Tanui v Republic (Miscellaneous Criminal Application E003 of 2023)
[2024] KEHC 1586 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1586 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

MISCELLANEOUS CRIMINAL APPLICATION E003 OF 2023

JRA WANANDA, J

FEBRUARY 23, 2024

BETWEEN

MOSES KIBITOK TANUI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant approached this Court *vide* the Notice of Motion filed in Court 11/07/2023 seeking re-sentencing under Section 333(2) of the *Criminal Procedure Code* which requires that the period spent by a convict in custody be factored in the computation of the prison sentence.

2. The Applicant was, jointly withy others, charged and convicted in Iten Magistrates Court Criminal Case No. 1057 of 2016 for the offence of robbery with violence and also for kidnapping with intent to confine. He was then sentenced to death on the charge of robbery with violence. Aggrieved with the conviction and sentence, he appealed *vide* Eldoret High Court Criminal Appeal No. 124B of 2019 in which the Court upheld the conviction on both counts. In respect to sentence, on the charge of kidnapping, the Court declined to interfere but on the charge of robbery with violence, reduced the death sentence to 10 years imprisonment.

3. State Counsel acting for the Respondent sought and was granted time to file a Response and Submissions on the Application. However, up to the time of concluding this decision, I had not come across any such Response or Submissions filed by her.

4. The Applicant contends that while determining the Appeal and while reviewing the sentence, the High Court failed to pronounce that the sentence should have commenced from the date of arrest. He submitted that he was arrested on 21/09/2016. He cited the *Criminal Procedure Code* and the *Judiciary Sentencing Guidelines* which provide that in determining the period of imprisonment that should be served by the offender, the Court should take into account the period the offender spent in custody

during the trial. He also relied on the case of *Ahamad Abolfathi Mohammed &Anor v Republic* (2018) eKLR and *Boniface Wekhanya & John Kipyego Rotich v Republic* in support of his submissions. The Applicant submitted further that he was remorseful repentant and reformed, and that he had acquired various skills in prison that will enable him to be self-reliant.

Analysis & Determination

5. The two issues that arise for determination in this matter are the following;

   i. Whether the present Application can be entertained considering that this Court had already heard and determined the Applicant's Appeal against sentence.

   ii. Whether the sentence imposed on the Applicant should be reviewed.

6. I now proceed to determine the issues

Whether the court has jurisdiction to determine this matter

7. As already stated, it is conceded by the Applicant that indeed he filed Eldoret High Court Criminal Appeal No. 124"B" of 2019 in this very same Court in which, among other prayers, he challenged the sentence of death imposed by the trial Court. It is also not in dispute that the Court reduced the sentence of death to 10 years imprisonment.

8. I note that in her Judgment in the said Appeal, H. Omondi J (as she then was) made the following statements:

> " 11. As regards the sentence meted out, the appellant's counsel urges this court to adapt the emerging jurisprudence developed by the Supreme Court in the case of *Francis Muruatetu and Anor v Republic* [2017] eKLR in respect of the mandatory death sentence. He has also cited the case of *Gerald Ndoho Munjuga v R* [2016] eKLR to the effect that the objective of criminal law is to impose an appropriate, adequate, just and proportionate sentence commensurate with the nature, gravity and manner in which the crime is committed.
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> 12. It is argued that the appellant was not given time to tender his mitigation at the trial, pointing out that the appellant was a young university student who had learnt from his mistakes, and urges the court to be compassionate.
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> .....
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> 14. As regards the sentence, Miss Okok concedes that although legal, it was rather harsh and excessive since the evidence showed that the complainant was not injured, and all his properties were recovered. She is agreeable to the sentence on count 1 being reviewed, but urges this court to uphold the sentence in count 2.
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> .....
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> 17. As regards the sentence, I take cognisance of the Supreme Court's pronouncement in the Muruatetu case which can be used as a foundation for the scrutiny of mandatory sentencing in general. The logic - mandatory aspect is regardless of the offence and similarly the absence of discretion is applicable across any other mandatory sentence. The *Muruatetu case* (*supra*) recognised

that the trial process does not stop at conviction of the accused; the principle of a fair trial must be accorded at the sentencing stage.

18. Mandatory sentences have the effect of disregarding mitigation thus depriving the court of its discretionary powers. I have as well taken into account as the *Judiciary's Sentencing Guidelines* on principles underlying sentencing to include-

    a) Proportionality to the offending behaviour i.e. the punishment must not be more or less than is merited in view of the gravity Sentencing is considered the primary prerogative of trial courts and they enjoy wide discretion to determine the type and severity of a sentence on a case-by-case basis. In doing so, they follow judge-made, broad sentencing principles known as the "triad of Zinn," which require that, when making sentencing determinations, judges consider three things:

    b) the gravity of the offense,

    c) the circumstances of the offender,

    d) and public interest.

19. I take into consideration that the bulk of the complainant's property was recovered and restituted to him. I take note that the appellant has been in confinement since the year 2016, and I am persuaded that the death penalty meted on count I is rather harsh and excessive. I therefore set aside the death sentence meted out in count 1 and substitute it with a 10-year sentence which shall run from the date of conviction."

9. It is therefore clear that the question of computation and length of the sentence was raised on appeal before a Judge of equal jurisdiction presiding over this very Court. The Judge stated with clarity that she had taken into consideration the time that the Applicant had spent in custody and in her wisdom directed that the sentence would start running "from the date of conviction". In the circumstances, this Court is now *functus officio* and cannot purport to interrogate the decision of Omondi J.

10. The upshot of the foregoing is that the Application is without merit as the issues it purports to raise were finally and conclusively determined by a Judge of concurrent jurisdiction. If this Court was to interfere with the decision which conclusively dealt with the issue of sentence, such action would be tantamount to sitting on appeal on the decision of a Judge of equal standing, a position that is untenable in law.

11. Having held as aforesaid, the second issue does not now arise.

Final Orders

12. In the premises, the Applicant's undated Notice of Motion filed herein on 11/07/2023 is dismissed.

DELIVERED, DATED AND SIGNED AT ITEN ON THIS 23RD DAY OF FEBRUARY 2024

WANANDA J.R. ANURO

.....

JUDGE

I cerrtify that this is a true copy of the original

Signed

DEPUTY REGISTRAR