



**Obara v Republic (Miscellaneous Criminal Application  
E003 of 2023) [2023] KEHC 21100 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
MISCELLANEOUS CRIMINAL APPLICATION E003 OF 2023**

**PN GICHOHI, J  
JULY 25, 2023**

**BETWEEN**

**KENNEDY OBARA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Justice R. E Sitati)*

**RULING**

1. The applicant herein moved this court by an undated notice of motion filed on January 17, 2023 seeking that this court considers resentencing hearing and resentence arguing that the court has powers to do so under article 165 (3) (b) and article 163 (7) of the Constitution.
2. In support of the application, he swore an affidavit which he filed on January 17, 2023 where he states that he was arrested, charged, tried and convicted for the offence of murder in High Court criminal case No 31 of 2010 and on October 28, 2014, he was sentenced by Justice R. E Sitati to serve 30 years imprisonment.
3. He appealed to the Court of Appeal in Kisumu being Criminal Appeal No 294 of 2018 against both conviction and sentence but before he could be heard and upon advice, he withdrew the appeal and filed Misc criminal application No 8 of 2018 and the same was dismissed by Justice A. Ndungu on February 25, 2020.
4. Further, he filed an application seeking that the period he had served in custody be considered under section 333 (2) of the Criminal Procedure Code but in vain as Justice R. Ougo referred him back to Court of Appeal in Kisumu where he had already done his withdrawal. He maintains that it was unfair for High Court not to have considered the five years he had spent in custody while it passed the sentence. While attaching certificates, he states that he has since acquired a Diploma in AFCM



Certificate in Emmaus Bible School, he urges the court to reduce the sentence at hand and take into account the period he spent while in remand.

5. The prosecution counsel Mr Justus Ochengo opposed that application on April 24, 2023 on the grounds that during mitigation, the issue of period spent in custody was raised and the court, while sentencing, did consider the period served in custody. That the court differently constituted having passed the sentence, this court in *functus officio*. He urges the court to dismiss the application.

### Determination

6. I have considered that application and the response by the respondent. I have also considered the entire court record showing the sequence of events leading to this application. To start with and even before the celebrated Supreme Court decision in *Muruatetu case*, Hon Lady Justice Sitati held while sentencing the accused on October 28, 2014 for the charge of murder:

“The law provides that anybody who is found guilty and convicted of the offence of murder is to be given only one sentence: death. This is what is provided for under section 204 of the *Penal Code*.

The court in this case has listened to and carefully considered the mitigating circumstances put forward by counsel on behalf of the accused person. The court also notes that though the accused is being treated as a first offender, the offence he committed against his own child is most foul offence.

The court also notes that the accused herein has been behind bars since he first appeared in court on April 26, 2010 and there is no doubt that he has learnt his lessons. Taking everything into account, and although the death penalty still sits pretty in our statute books, I hereby sentence the accused person to imprisonment for thirty (30) years.”

7. It is clear that even if the judge did not specifically mention section 333 (2) of the *Criminal Procedure Code* and indicate that the period spent in remand be put into account when computing the sentence, she was mindful of the long period accused had been in custody and that was one of the reasons she gave that sentence. However, it would have been clearer if the judge had at least indicated it specifically that the sentence of thirty (30) years imprisonment run from April 26, 2010 which was the date of first appearance. That position has since been emphasised by the Court of Appeal *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR where the said court held while discussing Sec 333 (2) of the *Criminal Procedure Code* as it dealt with an appeal from High Court decision in HCCRA Nos 106 and 107 of 2013;

“The appellants have been in custody from the date of their arrest on June 19, 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 June 19, 2012."

8. The court record further shows that the applicant wherein approached the court differently constituted and though constitutional petition No 8 of 2018 and sought to have the sentence reviewed but Ndungú J declined on the basis that there was nothing unconstitutional about the sentence herein. The application was dismissed. Another attempt before R. Ougo J, on the same issue was dismissed on October 28, 2018 on the grounds that the issue had been decided by another court of concurrent jurisdiction.
9. The sentence ought to run from the period of arrest if accused was not out on bond. However, despite the apparent hiccup in regard to the sentence not specifically stating that the sentence at least run from the specific date which was April 26, 2010 being the first date of his appearance in court, this court cannot purport to correct error or omission by a court of concurrent jurisdiction.
10. Recourse would have been an appeal before the Court of Appeal but he unfortunately withdrew the appeal. That would have been a perfect chance for the accused to raise the issue for consideration by the Court of Appeal in *Ahamad Abolfathi Mohammed & another* (supra).
11. In conclusion, I agree with the learned prosecution counsel that this court is now functus officio. The application herein is therefore dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 25<sup>TH</sup> DAY OF JULY, 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

Kennedy Obara/ Applicant Absent

Mr. Ochengo for Respondent

Kevin Isindu, Court Assistant

