Guhad v Republic (Miscellaneous Criminal Application E006 of 2024)
[2024] KEHC 11208 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11208 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

MISCELLANEOUS CRIMINAL APPLICATION E006 OF 2024

JN ONYIEGO, J

SEPTEMBER 26, 2024

BETWEEN

MOHUMED ABDULLAHI GUHAD ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged and convicted for the offence of murder contrary to Section 203 as read out with 204 of the penal code. Having returned a plea of not guilty, the matter proceeded to full trial. Upon conclusion of the trial, the applicant was found guilty but insane. Consequently, on the 14-11-13, the court committed him to be held at the pleasure of his excellency the president.

2. Aggrieved with the said decision, the applicant on 15-08-2019 filed a motion vide misc. application no. 57 of 2019 seeking re-hearing of the impugned sentence pursuant to the decision of the supreme court in Francis Muruatetu case. According to the applicant, the application was dismissed on 19.07-2021

3. From the record, the applicant filed another motion dated 01-07-21 seeking a retrial of his case considering that he had fully recovered and that indeterminate detention at the mercy of his excellency the president under section 166 was inconsistent with article 27(1)(2) and (4) and article 47(1)(2) of the *constitution*. From the record, it is not clear whether the application was heard and determined.

4. The above notwithstanding, the applicant lodged another undated motion under certificate of urgency dated 31-10-2023 seeking the court to grant mitigation and resentencing.

5. He averred that he was charged with the offence of murder contrary to section 203 as read with section 204 and was sentenced to be held at the presidential pleasure on 14.11.2013. That he previously applied for his sentence to be reviewed via I.R.O Misc No. 57 of 2019 at Garissa which was dismissed on 19.07.2021. He deposed that, he has since approached this court for resentencing hearing while relying

on Petition No. 226 of 2020 at Nairobi in *Isaac Ndegwa Kimaru and 17 others v Attorney General* where the presidential pleasure sentence was declared unconstitutional.

6. He contended that noting the development in various decided case, a jurisprudence has been developed declaring that the sentence he is currently serving is unconstitutional. That he has since exhausted all the avenues of appeal hence the urge for this court to consider the prayers sought.

7. The application was canvassed by way of oral submissions wherein the applicant urged this court to review his sentence considering that he had since reformed. He urged this court to find his application merited.

8. Mr. Kihara, the learned counsel for the prosecution in opposing the application submitted orally that the application was underserved as a similar application had been determined by a court of equal jurisdiction to this court. That this court ought to dismiss the application as it was functus officio. Counsel contended that a similar application had been made and application amounts to abuse of the court process.

9. I have considered the application herein together with the oral submissions by both parties. The only issue for determination is whether the order for resentencing can be granted.

10. Article 165 of the *Constitution* clothes the High Court with jurisdiction to hear and determine applications for redress of a denial, violation or infringement of or threat to, a right or fundamental freedom in the Bill of rights. Equally, Article 50(2) (p) (q) as read with Article 50 (6) (a) and (b) of the *Constitution* underscores the right to appeal or seek review against any decision made.

11. It should be noted that the instant application is not an appeal but an application seeking for re-sentencing. The applicant has submitted that previously, he had made a similar application for review of his sentence before this court and the same was heard and thereby dismissed.

12. It is trite that sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate court. See In *John Kamau Gachuha v Republic* [2019] eKLR, the Court held as follows;

> " ... The applicant merely seeks the imposition of a more lenient sentence. This court has no revision jurisdiction over an appeal it has concluded. The applicant's only option is to appeal in the Court of Appeal..."

13. The above notwithstanding, the applicant urged that he has since exhausted all his avenues of appeal. My interpretation of the same is that the Court of Appeal having already pronounced itself by upholding the finding of the trial court and the High Court having dismissed review applications, this court does not have the requisite jurisdiction to address itself to the orders sought.

14. From the foregoing, it follows that the instant application amounts to an abuse of the Court process and as such, the same is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF SEPTEMBER, 2024

J. N. ONYIEGO

JUDGE