



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO. 193 OF 2019

LESIT, J

MOSES OTIENO DOLA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being application for review of order in sentence by Lady Justice Lagat-Korir dated 29th November, 2018)

RULING ON APPLICATION FOR REVIEW

1. The Applicant has brought an application by way of a Notice of Motion. He seeks orders as follows:

(1) That may this application be considered on clemency basis with regards to the legality of the sentence only and consider a reduction of the same.

(2) That the sentence imposed falls within the probative terms and I do hereby request the honorable court to consider ordering it to be served under probation.

(3) That may it please this honourable court to substitute the imprisonment term with a non-custodial one for the sake of natural justice and alternative sentencing.

(4) That this application is grounded on the attached affidavit of MOSES OTIENO DOLA and other reasons to be adduced at the hearing of this application.

2. The application is premised on the supporting affidavit sworn by the Applicant. In brief the Applicant deposes that he was in remand custody for 21 months before posting bail and a further 2 months awaiting sentence and now seeks that the said period be considered as part of his sentence. He deposes further that he has undergone prison based reform programs including counselling and hence was begging for leniency and a second chance.

3. The Applicant deposes that through his family he has initiated reconciliatory talks with the family of his wife, the deceased in this case. He requests the court to consider the pre-sentence Report of the Probation Officer ordered by the trial Judge.

4. The Applicant gave submissions in this case virtually, on the 7th of May 2021. In his submissions he urged that he was basing his application on **Section 333(2) of the Criminal Procedure Code, Article 165(3) (b) of the Constitution**. He submitted that the law gave the High Court jurisdiction to determine the question whether a fundamental right and freedom has been infringed. He urged that the law gave the High Court supervisory jurisdiction over any other person, body or subordinate court.

5. The Applicant invoked the judgment of Odunga, J in **Vincent Jonah & 87 others Petition No. 15 of 2020**. The case was however not provided, and an attempt to search for it was futile.

6. The Applicant urged that he was seeking for a review of his sentence in terms of factoring in the period he spent in custody, both before posting bail and after conviction but before sentence. In addition, the Applicant urged the court to consider his character during the period he has been in prison. He relied on a Recommendation Letter given to him by Kenya Prison. He also submitted that he has since developed arthritis and required frequent visits to the orthopaedic for physiotherapy.

7. Ms Kibathi, learned Prosecution Counsel represented the State in this matter. Learned Counsel submitted that this court lacks jurisdiction to entertain the application. She urged that the Applicant was tried before Lagat – Korir Judge, a court of parallel jurisdiction as this court. That counsel urged, the Application was tantamount to asking this court to sit on appeal on its own decision. Counsel that since this court has made a final determination in the matter, the Applicant ought to file an appeal to the Court of Appeal if aggrieved by the sentence given by this court.

8. Ms Kibathi urged that the supervisory powers vested on this court under **Article 165** of the **Constitution** does not apply in this matter. Counsel further urged that the case cited by the Applicant, Petition No. 15 of 2020 by Odunga, J. was merely persuasive and not binding on this court.

9. Finally, Ms Kibathi urged that the court gave a very lenient sentence of 10 years, and to arrive at that sentence the court considered various aspects, including the time spent in custody and the Pre-Sentence Report by Probation. Learned Counsel urged the court to dismiss the application.

10. The Applicant in response to the submissions by the State, urged the court to consider whether there was meaningful consideration of the period of his incarceration before sentence.

11. I have considered this application, the affidavit sworn in its support together with submissions by both the Applicant and the State. The Applicant was sentenced to 10 years imprisonment by Lagat-Korir, J. on 29th November 2018. This was after a full trial in which the trial Judge substituted the charge facing the Applicant from murder contrary to **section 203** of the **Penal Code** to **Manslaughter** contrary to **section 202** of the **Penal Code**.

12. The key issue in this application is whether this court has jurisdiction to entertain the application in the first place. In **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & another [2012] eKLR**. It was held by the Supreme Court 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.”

13. The Applicant urged that this court has jurisdiction by virtue of **Article 165(6)** of the **Constitution**. This Article provides:

“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 not over a superior court.”

14. The provision does not aid the Applicant. It specifically bars this court from exercising supervisory powers over itself, which is what the Applicant sought this court to do.

15. The Applicant urged that this court has power to adjudicate on his application by virtue of **section 333(2)** of the **Criminal Procedure Code**. That section provides:

“(2) Subject to the provisions of section 38 of the Penal Code 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.”

16. The law is clear that the period a person was held in custody prior to being sentenced shall be taken into account. The sentence in this case was imposed by Lagat-Korir, J, a court of parallel jurisdiction, which was the trial court in this matter. That means that if the Applicant was aggrieved in the manner in which the period he spent in custody before sentence was considered, or not, his recourse is not before this court. His grievance should be addressed on appeal before the Court of Appeal.

17. He cannot return back to this same court to consider his grievance, for two reasons. First and most, it is this court which passed the impugned sentence. Having delivered itself on the matter, this court is *functus officio*. Secondly, the grievance he now has should be a ground of appeal which can only be considered on appeal before the Court of Appeal.

18. For these reasons, the application before this court is bad in law, incompetent and good only for striking out, which I hereby do.

DATED AT NAIROBI THIS 16TH DAY OF JUNE 2021.

LESIT, J.

JUDGE

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JUNE, 2021

BY

OGEMBO, D.O.

JUDGE

Court:

Ruling read out in court (on-line) in the presence of the applicant (Kiambu Prison) and Mr. Chebii for the state.

OGEMBO, D.O.

JUDGE

Appellant:

I filed an application yesterday about this ruling which was pending, I have been told by prison that it was not forwarded. I apologise.

Mr. Chebii:

I am not aware of the application.

Court:

The application, if at all, of the applicant, is not on the file. In view of the comment of the applicant, matter is left at that.

OGEMBO, D.O.

JUDGE