Savai & another v Republic (Miscellaneous Application E196 of 2024)
[2025] KEHC 9805 (KLR) (Appeals) (28 April 2025) (Ruling)

Neutral citation: [2025] KEHC 9805 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

MISCELLANEOUS APPLICATION E196 OF 2024

AB MWAMUYE, J

APRIL 28, 2025

BETWEEN

FELIX KHESHA SAVAI ..... 1ST APPLICANT

MABEL KAVATI ..... 2ND APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicants, Felix Khesha Savai and Mabel Kavati bring before this Court an application for revision of the 30-year sentences imposed on each of them following resentencing by Hon. Lesiit J in Misc. Application No. 326 of 2018. In a Certificate of Urgency and affidavits, they assert irreparable prejudice unless their sentences are reviewed forthwith. By undated Chamber Summons, they seek orders that:

    i. This Court invoke its unlimited jurisdiction under Article 165(3)(a) of *the Constitution* and Section 333(2) of the *Criminal Procedure Code* to review and alter their sentences;

    ii. They be placed on non-custodial probation orders under the *Probation of Offenders Act*, Cap 64; and

    iii. Credit be given for the period they have already served in custody.

2. The Applicants seek review of their sentence on grounds that: the sentencing court failed to consider the period spent in custody as required under Section 333(2) of the *Criminal Procedure Code*; their circumstances warrant a non-custodial sentence under Section 4 of the *Probation of Offenders Act*; and Article 50(2)(p) of *the Constitution* entitles them to the benefit of the least severe sentence prescribed.

3. Their Supporting Affidavits detail that each was originally sentenced to death in 2010, commuted to life imprisonment in 2016, and substituted to 30 years in 2020. Felix Khesha Savai has served 15 years while Mabel Kavati, by reason of age and frailty, argues further that continued incarceration poses serious health risks and has compounded family hardship. They rely on advanced rehabilitation, ill-health, family disintegration and parity with resentencing precedents whose custodial ceilings range between 15 and 20 years.

4. The Application was canvassed by way of written submissions and both parties complied by filing their respective submissions.

Applicants' Submissions

5. The Applicants argue that their sentences, although mitigated from death to 30 years, fail to account for time already served in custody before sentencing. They further argued that any lawful sentence must deduct time already spent in custody and failure to that inflates punishment. They rely heavily on Bethwel Wilson Kibor v Republic [2009] eKLR, Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR and Section 333 (2) CPC.

6. The Applicants also avers that the High Court's unlimited revisionary mandate permits it to reopen its own sentences where constitutional rights are implicated citing Article 165(3)(a) of *the Constitution* and Section 364 CPC. The Applicants further argued that after the 2010 Constitution and the 2017/2021 Francis Muruatetu & another v Republic decisions, a mandatory or rigid approach offends Article 50(2)(p) of *the Constitution*.

7. The 1st Applicant, Felix Khesha Savai highlights his academic progress, rehabilitation programs, and age, while Mabel Kavati emphasizes her health, age (63) years, and previous life sentence commuted to 30 years. They argue for leniency and rehabilitation in line with judicial sentencing policy guidelines.

Respondent's Submissions

8. The Respondent filed its written submissions dated 28th February, 2025 and maintains that the Applicants' application is res judicata, having been determined by courts of equal jurisdiction. The resentencing court already considered mitigation and issued a 30-year term and re-opening would erode finality and encourage repetitive filings. Reliance is placed on Vincent Oduor Okoth v Republic Misc. Criminal Application No. E235 of 2024.

9. The respondent avers that the sentences are proportionate to the aggravated circumstances of the murder and already reflect post Muruatetu discretion and that Probation is inappropriate for a homicide of high gravity and that public-interest and deterrence considerations still prevail.

10. The Respondent argues that entertaining this application would amount to sitting on appeal on a concurrent court's decision and urges this court to dismiss the application in its entirety as it lacks jurisdiction to entertain the application.

Issues For Determination

11. Having carefully considered the application, affidavits and submissions, the issues arising for determination are:

I. Whether this Court has jurisdiction to entertain this application;

II. Whether the Applicants are entitled to sentence revision under Section 333(2) of the *Criminal Procedure Code*;

III. Whether the Applicants have made a case for a non-custodial sentence;

IV. Whether repeated applications constitute an abuse of the court process warranting procedural sanctions.

Analysis And Determination

Whether this court has Jurisdiction to entertain the application

12. A court must satisfy itself of jurisdiction at the very threshold, for without it the entire edifice of adjudication collapses. Ordinarily, the High Court's revisional power in criminal matters is confined to subordinate-court records by sections 362-366 of the CPC, and once it determines a matter it becomes functus officio. However, Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) [2021] KESC 31 (KLR) created a discrete constitutional window for murder convicts originally sentenced under the mandatory regime. The Supreme Court clarified that the High Court may "re-hear sentence" where mitigation was previously fettered, provided no appeal is pending.

13. Subsequent High Court decisions, such as Stephen Mugendi Ndwiga v Republic [2021] KEHC 7153 (KLR) have recognized that this fresh jurisdiction exists but cautioned that it should be invoked only to cure clear sentencing defects.

14. Balancing the finality principle against the supremacy of *the Constitution* under Art 165(3)(a), the Court therefore retained a narrow supervisory competence: it may intervene where a constitutional or statutory mis-direction is shown but not to conduct a comprehensive resentencing exercise already undertaken by a court of concurrent jurisdiction. That delicate boundary answers the respondent's functus-officio demurral while still vindicating the applicants' fair trial rights.

Statutory duty under section 333(2) of the *Criminal Procedure Code*

15. Under section 333(2) of the *Criminal Procedure Code*, it is provided that; -

> " 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 in this Code. Provided that where the 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."

(See Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR).

16. Section 333(2) CPC is couched in mandatory terms that every sentencing court "shall take into account" pre-trial custody. The policy logic is obvious that without credit for time already spent behind bars, punishment becomes arbitrarily longer than the law intends, undermining proportionality and rehabilitation objectives in the Sentencing Policy Guidelines.

17. The Court of Appeal has supplied authoritative exposition in various cases. First, in Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR), the court underscored that:

> " The appellants have been in custody from the date of their arrest on 19th June 2012. 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 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."

18. Similarly, in Bethwel Wilson Kibor v Republic [2009] eKLR the Court of Appeal expressed itself 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."

19. High-Court benches continue to treat non-observance as an error of law. For instance, in Willy v Republic [2022] KEHC 134 (KLR), the court factored in the period of 8 months the Applicant was in custody before sentence pursuant to Section 333 (2) CPC. Similarly, in Republic v Samson Kalamai Lebene [2019] KEHC 8557 (KLR) where a 5-year term was ordered to be reckoned from 16th January 2017 when the Applicant was first remanded by the court.

20. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

21. This Court associates itself with the decision of the High Court by Hon. G. V. Odunga J in Vincent Sila Jona & 87 Others vs Kenya Prison Service & 2 Others [2021] eKLR where a joint petition was filed by 51 Petitioners whose sentences had not taken into account the time spent in remand and in order to enhance fundamental rights and freedoms of Petitioners while upholding the intention of the sentencing Court sought declaration on compliance with Section 333(2) CPC. The Court held as follows;

> " A declaration that Trial Courts are enjoined by Section 333(2) of the *Criminal Procedure Code*, in imposing sentences, other than sentence of death to take into account of the period spent in custody.
>
> A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.

A declaration that Section 333(2) CPC applies to the original sentence as well as sentence imposed during resentencing....."

22. The necessity to adhere to Section 333(2) of the CPC is obligatory when determining the duration of the sentence that the convict must serve, provided that the type of sentence is clarified. This requirement is further emphasized by the Judiciary Sentencing Policy, making it a crucial element of the sentencing procedure to prevent disproportionate punishments that exceed what is warranted by the offense committed. In the Rwabugande Moses v Uganda (2017) UGSC 8 the Supreme Court of Uganda profoundly held as follows on a constitutional provision with similar provisions with our section 333(2) of the CPC as follows:

> " 15. What is material in that decision is that spent in lawful custody prior to the trial and sentencing of the convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This court used the words to deduct and in an arithmetical way as a guide for the sentencing courts but those metaphors are not derived from *the Constitution*.
>
> 20. Where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict the sentence would not be interfered with by the appellate Court only because the sentencing judge or justice used different words in the judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower court would not be faulted when in effect the court has complied with the constitutional obligation in Article 23(8) of *the Constitution*."

23. The obligation to adhere to Section 333(2) CPC is essential when calculating the sentence that the Convict will serve upon being sentenced. This requirement is further emphasized by the Judiciary Sentencing Policy, making it a crucial element of the sentencing procedure to ensure that penalties are not excessive in relation to the crime committed and the legally prescribed sentence, in accordance with Article 29 (a) & Article 50 of *the Constitution*.

24. The Applicants were convicted in 22/10/2010 and were remitted to serve 30 years' imprisonment on 3rd February, 2020 by this court. The Applicants letter filed an Application in the High Court at Kibera which application was dismissed on 3rd December, 2024.

25. This court while resentencing held that:

> " Having taken all these factors into consideration, in re-sentencing, I order as follows:
>
> a). Each Applicant will now serve an imprisonment term of 30 years.
>
> b). The imprisonment term should run from the date of sentence in the original trial, which is 22nd October, 2010."

26. The re-sentencing judge expressly directed the 30-year term to "start from the date of sentence." As per the authorities cited above, that statement is ineffectual unless the start-date actually reflects the arrest date. The mis-direction therefore survives the respondents' finality objection and attracts curative adjustment by this Court.

27. It follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period was not taken into consideration.

28. It therefore means that where it comes to the notice of this court that the period spent in custody was not taken into account during sentencing, the said sentence can be reviewed by this court on the basis that the same is illegal, incorrect and improper.

29. Accordingly, in line with Section 333(2) of the *Criminal Procedure Code*, the calculation of the sentence should account for the time the Accused individuals spent in custody while the case was being heard and resolved before the sentence was imposed.

30. The sentencing process and its outcome are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revision pursuant to Article 165(3) of *the Constitution* where mandatory provisions of the law have not been complied with.

Whether the remaining custodial term should be converted to probation

31. Sentencing is a calibrated synthesis of retribution, deterrence, rehabilitation, restorative justice and community protection. After Muruatetu's case(supra), the inquiry is intensely individualized. On mitigation, the applicants raised several issues among them being 15–16 years already served; clean prison conduct; acquisition of vocational and academic skills; advanced age for the 2nd Applicant, Mabel Kavati who is 63 years old; chronic ill-health; and positive social-reintegration reports. Comparative jurisprudence shows that a fixed-term cap has become orthodox for post Muruatetu murder resentencing.

32. Yet gravity still matters. Probation in a homicide case is rare and usually predicated on extraordinary residual term. Probation reports here recommend conditional release but not outright non-custodial substitution. The penalty set by law for the offense in question is life imprisonment. I recognize that the applicants were found guilty of the crime. The sentencing decision made by the trial court and both this court indicated that mitigating factors were taken into account. I believe that the court thoughtfully considered all mitigating factors and delivered a suitable sentence, particularly given that murder carries a sentence of life imprisonment. The applicants must understand that murder is a serious offense, and the sentence given is fitting.

Whether repeated filings amount to an abuse of the court process

33. The respondent invokes the doctrines of res judicata, functus officio and the inherent power of the Court to prevent vexatious or duplicative proceedings. Abuse of process jurisprudence aims not merely at litigant chastisement but at safeguarding scarce judicial resources and the authority of final orders. The High Court recently emphasized this point in the case of Vincent Oduor Okoth v Republic (Misc Cr. Appl. E235/2024), directing that a serial revision applicant "shall not be allowed to file any other application regarding his sentence unless he first obtains leave of this Court."

34. Applying those principles, the Court recognizes that the applicants have twice litigated sentence issues in this court, but also that the present motion targeted an unresolved statutory error. Granting limited relief while imposing a leave requirement for any future sentence-related motion strikes an equitable balance: it preserves access to constitutional redress yet curbs potential procedural abuse.

35. Through the prism of these four issues, the Court reconciles the competing imperatives of legality, proportionality, rehabilitation and finality.

36. The trial court holds the authority over the sentencing process and its results. Nevertheless, given that circumstances differ from one case to another, this court may intervene through its revisionary jurisdiction as granted by Articles 165 and 50 of *the Constitution*, along with Section 364 of the CPC. This court's role is to ensure that any accused person who has been tried, convicted, and sentenced to prison receives a fair trial, and that the imposed sentence reflects the essence of the law stipulated in Section 333(2) of the CPC. It would not be excessive for this court to assert that a custodial sentence issued against a convict who has been in pre-trial remand without considering the aforementioned provisions could be regarded as unlawful.

37. From the analysis above, there is clear evidence indicating noncompliance with Section 333(2) of the CPC by the trial court and resentencing court. Accordingly, the committal warrant for imprisonment should be revised to account for the time the applicants have spent in remand custody. Therefore, the sentence is considered to begin from the date the Applicants were first arrested being 31st January, 2009 for the first Applicant and 30th January, 2009 for the 2nd Applicant. Given that re-sentence was to begin from 22nd October 2010 and factoring in the time already spent in remand custody; 1 year 8 months, the remaining period to be served should be reduced accordingly and the Applicants have to serve a remaining period of 13 years and nine (9) months.

    Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 28TH DAY OF APRIL 2025.

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BAHATI MWAMUYE

JUDGE