



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL MISCELLANEOUS APPLICATION E183 OF 2021

RICHARD MWANTHI NYAMBURA1ST APPLICANT

MICHAEL KARIUKI NYAMBURA.....2ND APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

The 2 applicants **RICHARD MWANTHI NYAMBURA and MICHAEL KARIUKI NYAMBURA** have moved this court by way of Notice of Motion application filed herein on 17.5.2021. The joint application of the applicants seek the following orders:

- 1. THAT** this court be pleased to consider the entire period that the applicants have spent in custody from the date of arrest on 14.2.2018 to-date.
- 2. THAT** this Hon. Court be pleased to grant the applicants reprieve in terms of the sentence that the applicants are serving.
- 3. THAT** this court put into consideration the mitigating factors and order a resentencing.
- 4. THAT** this court be pleased to reduce the sentence to the time served so far.

This application is supported by the affidavits of the applicants. It is indicated that this court be persuaded by the findings of the Supreme Court in Petition Nos 15 and 16 of 2015, Francis Karioko Muruatetu and Another Versus Republic.

The applicants have further filed submissions, which are rather similar, in support of this application. Basically that in the sentence, the period spent in police custody was not accounted for. That they have reformed while in prison. That their families are suffering. That they were both first offenders. They have also expressed remorse. They so pleaded.

The learned counsel for the state, Mr. Mutuma chose to rely on the court record of the previous proceedings.

I have considered the submissions of both sides. I have also carefully perused and considered the record of the proceedings herein. As I get it, this application raises the following issues:-

- i. The issue of period spent while in custody i.e section 333(2) of the Criminal Procedure Code.**

ii. The issue of resentencing i.e the applicability of the Muruatetu case.

On the 1st issues, section 333(2) of the Criminal Procedure Code, at its proviso, states;

“Provided that where the person sentenced under sub-section (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

My reading of the above is that the period referred to is period spent in custody awaiting trial and determination of the case. Trial commences from the time a party is first arraigned in court. It does not include the period of incarceration at police cells or indeed any holding facilities. I say this because the court can only be the custodian of a prisoner when that prisoner is presented before it. The applicant’s plea for the period spent in police custody before being arraigned in court therefore does not fall under section 333(2) of the Criminal Procedure Code. the plea to include the same in the sentence lacks any legal basis. I decline to grant the same.

On the 2nd issued on applicability of the Muruatetu case and plea for resentencing, I have carefully considered the record of the trial court. It is clear that on 27.9.2018, the 2 applicants were accorded the opportunity to and they both made their mitigation. In the mitigation, they both asked for leniency. They pleaded remorse. And the fact that they were first offenders. They pleaded for non-custodial sentence.

In the detailed ruling on sentence on 5.10.2018, the Honourable Justice R. Lagat Korir, considered the circumstances of the case, the mitigation by the applicants, the sentencing policy guidelines (2016), the long period the trial took of approximately 12 years. the court even took into account the directions of the Supreme Court in the Muruatetu case. The court finally sentenced the applicants to each serve 20 years imprisonment less 8 years that they served in pre-trial custody.

The application by the applicants therefore raise the same issues that have been raised and ruled on by a Judge of concurrent jurisdiction. Neither the constitution, nor any statute gives this court the jurisdiction to revisit, after or revise any orders of a Court of concurrent jurisdiction. And this court must decline any invitation at exercising any such patently illegal jurisdiction. For lack of jurisdiction the application of the applicants must fail. I so find. This application of the applicants filed herein on 17.5.2021 is accordingly dismissed wholly. Orders accordingly.

D. O. OGEMBO

JUDGE

22.3.2022.

Court:

Ruling read out in court (on-line) in presence of the 2 applicants and Ms. Joy for the state.

D. O. OGEMBO

JUDGE

22.3.2022.



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