Pamba v Republic (Criminal Application E003 of 2025)
[2025] KECA 793 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 793 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPLICATION E003 OF 2025

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 9, 2025

BETWEEN

CALEB OMONDI PAMBA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(An application under section 333(2) of the Criminal Procedure Code emanating from the judgment of the Court of Appeal, Kisumu, (Nambuye, Asike-Makhandia & Kantai JJA), dated 21st day of November, 2019 in (Court of Appeal Criminal Appeal Number 46 of 2016))

RULING

1. The applicant was tried and convicted by the High Court of Kenya at Busia in criminal case number 11 of 2012 for the offence of murder, contrary to Section 203, as read with Section 204, of the *Penal Code*. Consequent upon which, he was sentenced to death as was mandatorily required by the law at the time.

2. The applicant appealed against the conviction and sentence to the Court of Appeal at Kisumu in Criminal Appeal Number 46 of 2016.

   This court (Nambuye, Asike-Makhandia & Kantai JJA), upon merit hearing of the appeal, dismissed it on conviction but partially allowed it on sentence by reducing it from death sentence to 25 years' imprisonment. This was on the basis of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, which held that the mandatory nature of death sentence in murder cases was unconstitutional.

3. The applicant did not stop there but reverted to the High Court after this Court's decision aforesaid. In the High Court, at Kisumu, he filed Miscellaneous Criminal Application Numbers. E003 and E015 both of 2023, praying that since the period he spent in remand custody awaiting the trial and determination of his case was not considered during the initial sentencing, the High Court do review

the sentence by taking into account the custody period, pursuant to the provisions of section 333(2) of the *Criminal Procedure Code*.

4. Upon hearing the application, the High Court declined the prayer sort on the ground that it lacked jurisdiction and rightly so in our view, to revisit a sentence imposed by the Court of Appeal. In support of the position, the High Court referred to the case of *Grace Sarapay Wakhungu & 2 others v Republic* - Nairobi Criminal Appeal Number E039 of 2022, in which this Court stated that, a lower court has no jurisdiction to review a decision of a Higher Court to it.

5. The High Court further emphasized that any issues arising from the judgment of the Court of Appeal, should be addressed by the said Court or through an appeal to the Supreme Court.

6. Undeterred, the applicant is now before us with a similar application and invoking similar prayers. Suffice to add that the only other prayer he has added is that we grant any other relief we may deem fit and appropriate.

7. The motion is supported by the applicant's undated affidavit, which reiterates the case history and the grounds in support thereof already set out in this ruling and we need not rehash. The respondent did not file any papers in support or opposition to the application.

8. When the application was heard on 26th February 2025, the applicant appeared in person, while the respondent was represented by Mr. Okango, the learned Assistant Director of Public Prosecutions. None of the parties had filed written submissions. Accordingly, they opted to canvas the application orally.

9. The applicant relied on the contents of the application and reiterated that this court should consider the time he had spent in custody while undergoing trial and deduct it from 25-years of imprisonment imposed by this court.

10. In opposition, Mr. Okango asserted that the Court of Appeal, while reducing the sentence to 25 years, did so within its appellate jurisdiction; therefore, section 333(2) of the *Criminal Procedure Code* was not applicable. That the application was in any event unknown in law and ought to be struck out as the court was *functus officio*.

11. The sole issue for our determination is whether the applicant is entitled to a review of sentence imposed by this court pursuant to Section 333(2) of the *Criminal Procedure Code*. That section provides *inter alia*:

> " 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

12. It is therefore apparent that the period which an accused has been held in custody pending trial and determination of his case has to be considered in meting out the sentence where it is not hindered by any other provisions of the law. In the case of *Bukenya v Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 the Court of Appeal stated that:

> " Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in exact that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court

pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgment"

13. We fully concur and accept that this is the proper position in law. However, the specific circumstances of the current application differ significantly. As we have already stated, the judgment rendered by this Court arose from an appeal against the judgment of the High Court dated 20th November 2014. The appellate judgment partially allowed the appeal on sentence by reducing it to 25 years, not in the capacity of a trial court but as an appellate court.

14. It is essential to emphasize that the consideration of the period spent in custody, as mandated by section 333(2) of the *Criminal Procedure Code*, is within the purview of the trial court during the initial sentencing phase. This provision does not extend to the appellate court once an appeal has been adjudicated upon resulting in either the enhancement or reduction of the sentence. Indeed we note that some of the grounds of the initial appeal to this Court were on sentence. It is also not lost on us that the appellant had been sentenced to death.

15. In a nutshell therefore, section 333(2) of the *Criminal Procedure Code* is specifically intended for application during the initial sentencing stage.

16. In any case if the applicant was unhappy with the decision of the High Court in dismissing the applications, he should have proffered an appeal instead of embarking on the instant application. This court only deals with appeals and not matters specifically reserved for courts of original jurisdiction. Further, once this court makes any determination of whatever kind in an appeal, it becomes *functus officio*.

17. Having determined as above, this application is devoid of merit and is accordingly dismissed.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR