Kariuki v Republic (Criminal Revision E212 of 2024)
[2025] KEHC 7326 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7326 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E212 OF 2024

DKN MAGARE, J

MAY 29, 2025

BETWEEN

JOHN KARIUKI MUGAMBI ALIAS JOHN MUGAMBI KARIUKI . APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling over an application by the Applicant seeking to review sentence meted out against him in *Nyeri CMCC No. E126 of 2023 vide* the Judgment dated and delivered by Honourable Mr. Mathias Okuche, Senior Principal Magistrate.

2. The trial court sentenced the Applicant having found him guilty of the offence of trafficking narcotic drugs contrary to Section 4(a)(ii) of the *Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994*. The Applicant was sentenced to serve 3 years imprisonment and in default to pay a fine of Ksh. 500,000/=. He was also sentenced to serve 3 months or pay a fine of Kshs. 10,000/= for the offence of trafficking 7 rolls of cannabis sativa.

3. The Applicant stated that he was remorseful as first offender and ready to change. He prayed for a noncustodial sentence. The Respondent conceded that the court did not consider the mitigation of the Applicant as a first offender and days in custody.

Analysis

4. The court has considered the application that is in the form of a formal letter to the Presiding Judge and the Deputy Registrar of this court. The letter is dated 19.7.2024. The application was filed just eight days after the date of sentencing. The issue is whether the sentence should be revised to a lessor one.

5. The Applicant was charged with the offence of trafficking narcotic drugs contrary to section 4(a)(iii) of the *Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994*. The particulars of the offence

were that on 2.2.2023 at about 00200hrs at Ihithe Trading Centre in Tetu Sub-location in Tetu Sub-county of Nyeri County the Applicant was found trafficking narcotic drugs by storing in his house 4 kgs of cannabis seeds with a street value of Kshs. 120,000 and 7 rolls of cannabis with a street value of Ksh. 210 in contravention of the said Act.

6. The trial court considered the case and having convicted the Applicant sentenced him to serve 3 years imprisonment and in default to pay a fine of Ksh. 500,000/-. The Applicant was on the second offence, in respect of trafficking 7 rolls of cannabis sativa, sentenced to serve 3 months of pay a fine of Ksh. 10,000/=. Aggrieved the Applicant filed for revision of the sentence only. There was no appeal on conviction.

7. The revisionary power of this court also serves the supervisory role and the court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides as doth:

> 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.

8. The object of revisionary powers of the High Court is to confer upon the High Court a kind of paternal or supervisory jurisdiction in order to correct or prevent a miscarriage of justice. In the High Court of Malaysia in *Public Prosecutor v Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

> " The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case"

9. The Applicant alleged that his mitigation was not considered. It was his case that he was the sole bread winner for his family whom he did not however, describe. Further, that he was a first offender and remorseful and that he would be prone to negative influence while incarcerated.

10. The Supreme Court has propounded in the *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR the following guidelines with regard to mitigating factors in a re-hearing sentence:

    (a) age of the offender;

    (b) being a first offender;

    (c) whether the offender pleaded guilty;

    (d) character and record of the offender;

    (e) commission of the offence in response to gender-based violence;

    (f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

11. The purpose and objectives of sentencing as stated in the *Judiciary Sentencing Policy* should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 *Sentencing Guidelines* are as follows: -

> " 1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
>
> i. Retribution: To punish the offender for their criminal conduct in a just manner.
>
> ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
>
> iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
>
> iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community
>
> v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
>
> vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
>
> vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
>
> viii. Reintegration: To facilitate the re-entry of the offender into the society"

12. The relevant provisions under which the Applicant was charged, convicted and sentenced are as follows:

Any person who traffics in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable—

(a) in respect of any narcotic drug or psychotropic substance-

(i) where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;

(ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;

13. The Applicant was a first offender and expressed remorse. However, the Court notes that no probation report was produced. This was unfortunate as it did not give the applicant the benefit of probation and after care services. However, it is not lost on the court that the offence is a serious one, in so far as trafficking involved is trafficking cannabis seeds. The offence attracts a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years. The minimum fine the applicant would have been given is Ksh480,620/=. A fine of Ksh. 500,000/= given was thus proper. The sentence was in my view lenient as the quantity of seeds were humongous. The default of fine was commensurate with the fine.

14. Consequently, given the severity of the sentences and fines stipulated in the relevant statute, I do not consider the penalty imposed by the trial court, that is a term of three years or a fine of up to 500,000/=, to be excessive. The applicant received a slap on the wrist and should be forever grateful. This is because, while the possession and trafficking of bhang is serious, the possession and trafficking of bhang seeds is even graver.

15. The latter poses a greater threat, as even when cannabis is confiscated, the seeds can continue to grow unchecked in unknown locations, potentially spreading the issue further and beyond easy detection. In the circumstances, I decline the invitation to interfere with the sentence and dismiss the resultant application.

16. The Applicant was out on bond from 23rd April 2023 until the time of his conviction. The law under Section 333(2) of the *Criminal Procedure Code* provides as doth:

> " 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."

17. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018]eKLR stated as follows as regards time spent in custody:

> " 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 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. This is buttressed in the *Judiciary Sentencing Policy Guidelines*, 2023 as follows:

The proviso 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."

19. The Applicant was arrested on 2.2.2023 and released on bond on 23.04.2023. The Applicant remained in custody after taking plea until 23.04.2023. Section 333(2) of the *Criminal Procedure Code* provides that the period spent in custody pending trial shall be taken into account during sentencing. It is clear that the time spent in custody was not considered. The period spent in custody must mean considering that period so that the imposed sentence is reduced mathematically.

Determination

20. I therefore make the following orders: -

    a. The application dated 19.07.2024 for revision is partly allowed to the extent that it is ordered that the sentence imposed shall commence from the date of arrest, 02.02.2023, excluding the period between 13.04.2023 and the date of conviction, 10.07.2024.

    b. The prayer to revise the sentence is dismissed.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF MAY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Pro se Applicant

Mr. Kimani for the Respondent

Court Assistant – Michael