



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL REVISION NO. E034 OF 2021

JOHN IKUYU KATHARE APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1 This ruling relates to the undated chamber summons filed in court on 14th June 2021 by the applicant seeking for orders that, the Honorable court be pleased to review the sentence imposed on him by the Court of Appeal by factoring in the period spent in custody from the date of arrest on 16/3/2009 to date of conviction in 20/2/2015 and to impose an appropriate sentence to be served after application of Section 333(2) of the Criminal Procedure Code.

2. The grounds put forth in supporting the application are that, the applicant was convicted on 20/2/2015 in Meru High Court Criminal Case No. 33 of 2009 for the offence of murder and sentenced to death. He appealed against the conviction and sentence but the court of appeal upheld the conviction but tinkered with the sentence by imposing a jail term of 15 years in place of the death sentence. His plea is that the court considers the period spent in custody pending trial so that the sentence runs from that date.

3. The prosecution, in opposition prayed that the matter be struck out for lack of jurisdiction by putting reliance on the decision in **Kenneth Kirimi v Republic** in which Muchemi J held that the revision power of the High Court is limited to revision of orders by the subordinate courts and never extendable to orders by courts of equal jurisdiction or those above the High Court.

4. The brief background facts of the matter are that having been charged with the offence of Murder in Meru H C CR C No 33 of 2009, he was convicted and sentenced to suffer death, appealed against the sentence and conviction in Nyeri C A CR A No 65 of 2016 and the sentence was reduced to a term of 15 years. Unfortunately, the decision by the court of appeal was never availed to court and my search of the internet has not availed it. I have thus been unable to know what the court of appeal considered and said in arriving at the sentence and whether the period served while undergoing trial was reckoned with.

Analysis and Determination

5. Section 333(2) of the Criminal Procedure Code mandates a court to take into consideration the period an accused has been in custody, during sentencing. That duty is not limited to the trial court only but also upon the first appellate court which proceeds by way of a retrial. The court of appeal was thus bound to reckon with the period of incarceration pending trial. If it be demonstrated that the court made any error in ignoring the legal requirement upon it, it never sits with the High Court to correct such an error. This I find well aware that the duty to take such period into consideration is not an option but a duty.

6. That duty was laid out by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR** where it stated;

“By dint of Section 333 (2) of the Criminal Procedure Code, the court has obliged to take into account the period that they had spent in custody before they were sentenced.

Although the learned Judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants 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.”

7. I therefore find that it is mandatory that the period for which an accused has been held in custody prior to being sentenced, be taken into account during meting out the sentence.

8. Here the applicant claims that he was arrested on 16/2/2009 and was in custody throughout the trial and to date and that no regard was given to the period in the sentence meted by the court of appeal. While that may be true, this court has not had the benefit to verify those allegations, as the Court of Appeal record, including the judgment, was never availed, to ascertain the true position in this matter.

9. With the said facts, I find that this court has no jurisdiction to purport to revise the decision on sentence by the Court of Appeal especially where this court's decision has been subjected to an appeal by that appellate court. Without jurisdiction I find that the matter is improperly before the court for which reason I order that it be struck out for want of jurisdiction

Dated, signed and delivered at Meru virtually via Microsoft teams this 8th day of November, 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Maina for the prosecution/respondent

Petitioner in person in custody

Patrick J.O Otieno

Judge