



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

MISC. CRIMINAL APPLICATION NO. E020 OF 2021

EVANS KIPKEMOI MUTAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant in this case was initially charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Upon plea agreement with the prosecution, the charge was reduced to manslaughter to which he pleaded guilty. He was convicted on his own guilty plea by Muya J on 29th May 2018.
2. The court after considering the pre-sentence probation officer's report and the mitigation sentenced the Applicant to serve 9 years imprisonment on 19th June 2018.
3. The Applicant has now approached this court seeking that his sentence be reviewed to take into consideration the 11 months spent in pre-trial remand. He has asked the court to invoke Section 333 of the Criminal Procedure Code (CPC).
4. In the Supporting Affidavit the Applicant states that he was convicted of murder which upon trial was reduced to manslaughter. That he had spent 11 months in custody when he was sentenced to serve 9 years imprisonment. That the court should invoke Section 333 of the Criminal Procedure Code and revise his sentence to include the pre-trial custody; and; that the court should grant him a non-custodial sentence so that he can re-unite with his family.
5. At the hearing of the application on 28th September 2021, the Applicant relied on the written application and annexures. He further submitted that he was charged in 2017 and was convicted after 11 months of pre-trial custody. He submitted that he was satisfied with the conviction and was only praying that the period be included in order to reduce his 9 year sentence. He submitted that he had acquired various skills while in prison custody.
6. In his submissions, Mr. Murithi learned Prosecution Counsel stated that a sentence of 9 years for manslaughter was lenient considered against the maximum sentence which is life imprisonment. Further, Counsel submitted that the court having delivered itself on the sentence had no jurisdiction.
7. In response the Applicant submitted that he was only concerned about the period he spent in remand.
8. From the application and the respective submissions, two issues arise for my determination. Firstly, is whether this court has the jurisdiction to determine the application, and secondly; whether the court should revise the sentence issued.
9. **Section 332 of the Criminal Procedure Code** 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.”

10. The above Section entitles a convicted person to have the period spent in remand factored into the sentence upon conviction.

11. In this case, I have perused the trial file. The record shows that the Applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was alleged to have murdered his wife one Sheila Chepkorir on 18th July 2017. In the course of trial however, the parties entered into a plea agreement and the charge was reduced to one of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The Applicant pleaded guilty and was convicted on his own plea. He was sentenced to serve 9 years imprisonment by Muya J.

12. The question which arises here is whether this court has revisionary jurisdiction over a matter that has been decided by a court of equal jurisdiction. The answer to this question is found in Article 165 (6) of the Constitution and Section 362 – 366 of the Criminal Procedure Code.

13. The Revisionary powers of the High Court are provided under **Article 165** of the Constitution and **Section 362 to 366** of the Criminal Procedure Code which provide as follows:-

Article 165 of the Constitution

“(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 not 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.”

Section 362 of the Criminal Procedure Code, Cap 75

“Power of the High Court to Call for Records:

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 such subordinate court.”

Section 364 further outlines the manner in which this jurisdiction should be exercised. It states as follows:

“Powers of the High Court on Revision

(1) 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 its knowledge, the High Court may –

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 defense:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

14. **Section 364** outlines the manner in which the revision jurisdiction should be exercised. It states as follows:

“Powers of the High Court on Revision

(1.) 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 its 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 sections 354, 357 and 358, and may enhance the 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 defense:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3.) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed that might have been inflicted by the court which imposed the sentence.

4.) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

5.) When an appeal lies from a finding a sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

15. It is clear from the provision above that this court does not have jurisdiction to reconsider the sentence meted out by Muya J, a court of equal jurisdiction. In **Ronald Kibet Rotich Vs. Republic Bomet High Court Misc. Criminal Application No. E024 of 2021 (2021) eKLR**, this court stated thus:- **“Once the court considered and rendered itself on the appropriate sentence, it became functus officio.”** I agree with the reasoning of Lesiit J. (now JA) in **Moses Otieno Dola V. R, Criminal Revision Case No. 193 of 2019, (2021) eKLR** where on considering a similar application held that:-

“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.

He cannot return back to this same court to consider his grievance, for two reasons. First and foremost, 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.”

16. Having found that this court has no jurisdiction to revise the sentence issued by Muya J, I need not go into the merits of the application. The same is struck out to enable the Applicant urge the same in the court of appeal.

17. Orders accordingly.

Ruling delivered dated and signed this 17th day of November, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant, Mr. Murithi for the Respondent and Kiprotich (Court Assistant)