



**Samal v Republic (Miscellaneous Application E094 of 2023)
[2023] KEHC 22381 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS APPLICATION E094 OF 2023
RN NYAKUNDI, J
SEPTEMBER 19, 2023**

BETWEEN

LOWOYA SAMAL APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with offence of Robbery with violence contrary to Section 296 (2) of the [Penal Code](#). The trial magistrate made a finding of guilty for the offence followed with a conviction and mandatory sentence to serve a death by hanging. Being dissatisfied with both conviction and sentence he appealed to the High Court which made a finding as follows: I find that the evidence does not disclose the offence of robbery with violence it rather discloses the offence of causing grievous harm contrary to section 234 of the penal code under section 364 of the [criminal procedure code](#), I hereby quash conviction on robbery with violence set aside the death sentence and hereby substitute the offence with causing grievous harm contrary to section 234 of the penal code. I hereby sentence the appellant to serve 10 years imprisonment from date of judgement 3.8.2017. The second bite on the cherry concerns the following prayers:
 1. That: I was convicted and sentenced to serve Death sentence before being reduced to 10 years imprisonment by the court for the alternative offence of grievous harm.
 2. That: My lordship, the time I spent in custody was not considered during my resentencing. Hence section 333(2) of the criminal procedure code requires a sentencing court to take into account the period that a convicted person has spent in custody prior to the sentence.
 3. That the applicant is serving excessive sentence since Article 27(1) was violated relying on the case of Bernard Mulwa Musyoka vs Rep 26/01/2018 at Mombasa and Abdul Hussein Gholi Safe and Another vs Rep2018 eKLR



4. That I the applicant had never been released on bond up to conviction.
2. I bare in mind the maxim that an appropriate sentence is a matter for the discretion for the trial magistrate. For even on appeal the 1st or 2nd Appellate court would not normally interfere with such a discretion of the sentencing trial magistrate unless the sentence is blatantly illegal, wrong, manifestly excessive or punitive likely to amount to a prejudice or injustice to the Applicant. The major grievance is on Section 333(2) of the criminal procedure code but the applicant forgets that the initial sentence imposed was the death penalty for the offence of robbery with violence contrary to 296(2) of the penal code. The substitution of the offence of robbery with violence with that of grievous harm was the cumulative effect on what the High Court considered to be a proper sentence based on the circumstances and gravity of the offence. From the record, applicant was arraigned in court on 27th September 2016 whereas the final judgement by the trial court was read and pronounced on 3rd August 2017. This indictment was post 2010 constitution which prescribed under Article 49 (1) (h) that every arrested person has a right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. It is not on record that the applicant was in remand custody for the entire period to call upon this court to invoke Section 333(2) of the CPC. I therefore find no material evidence to exercise discretion in favour of the applicant as agitated in the notice of motion. There is also no evidence that the sentence imposed by the High Court was unlawful to be subjected to a resentencing pursuant to Article 50 (6) (a) & (b) of the constitution. The application stands dismissed by want of merit.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF SEPTEMBER 2023.

R. NYAKUNDI

JUDGE

In the Presence of

Mr. Kakoi for the DPP

Applicant Present

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R. NYAKUNDI

JUDGE

