Kemboi v Republic (Miscellaneous Criminal Application E101 of 2024) [2025] KEHC 924 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION E101 OF 2024

SC CHIRCHIR, J

JANUARY 30, 2025

IN THE MATTER OF ARTICLES 22 (1), 23(1), 25 (C), 27 (10(4), (50(2) (P) (Q) AND 165 (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

BETWEEN

NICHOLAS KIMARU KEMBOI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By way of Notice of Motion dated 24th June 2024, the applicant herein seeks for a review of his sentence. He further prays that this court considers the time in which he had spent in remand prior to conviction.

2. He states that he was sentenced to 40 years imprisonment upon being convicted of the offence of murder ; that he has he has undergone rehabilitation programmes which have transformed his behaviour.He considers the sentence imposed to have been lacking in proportionality.

3. He submits that this court is clothed with the jurisdiction to determine this Application.

4. The application was canvassed by way of written submissions and I have perused and considered the Applicant's submissions. There was no response on the part of the Respondent.

Analysis and Determination.

5. The Applicant was convicted and sentenced by this court.(Musyoka J).He was sentenced to serve 40 years . He has come back to this court seeking for resentencing purportedly in accordance with the

directions given by the supreme court in Muruatetu case (ref: *Muruatetu & another v Republic; Katiba Institute & 4 others* (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)

6. However the directions on resentencing given by the supreme court in Murautetu case only applied to convicts who had been sentenced to death. The Applicant in this case was not sentenced to death. Further the ruling on sentence delivered on 10th April 2019 shows that the court recorded and considered his mitigation.

7. Nevertheless, the Applicant herein is not legible for resentencing.

8. The Applicant has further pleaded that the period spent in custody should be factored in.

9. I have perused the ruling and noted that the ruling is silent on whether the provisions of Section 333(2) was taken into consideration. The section provides as follows:

> " 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"

10. The essence and objective of section 333(2) of the *criminal procedure code* was explained by the court of Appeal in In *Ahamad Abolfathi Mohammed & Another v Republic* [2018]eKLR as follows:-

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code.* By dint of section 333(2) of the *Criminal Procedure Cod*e, the court was 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. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

11. To the extent that the ruling is silent on whether the period spent in custody had been considered I will consider this as a case of inadvertence on the part of the Judge and allow the Application to this extent only.

12. In conclusion:

    a). The Applicant's prayer for review of sentence is hereby dismissed.

b). The sentence of 40 years is deemed to have taken effect from 28/2/2011 being the date when the Applicant was first arraigned in court.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE