Oketch v Republic (Criminal Miscellaneous Application E187 of 2024)
[2025] KEHC 4142 (KLR) (Crim) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4142 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL MISCELLANEOUS APPLICATION E187 OF 2024

AB MWAMUYE, J

MARCH 27, 2025

BETWEEN

GILBERT KAPULE OKETCH ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Gilbert Kapule Oketch, the Applicant herein, was charged with the offence of Murder contrary to Section 203 as read together with section 204 of the *Penal Code*.

2. He was tried, convicted and consequently sentenced to thirty years' imprisonment. The Applicant has now approached this Court vide an application dated the 4th June, 2024 seeking that the time he has served be deemed as sufficient for retribution.

3. The grounds of the application are that the applicant was sentenced to serve 30 years' imprisonment and that he has already served 12 years. He states that he has acquired several skills while in custody and he has reformed. He therefore requests to be re-integrated back to the society.

4. The applicant further argues that he is remorseful and regrets committing the offence. He is now reformed, rehabilitated and ready for social adaptation.

5. The Respondent did not file any response to the application.

6. The application was canvassed by way of written submissions. The Applicant filed his submissions dated the 18th October, 2024 and the Respondent filed their undated submissions on the 10th February, 2025.

7. The Applicant, in his submissions argues that the application does not seek to review the trial Court's evidence but is seeking a review of the sentence without contesting the conviction by the trial Court.

8. The Applicant also sought for the period served from the date of arrest to be put into account when computing the sentence in accordance with Section 333 (2) of the *Criminal Procedure Code*. On this, he placed reliance on the case of Bethwel Wilson Kibor Vs. Republic [2009] eKLR and the Judiciary Sentencing Policy Guidelines to support his argument of including the time already spent in custody.

9. The prosecution Counsel in his submissions relied on the case of Shadrack Kipchoge Kogo Vs. Republic Crim appeal 253 of 2003 where the Court of Appeal stated that

> " Sentence is essentially an exercise of the trial Court and for this Court to interfere, it must be shown that in passing the sentence, the Court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

10. The prosecution further submitted that the application before Court has not demonstrated that the trial Court took into account an irrelevant factor, neither has he demonstrated that a wrong principle was applied that led to his conviction and sentence.

11. On perusal of the application, I find that the main issues for determination herein are;

    a. Whether time already spent in custody should be considered as per Section 333(2) of the *Criminal Procedure Code*; and

    b. Whether the applicant is entitled to review of sentence.

Whether time already spent in custody ought to be considered as per Section 333(2) of the *Criminal Procedure Code*

12. Section 333(2) of the *Criminal Procedure Code* provides: -

> " 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."

13. The powers of the Court under section 333 (2) of the *Criminal Procedure Code* and the proviso thereto were explained in the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018]eKLR where the Court of Appeal held that:-

> " .....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 Code*, 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 provison 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."

14. The Court while applying the said provision held that by dint of section 333 (2) of the *Criminal Procedure Code*, the Courts during sentencing ought to take into account the period that the appellants had spent in custody before they were sentenced. The The Judiciary Sentencing Policy Guidelines further buttresses this legal position as it provides that: -

> " The provision 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 proportional 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 the trial."
>
> Further, in Bethwel Wilson Kibor Vs. Republic [2009] eKLR it was stated as follows: -
>
> "By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

15. It is clear from the above provision that the law requires Courts to take into account the period the convict spent in custody.

16. This Court is empowered by Article 165(6) of *the Constitution* of Kenya to review a decision by a subordinate Court. Article 165(6) provides: -

    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.

17. The Applicant only states that he had been in custody for a considerable period of time during trial but does not disclose how long he had been in custody. However, it is a settled principle of law and by virtue of Section 333(2) of the *Criminal Procedure Code*, that the duration spent in custody during trial and before conviction ought to have been considered during sentencing.

18. I therefore find that the period spent by the applicant in custody after his arrest should be tabulated and the same be included in his sentence.

Whether the applicant is entitled to review of the sentence

19. The High Court's classical criminal revision jurisdiction, also referred to as its review jurisdiction, is that donated to it by Sections 362 to 366 of the *Criminal Procedure Code*. The Court can only review the judgment of a subordinate Court under Section 364 which provides for powers of High Court on revision as follows:

    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"

20. In the case of a review under the provisions of section 364, this clearly only applies to review of decisions of the subordinate Courts. This Court has no statutory review powers of High Court decisions under that section.

21. The Supreme Court, however, added a new category of revision in cases of murder where the mandatory death sentence was imposed notwithstanding the mitigating factors availed by the applicant.

22. The decision of the Supreme Court basically held that the mandatory death sentence was unconstitutional to the extent that it deprived an accused person mitigative rights, and the Court was deprived its discretion to in making a sentencing decision weighed upon mitigation.

23. Ultimately, the Supreme Court did not delimit the issue of resentencing to higher Courts, but left it open.

24. In the case of Stephen Mugendi Ndwiga V. Republic [2021] eKLR Njuguna J held:

> "...the new jurisprudence as developed by the Supreme Court in Muruatetu's case, High Court (being the trial Court in murder cases) now has jurisdiction to re-sentence in cases where an accused person was sentenced under the mandatory section 204 of the penal Code. (See paragraphs 110 and 111 of the said decision). The Court in ordering resentence hearing found that section 204 of the *Penal Code* was unconstitutional as it provided for mandatory minimum sentence."

25. In the Ndwige case above, the learned Judge further went on to state

> "It is my considered view that this Court cannot review a judgment of Hon. S. Chitembwe J and in doing so resentence the petitioner herein while invoking the dictum in Muruatetu's case despite the change in law. Doing so would be tantamount to reopening the matter and applying the judicial decision retrospectively. Further this Court is bereft of jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate Court on the judgment of the Learned Judge and which act the law abhors."

26. In my view, however, this Court does have jurisdiction to review a High Court sentence under the Muruatetu case principles in a case such as this, not merely because it may have a different view of the sentence meted, but more particularly, if the mitigation availed at the time of sentencing was not fully

or properly considered, or did not adequately bring forth the circumstances that ought to have been considered.

27. It is important to note that the offence of murder carries a maximum of death sentence which is still lawful. The decision in Francis Muaruatetu & Another v Republic (2017) eKLR , only outlawed the automatic imposition of the mandatory death penalty, upon an accused who is charged with murder. Depending on the circumstances of each case, the mitigation of the accused and the sentencing guidelines in place, a convict in a murder case could still be sentenced to death. During sentencing, it is clear from the record that the trial Court considered the mitigation factors and the circumstances under which the offence was committed.

28. In this case, the Applicant seeks a review of his 30-year sentence on the ground that it is harsh. He submitted that the sentence is torturous, discriminatory and a denial of his chances to reform which is contrary to the primary purpose of sentence of imprisonment whereby sentence should not only be imposed for the purpose of retribution but also for the rehabilitation of prisoners.

29. However, the Trial Court clearly considered and took into account the mitigating circumstances availed. The Trial Court did not thereafter mete the mandatory death penalty prescribed, although it could have done so. Instead, it exercised its discretion and opted for a lesser sentence of imprisonment for thirty (30) years. In so doing, the Court ensured that the Applicant had benefitted from the new regimen of law under the Muruatetu case, in imposing the lesser sentence, as against the mandatory sentence.

30. Further, the Applicant has not raised any mitigating circumstances that warrant the Court to consider reviewing the sentence. The Trial Court appreciated the full circumstances of and concerning the offender, to enable it to apply its discretion judiciously; and the Applicant has not raised any new circumstances or information that would support a review.

31. Accordingly, there is no basis made out in the application for this Court to review the sentence. The prayer on review, and the Application as a whole, are therefore dismissed save for his benefit under Section 333(2) of the *Criminal Procedure Code*, which shall be applied to his sentence.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH, 2025.

……..

BAHATI MWAMUYE

JUDGE

In the Presence Of:

Applicant – Mr. Gilbert Kapule present at Kamiti Maximum

Respondent – Counsel Mwandawiro

Court Assistant – Ms. Neema