



**Too v Republic (Miscellaneous Application E137 of 2022)  
[2023] KEHC 20796 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20796 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E137 OF 2022**

**SM MOHOCHI, J**

**JULY 24, 2023**

**BETWEEN**

**MOSES KIPKORIR TOO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is an Application placed before the Court seeking that the Court reviews and converts the imprisonment sentence in High Court of Kenya at Kericho, Criminal Case No 007 of 2003, from a mandatory death sentence to a non-custodial sentence.
2. The Applicant is currently serving a death sentence, having been convicted and sentenced on July 20, 2007, with his trial having commenced in the year 2002 together with two co-accused persons of whom one is deceased while the other one is serving a 3-year probation for the same offence.
3. The trio appealed to the Court of Appeal vide Nakuru Court of Appeal Criminal Appeal Number 634 of 2010 and by dint of the judgment delivered on the April 12, 2013, the Court of Appeal dismissed the appeal hence upholding the High Court decision. As at the time of prosecuting the appeal, before the Court of Appeal, the 2<sup>nd</sup> Appellant (Charles Kipkoech Korir) was deceased.
4. The Applicant's Co-Appellant Geoffrey Kipkemoi Kemei successfully filed a sentence review Application vide Nakuru High Court Miscellaneous Criminal Application Number 255 of 2018 whose Ruling was delivered on November 9, 2022 whereby the Applicant's death sentence was set aside and varied to a three-year probationary supervision sentence.
5. The Application before the Court was filed in person and under the Reliefs sought the applicant prayed for: -



- i. That the Honourable Court be pleased to consider grant me an appropriate sentence to be served to the Applicant pursuant to the Supreme Court Order dated December 14, 2017 vide Petition Number 15 of 2017.
  - ii. This Honourable Court be pleased to grant an appropriate sentence as prayed herein.
6. The Applicant preferred the mitigation anchoring them on the Supreme Court Petition Number 15 & 16 of 2015 delivered on the December 14, 2015.
  7. The Applicant's Application for review is premised on four (4) grounds;
    - a. That the Applicant is remorseful
    - b. There has been no previous conviction
    - c. That the applicant has been in custody since 2002 when he was arrested and detained up to date
    - d. The report in support of the Applicant's reduction of sentence.
  8. The Applicant invites the Court to the pronouncement in the case of *Abamad Abulfathi Mohamed & Another -V- Republic (2018) eKLR* the Court stated thus: -

' The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *criminal procedure code*. That provision provides as follows:

'333

(2) 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

I) Has. prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.'

9. The Applicant has been in custody from the date of his arrest on the June 19, 2002. By dint of Section 333(2) of the Criminal Procedure Code the court was obliged to take account the period that they had spent in custody that they had spent in custody before they sentenced. Although the learned judge stated that, he had taken into account the period the Applicant had been in custody he ordered that their sentence shall take effect from the date of their conviction by the trial court.
10. With respect, there is no evidence that the court took into account the period already spent by the appellant 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.
11. 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(s) power to include the period already spent in custody in the sentence that it metes out to the accused person.



12. This court finds that, the first appellate court misdirected itself in that respect and should have directed the Applicant' sentence of imprisonment to run from the date of their arrest on June 19, 2002.
13. The Applicant has no other pending or previous conviction save for the case herein. It is urged on his behalf for the Court to rely upon the fact that there was no previous conviction in passing the sentence. We rely on the case of [Francis Opondo -V- Republic \(2017\) eKLR](#) in which the Court held thus:-

' The antecedents of an accused person also come into play when the court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the court is to encourage reform and discourage recidivism.'

14. The Appellant herein had no previous records as communicated to the Trial Court by the prosecutor. He ought to have been treated as a first offender. He had been in remand for close to eleven months and the Court ought to have taken this period into account. The record does not show that the Court considered this fact when imposing the prison sentence.

The Applicant relied on the following authorities;

- i. Francis Opondo -V- Republic (supra),
- ii. [Lawrence Nkonge Mwiandi Rep \[2018\]](#);
- iii. *Misc. Application No. 72 of 2018, Rep V John Nganga Gacheru & Another*;
- iv. *Mark Nakitare Simiyu v Rep Criminal Appeal No.32 of 2011*;
- v. [Douglas Muthaura Ntoribi V Republic \(2018\) eKLR](#); and
- vi. [Maurice Amukiese Mutambi V Republic \(2020\) eKLR](#).

### **Issue for determination**

15. The issue for determination is, whether the Applicant has established a case for revision based on the provisions of Article 165 (6) of the [Constitution](#) and under Section 362 of the Criminal Procedure Code.

### **The Law**

16. The High Court power of revision is set out in Article 165 which provides:-

- ' (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.'

17. Section 362 of the Criminal Procedure Code, empowers the High Court to call 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.



18. Section 364(1) of the Criminal Procedure Code provides: -

' 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 his 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 section 354, 357 and 358, and may enhance sentence;
- (b) In the case of any other order other than an order of acquittal alter or reverse the order.
- (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.'

19. In the case of *Prosecutor vs Stephen Lesinko [2018] eKLR* Nyakundi J outlined the principles to guide the 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.

20. The foregoing provisions bestow jurisdiction to this Court to exercise revisionary powers in respect of orders of the Subordinate Courts. This Court is therefore possessed of the requisite jurisdiction to hear and determine this application.

21. Guided by the favorable report, which paints him as a person ready to go back to the community and family, and pursuant to the guidance of Muruatetu 1, the Court finds the Applicant suitable for a non-custodial sentence recommended in the report, Probation and After Care Services has committed to endeavor to ensure his smooth reintegration and re-settlement back into the community and the family if released on probation supervision for three (3) years.

22. In the circumstances, the death sentence imposed is hereby reviewed and set-aside as follows: -

- i. The twenty-one (21) years' time served in prison, is sufficient custodial term for the offence.
- ii. For the purpose of reintegration and settlement, the Applicant is placed on probation supervision for three (3) years, during which he will abide by the supervision order, and not commit any other offence.

23. The Probation Officer to ensure the Applicant abides per the conditions set.

It is so ordered.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 24<sup>TH</sup> JULY 2023**



.....

**Mohochi S.M**

**JUDGE**

**Coram:**

C.A Schola

**Maragia Ogáro Advocate for the Applicant**

