN MAGARE, J

OCTOBER 9, 2024

BETWEEN

DANFORD KABAGE MWANGI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling over an application dated 16/1/2024 by the Applicant seeking to review sentence to take into consideration time spent in custody.
2. The application is supported by the affidavit of the Applicant and it was deposed in material as follows:
    a. The Applicant was arrested on 15/8/2016 and remained in remand until 22/12/2016. His bond was cancelled on 17/5/2019 and he was convicted on 28/6/2019.
    b. The time spent in custody was not considered during sentencing.
    c. Prays for noncustodial sentence.
3. The Respondent filed a preliminary objection dated 31/7/2024 on the ground that the issue of time spent in custody was well considered and was res judicata and a review would not stand in a court of concurrent jurisdiction.

Submissions

4. The Respondent filed submissions dated 31st July 2024 and urged the court to dismiss the Application as res judicata and a review would not be entertained as the Applicant ought to have appealed to the Court of Appeal. On his part, the Applicant did not file submissions.

Analysis

5. The issue is whether this court has jurisdiction to revise its sentence on account of the time spent in custody.

6. The court notes that in her ruling on sentence, Matheka J took into consideration that the Applicant was a first offender as well as the time spent in custody and sentenced the Applicant to 10 years imprisonment on the conviction of murder contrary to Section 203 as read with 204 of the *Penal Code*.

7. The Applicant seeks what appears to be revision of the sentence to take into account the time he has spent in custody. The revisionary powers of this court are set out under the law. Under Section 362 of the *Criminal Procedure Code* it is provided as follows:

> 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.

8. Further, Section 367 of the *Criminal Procedure Code*, on the other hand, provides as hereunder: -

> When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

9. Revisionary powers are therefore exercisable in respect of a decision of the Subordinate Court to this Court. In the circumstances, this court has to first establish whether it has the jurisdiction to entertain a revision of sentence in the manner suggested by the Applicant.

10. It is my understanding that jurisdiction is everything. The court is bound to take jurisdiction where it has and down its tools where it does not have jurisdiction. My senior brother Nyarangi JA, as he was then, immortalized these words, in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR as follows: -

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> > "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or

> tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

11. This means that the court cannot assume jurisdiction that it does not have nor eschew jurisdiction it has. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

12. The Applicant asks this court to consider time spent in custody with the effect of reducing the sentence of 10 years. In its sentencing ruling dated 28/6/2019, this court observed the parameters stipulated in the case of Francis Karioko Muruatetu & another v Republic (2017) eKLR and considered the time spent by the Applicant in custody before arriving at the 10 years imprisonment. Therefore, the Applicant appears to be appealing against the Ruling of this court but to the same court, through the back door. This is improper. It is an abuse of the court process. The Court was functus officio upon pronouncing itself on conviction and sentence and the option that the Applicant had was to appeal but not revision.

13. The application is thus wrongly before this court. Therefore, I down my tools.

Determination

14. In the upshot, I make the following orders: -

    a. The application dated 16/1/2024 is therefore dismissed.

    b. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 9TH DAY OF OCTOBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Applicant in person

Court Assistant – Jedidah