



REPUBLIC OF KENYA



KENYA LAW
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**Keroro v Republic (Criminal Revision E039 of 2022)
[2023] KEHC 2210 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL REVISION E039 OF 2022**

WA OKWANY, J

MARCH 9, 2023

BETWEEN

GEOFFREY AKUNGA KERORO PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner herein, Geoffrey Akunga Keroro, was convicted by this Court (differently constituted) in Nyamira High Court in Criminal Case No 42 of 2015 of the offence of murder on December 20, 2018 and sentenced to serve 20 years imprisonment. He did not appeal against the conviction or sentence.
2. This file is before me for revision under section 362 and 364 of the *Criminal Procedure Code*.
3. The Petitioner filed this petition on August 18, 2022 seeking orders under Section 333(2) of the Criminal Procedure Code which provides that the trial court, while sentencing, shall take into consideration the period spent in custody pending hearing and determination of the case. The Petitioner contends that he is remorseful for the offence that he committed, that he has fully reformed and is now ready to be reintegrated back to the society. He seeks the reduction of the sentence that he is currently serving and faults the trial court for failing to consider the 9 years that he had spent in custody into account while passing the sentence.
4. I will now proceed and consider the competency of the Petition given its background facts.



5. It is imperative to mention that the jurisdiction of a court of law is donated by the Constitution and the statute. In Samuel Kamau Macharia v KCB & 2 others, Civil application No 2 of 2011 it was held that: -

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

6. As I have already stated hereinabove, the petition before me is for review of sentence under Section 333(2) of the Criminal Procedure Code which, he alleges, was overlooked by the trial court. It is therefore important to examine the provisions of the law in regard to review of sentences or orders in a criminal case.

7. Article 50(2) of the Constitution provides: -

“Every accused person has the right to a fair trial, which includes the right-

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.”

8. Article 165(6) of the Constitution empowers the High Court to exercise supervisory jurisdiction over subordinate courts.

9. Section 362 of the Criminal Procedure Code provides: -

“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 subordinate court.”

10. Section 364 of the same Code empowers the High court to exercise its revisionary powersconferred to it as a court of appeal by Sections 354, 357 and 358 and may enhance sentence.

11. the Constitution is clear that a person can only apply for review of an order or sentence in a criminal case to a higher court. Section 362 of the Criminal Procedure code limits the revisionary powers of the High Court to orders of the subordinate court. This means that this court has no power to stretch its wings further than the law permits.

12. In the present case, the Petitioner seeks a review of the sentence of this Court. My finding is that the Petition is misconceived as this court does not have revisionary powers over its own sentence.

13. The provisions of section 362 and 364 of the Criminal Procedure Code empowers this court to review the orders of the trial magistrate where a mistake, irregularity or illegality is found to have occurred or where such orders were given without jurisdiction.

14. I have perused the Supreme Court Petition No 15 of 2017 Francis Muruatetu & another that the petitioner relied in seeking the resentencing. The Supreme Court examined comparative jurisprudence and stated:-

“We agree with the reasoning of the courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amicus curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice.....Remitting the matter



back to the high court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.”

15. My understanding of the pronouncement by the Supreme Court is that petitions for resentencing of the petitioners charged and convicted of the offence of murder contrary to sections 203 as read with 204 of the Penal Code is only in respect to the death sentence. In the present case, the Petitioner was not given the death sentence and I therefore find that the principles espoused in the Muruatetu case are not applicable to this case.
16. Section 333(2) of the Criminal Procedure Code provides that: -

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis mine).”
17. The duty to consider the period spent in custody while awaiting trial is also contained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that: -

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
18. The Court of Appeal acknowledged the duty to take in account the period an accused person had remained in custody in sentencing (under section 333(2) of the Criminal Procedure Code) in Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR. (see also Bethwel Wilson Kibor v Republic [2009] eKLR).
19. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be taken into account in meting out the sentence where it is not hindered by other provisions of the law.
20. In addition to my above finding that this court does not have revisionary powers over its own sentence, I find that the proper forum that the Petitioner should have addressed his grievance with the sentence should have been through an appeal to the Court of Appeal. I find that this court became functus officio the moment it rendered its verdict and sentence and cannot therefore be seen to turn around and reconsider/review the sentence.
21. My above findings notwithstanding, and even assuming, for argument’s sake, that this court had the jurisdiction to review the sentence, I still find that the Petition is misconceived as a perusal of the record



reveals that the trial court took into account the years that the Petitioner spent in custody during sentencing when she rendered herself, in part, as follows: -

“The offence attracts a death sentence but this court has considered that the accused is a first offender and also that he has been in custody for nine years. Accordingly, but noting that he is not remorseful, he shall be sentenced to serve twenty (20) years imprisonment.”

22. Having regard to the findings and observations that I have made in this judgment, I find that the instant Petition is not merited and I accordingly dismiss it.
23. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA ON THIS 9TH DAY OF MARCH 2023.

W. A. OKWANY

JUDGE

