



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL REVISION NO. 115 OF 2019

GEDI BARE BAROW.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant **Gedi Bare Barow** was faced with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars thereof being that he had on the night of 7th August 2010 at Jarirot Sub-Location of Garissa District murdered **Abdi Ahmed Dahir**.

2. The Applicant denied the charge, the matter proceeded to full trial, he was found guilty of the offence, convicted and sentenced to 20 years imprisonment.

3. There is no indication from the record before court that an appeal to the Court of Appeal was preferred. The Applicant has now moved the court by way of an application seeking for review of the sentence that was meted out on him on the following grounds;

- i. He was a first offender.**
- ii. During a raid at Kamiti Prison in 2014 he received severe permanent injuries.**
- iii. He was the sole breadwinner of his family.**
- iv. The period of 7 years he spent in custody awaiting trial was not considered at the time of sentencing.**
- v. He seeks for non-custodial sentence.**

4. The application was opposed by the State.

The matter proceeded by way of submissions as follows;

Applicant's Submissions

In the submissions the Applicant concentrated on the prosecution evidence, analyzing and criticizing the same as if he were conducting an appeal. He did not address any of the grounds raised in the application. However, at the time of highlighting his submissions he urged the court to consider the 1 year and a few months he spent in custody as the same was not considered by the trial court.

Prosecution's Submissions

It was submitted that his submissions, the Applicant challenges both conviction and sentence which ought to be done by way of an appeal. That it is in very rare occasions that the High Court would call and review its on orders. Further, the decision at hand was made by a court of concurrent jurisdiction.

In relation to consideration of the time spent in custody the same was left to the court's discretion.

5. As aptly stated by the State, this very court passed Judgement against the Applicant. Procedurally therefore this court cannot sit on appeal against its own decision. In the application the Applicant raised issues as follows;

- **on the contradictory nature of the prosecution evidence.**
- **analyzation of the pathologist.**
- **issue of identification; and**
- **reliance on hearsay evidence.**

All the above are materials for an appeal which ought to have been preferred to the Court of Appeal.

Therefore, the grounds raised in the application based on the above must of necessity fail.

6. **Section 333(2)** of the Criminal Procedure Code provides

“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 for in this Code. Provided that where thee 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.”

7. The provision is also captured in the **Judiciary Sentencing Guidelines** mainly **Clauses 7.10** and **7.11** as follows;

“The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportionate to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during trial.”

8. From the record the charge sheet (information) is dated 23rd August 2010 and the first appearance before a judge the 7th of September 2010. Sentense was read and on the 9th of May 2013. The case was triad in a record 2 years 5 months and therefore the Applicant could not have spent seven years in custody as he alleged. Further the issue of his time in custody was raised very succinctly by his counsel in mitigation.

In passing sentense the judge indicated that she had considered the mitigation of counsel. Secondly, the circumstances of the case were considered.

I have considered the record and since the circumstances that led to the death of the deceased in this case, I also appreciate that sentensing is discretionary on the part of a Judicial Officer.

Thirdly, the fact that in the circumstances the Applicant got away with a reasonable sentense that must have considered the time spent in custody and I therefore find no reason to interfere with the same.

Application is declined.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 4th DAY OF NOVEMBER, 2021.

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ALI-ARONI

JUDGE