Nyaga v Republic (Criminal Revision E082 of 2024)
[2024] KEHC 13105 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13105 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL REVISION E082 OF 2024

LM NJUGUNA, J

OCTOBER 30, 2024

BETWEEN

PETER IRERI NYAGA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. For determination is a notice of motion dated 13th February 2024 through which the applicant seeks the following orders:

   a. Spent;

   b. That the honourable court be pleased to grant a mitigation and resentencing hearing.

2. The applicant was charged with the offence of defilement contrary to section 8(1) as read together with 8(3) of the *Sexual Offences Act*, in Runyenjes Criminal Case no. 471 of 2012 and he was convicted and sentenced to 21 years imprisonment. He appealed against the decision of the trial court and this court, being constituted differently, in Embu Criminal Appeal no. 166 of 2012, dismissed the appeal. He further appealed to the Court of Appeal through Nyeri Criminal Appeal No. 102 of 2014 where the court of appeal upheld the conviction and enhanced the sentence to life imprisonment.

3. In the application, he argued that the life imprisonment has since been held as unconstitutional through the Court of Appeal decision in the case of Julius Kitsao *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR), thus this court should review the sentence. He also told the court that he has reformed through his incarceration and he is ready to be reintegrated back to the community. That he has been in custody since he was arrested on 26th May 2012 and he urged the court to consider the time spent in custody in computing his sentence, in accordance with section 333 of the Criminal Procedure Code. He also prayed for a non-custodial sentence for the remainder of his sentence.

4. The respondent opposed the application by stating that this court does not have jurisdiction to entertain this application. It referred to Article 165(6) of *the constitution* and section 362 of the Criminal Procedure Code. It stated that the applicant ought to seek resentencing hearing from the Court of Appeal which was the final court that enhanced his sentence.

5. The application was canvassed by way of written submissions.

6. The applicant submitted that he is remorseful for his actions and apologized to the victim's family. He relied on the case of *Michael Kalewa v. Republic* (2018) eKLR and stated that the court should consider he remorsefulness of the offender in resentencing. He also relied on the case of *Mubanda Ali Mabanda v. Republic* (2018) eKLR where the court considered that the applicant was a first offender and had been in custody for 9 years, thus he was held to have paid his debt to society. Further reliance was placed on the case of *Republic v. Otieno* (1983) eKLR where the court discouraged the practice of meting maximum sentences to first offenders.

7. He urged the court to consider that he has been in custody since he was arrested on 26th May 2012 and that the sentence should include that time spent in custody in accordance with Article 29(1) of *the Constitution*, Section 333(2) of the *Criminal Procedure Code* and clause 5.1.21 of the Sentencing Guidelines 2023. He also relied on the case of Evans Nyamari *Ayako v. Republic Criminal Appeal No. 22 of 2018* where the Court of Appeal held the indeterminate life imprisonment sentence to be unconstitutional. He argued that the mandatory sentences prescribed under the *Sexual Offences Act* were no longer mandatory and he urged the court to grant his application.

8. On its part, the respondent submitted that in exercising its revisionary powers, the court should limit its findings to the corrects, legality or propriety of the sentence. That in this case, the sentence was enhanced by the Court of Appeal, over which the High Court does not have supervisory jurisdiction in light of Article 165(6) of *the Constitution*. It relied on *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR) (6 July 2021) (Directions), where the Supreme Court clarified that the decision in Muruatetu only applied to Murder cases. It urged that this court has become functus officio and the application should be dismissed.

9. The issue for determination is whether the court has jurisdiction to entertain the application.

10. The revisionary power of the High Court is drawn from Article 167(6)&(7) of *the Constitution* 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 not 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."

11. Section 362 of the *Criminal Procedure Code* provided as follows on the High Court's supervisory jurisdiction:

> "The High Court may call for 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."

12. The applicant was sentenced to 21 years imprisonment by the trial court, which sentence was upheld by this court on appeal. However, on a second appeal, the Court of Appeal enhanced the sentence to life imprisonment. In the series of events, the Court of Appeal was the last court to sentence the applicant and it is the one that imposed the impugned sentence, not the magistrate's court. The respondent has rightly submitted that the High Court does not have supervisory jurisdiction over a superior court according to Article 165(6) of *the Constitution*.

13. This goes to say that sections 362-366 of the Criminal Procedure Code, under which this application has been filed, do not apply to the Court of Appeal but only to the High Court in exercising its supervisory jurisdiction over subordinate courts. The applicant herein is challenging the life imprisonment sentence imposed by the Court of Appeal in light of the Court of Appeal decision in the case of Julius Kitsao *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR). Paragraph 4.8.18 of the Judiciary Sentencing Policy Guidelines 2023 provides:

> " Resentencing cases shall be handled by the 'Sentencing Court' – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts."

14. In light of the foregoing, the court finds itself lacking jurisdiction to entertain the application for resentencing. The application is premised on provisions of the Criminal Procedure Code that cannot bind the Court of Appeal. Further, nothing stops the applicant from bringing this application before the Court of Appeal for purposes of re-consideration of its own sentence. In addition, this court cannot delve into the arguments regarding section 333 of the Criminal Procedure Code as to do so would amount to a nullity since it lacks jurisdiction howsoever one looks at it. Further in the case of *Muruatetu & Another Vs. Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 and 16 of 2015)* [2021] KESL 31 (KLR) (6th July 2021) (Directions), the Supreme Court clarified that the decision in Muruatetu only applied to murder cases.

15. Therefore, the application lacks merit before this court, and the same is hereby struck out for want of jurisdiction.

16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent