



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Alfayo v Republic (Miscellaneous Criminal Application E035 of 2023)
[2024] KEHC 2031 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E035 OF 2023**

JN KAMAU, J

FEBRUARY 27, 2024

BETWEEN

JOHN OTIENDE ALFAYO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Criminal Procedure Code. He was convicted and sentenced to twenty (20) years imprisonment.
2. On 14th August 2023, he filed a Notice of Motion application seeking to have the period that he stayed in custody while the trial was ongoing, a period of five (5) years seven (7) months, be taken into account as part of the sentence that he had already served pursuant to Section 333(2) of the Criminal Procedure Code.
3. It was his assertion that the omission by the Trial Court to consider this period contravened his right to fair trial and dignity under Article 28 and 50 (2) of *the Constitution*.
4. He cited the case of *Ahamad Albofathi Mohammed & Another vs Republic* [2018] eKLR where the court held that sentence ought to run from the date of arrest and the case of *Simon Kipkirui Kimon vs Republic* (citation not given) where it was held that a court in cases such as his should consider the mitigating factors by the appellant. He thus urged this court to grant him the orders that he had sought.
5. He did not file Written Submissions to support his prayer. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.



Legal Analysis

6. As seen hereinabove, the Applicant's application was based on Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). The said Section provides 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” (emphasis court).

7. This duty is also contained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that: -

“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.”

8. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another vs Republic (Supra).

9. The Applicant was arrested on 2nd December 2013. He was convicted and sentenced on 3rd July 2019. He thus spent five (5) years and six (6) months and twenty five (25) days in custody before he was sentenced.

10. This court did not have the benefit of seeing the original court file because the matter was initially handled at Kakamega High Court. The present application was filed in this court as there was now a High Court at Vihiga. As there were challenges of obtaining the High Court file from Kakamega High Court, this court therefore took the liberty of obtaining the decision the Applicant was alluding to from the Kenya Law Reports website.

11. It noted that Republic v John Otiende Alfayo [2019] eKLR was posted in the aforesaid website. It showed that Njagi J sentenced the Applicant herein to twenty (20) years imprisonment on 3rd July 2019.

12. Whilst sentencing him, the Learned Judge rendered himself as follows:-

“...Sentencing is a discretion of the trial court. In Ambani Vs Republic, the High Court stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. ...The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:... Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.... The sentence imposed on the



accused should be proportionate to the serious offence that he committed. The maximum sentence for the offence of murder as held in *Francis Karioko Muruatetu & Another v Republic & Others* [2017] eKLR is death. I do not however consider that a death sentence is warranted in the circumstances of the case. A prison sentence would serve the interests of justice in the case. I accordingly sentence the accused to serve 20 years imprisonment.

13. As was correctly stated by the said Learned Judge, the punishment for murder prescribed in the Penal Code was death. He considered the same along with the Judiciary Sentencing Guidelines as well as the provisions of Section 333 (2) of the *Criminal Procedure Code*. He had the discretion to sentence the Applicant herein to death or to mete a determinate sentence in line with the principles that were set out by the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Another vs Republic & Others* (Supra) on 6th July 2012. He exercised his discretion and meted a determinate sentence of twenty years (20) years upon the Applicant herein.
14. It therefore followed that whereas the Respondent was not opposed to the Applicant's application for the period he spent in custody to be considered, it was not lost to this court that Njagi J was a judge of equal and competent jurisdiction such as this court. This court could not therefore purport to sit on appeal and/or review the sentence that he meted upon the Applicant herein. In the event the Applicant herein was aggrieved by the said sentence, the only option that he had was to appeal his decision at the Court of Appeal.

Disposition

15. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was filed on 14th August 2023 was not merited and the same be and is hereby dismissed.
16. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF FEBRUARY 2024

J. KAMAU

JUDGE

