



**Kamau v Director of Public Prosecutions (Miscellaneous Application E154 of 2023) [2024] KEHC 4838 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4838 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E154 OF 2023  
SM MOHOCHI, J  
APRIL 24, 2024**

**BETWEEN**

**TOM MWANGI KAMAU ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**RULING**

1. The Application before Court is seeking to be put on probation for remainder of his prison term. His application is supported by his undated affidavit in which he avers that he was charged with gang rape under the *Sexual Offences Act* and added that the Court is bound by the decision of the Supreme Court under Article 163 (7) of the *Constitution*. He further deponed that the Court has jurisdiction to hear re-sentencing and met out appropriate sentence in line with Article 165 of the *Constitution*.
2. The Applicant in support of his claim attached a recommendation letter from the Officer In charge Nakuru Main Prison dated 3<sup>rd</sup> October, 2023. It highlighted that the Applicant undergoes his reformation and rehabilitation process in the Prison Industry Welding and Mental Work Section, has trained in Arc Welding, Spray Painting and acquired Grade II and can work with minimal supervision. That he was a member of the Prisons Pentecostal church, a house leader in charge of the metal section and the team captain of the prisons football club. That in the various prisons he has served his sentence, he has portrayed leadership and good behaviour.
3. The Respondent through State Counsel Ms. Jackie opposed the application and in her oral submissions, she stated that the Applicant's Application invoked Section 333 of the *Penal Code*. She added that from the record the Applicant in Nakuru Cr. Case No. 119 of 2004 released on bond during the pendency of the trial. The Applicant was arrested on 24<sup>th</sup> May, 2004 and released on bond on 19<sup>th</sup> July, 2004. That he was in remand for only 2 months



4. Ms. Jackie added that the Applicant was charged with 3 counts of defilement and 2 counts of attempted defilement, was found guilty of all of them and imprisoned for 5 years on each count with the sentences to run concurrently. He appealed to the High Court in Nakuru Criminal Appeal No. 334 of 2004 on the sentence. The Appeal was dismissed and sentence enhanced to 7 years on each count and the sentence to run consecutively.
5. Counsel added that the sentence was lenient considering the charge and were not awarded in mandatory time. That the recent jurisprudence relating to mandatory sentences under the *Sexual Offences Act* do not relate to the Applicant as he was charged under the Penal Code. She prayed that the Application be dismissed in its entirety and that the Applicant does serve his time.
6. The brief facts of the case are that, the Applicant was arrested on 16<sup>th</sup> May, 2004 and charged in Nakuru Chief Magistrate's Criminal Case No. 1199 of 2004 on 24<sup>th</sup> May, 2004 with 3 Counts of Defilement contrary to Section 145(1) of the *Penal Code* and 2 Counts of Attempted Defilement contrary to Section 145 (2) of the *Penal Code*. He pleaded not guilty to all the charges. He was remanded in custody until 19<sup>th</sup> July, 2004 when he was released on bond. The Trial Magistrate in her judgment dated 30<sup>th</sup> November, 2004 found the Applicant guilty and sentenced him to serve 5 years imprisonment with hard labour. The Sentences were to run consecutively. The Applicant thereafter preferred an appeal against the sentence a conviction in Nakuru Criminal Appeal No. 334 of 2004. The Appellate Court in the Judgment delivered on 10<sup>th</sup> June, 2011 dismissed the Appeal and enhanced the sentence to 7 years' imprisonment on each count plus hard labour with the sentences running consecutively.
7. The Applicant has invoked Section 333 of the *Criminal Procedure Code*. The section guides Courts as to the time an accused person has spent in custody in meting out sentences in order to prevent an accused person from serving a more severe sentence than was to be served. The Applicant in this regard spent 8 days in custody before he was presented before a Magistrate to be charged. During the pendency of the trial the Applicant spent 45 days in custody before he was released on bond.

#### **Issue for determination**

8. The issue for determination is whether the Applicant has established a case for revision based on the provisions of Article 165 (6) of the *Constitution* and under Section 362 of the Criminal Procedure Code.

#### **The Law**

9. The High Court power of revision is set out in Article 165 which provides:
  - (6) 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 over a superior Court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate Court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
10. Section 362 of the *Criminal Procedure Code*, empowers the High Court to call and examine the record of any criminal proceedings before any Subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court.



11. Section 364(1) of the *Criminal Procedure Code* provides: -

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 his 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 section 354, 357 and 358, and may enhance sentence;
  - (b) In the case of any other order other than an order of acquittal alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

12. This Court, Justice R Wendoh considered the Applicants Sentence on appeal and found it to be too lenient thereby enhancing the same to Seven years’ imprisonment and that the sentences were to run concurrently.

13. The Sentence thus imposed is for all intents and purpose a sentence by the high Court.

14. This Court does not have criminal revision jurisdiction over the High Court and does not supervise Superior Courts.

15. I accordingly find this Application to be without merit, the same is accordingly dismissed.

It is so ordered.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 24TH APRIL 2024**

**MOHOCHI S.M**

**JUDGE**

