Mungare v Republic (Miscellaneous Criminal Petition E015 of 2022) [2023] KEHC 2550 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2550 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

MISCELLANEOUS CRIMINAL PETITION E015 OF 2022

RL KORIR, J

MARCH 29, 2023

BETWEEN

BENARD NYANUMBA MUNGARE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This Miscellaneous Application was filed on June 5, 2022 by the Applicant herein through a Petition seeking a resentence on the grounds that the Applicant's constitutional rights were disregarded. The Applicant raised several grounds summarized as follows: -

    1. That he prayed for resentencing as his mitigation and the circumstances of the case were not considered and he was instead subjected to the mandatory minimum sentence as provided for under section 8 (3) of the *Sexual Offences Act*.

    2. That he prayed for a resentence since mandatory minimum sentences were unconstitutional and subjected him to cruel and inhuman torture contrary to Articles 2 (1), (3), (4), 25 (a) and 28 of *the Constitution*.

    3. That in sentencing him to the mandatory minimum sentence was in violation of his right to access justice and fair trial in light to Articles 48,50 (2) (p) of *the Constitution*.

    4. That he prayed to be present before the Court to receive a reduction in sentence in light of the High Court at Machakos decision which declared mandatory minimum sentences unconstitutional and in light of the Supreme Court decision in *Francis Karioko Muruatetu & Another v R* (Supreme Court Petition No, 15 of 2015).

2. The background to this Application is contained both in the trial and appellate files which I have perused. The facts were that the Applicant was charged of the offence of defilement contrary to section

8(1) as read with section 8 (3) of the *Sexual Offences Act*. The Applicant was convicted of the said charge on February 5, 2017 and sentenced on January 22, 2018 to serve 20 years imprisonment by the trial court at Sotik.

3. On February 14, 2018, the Applicant filed a Petition of Appeal dated February 13, 2018 before Muya J. seeking to appeal both the conviction and sentence of the trial court. The said Appeal was dismissed on March 13, 2019 and the conviction and sentence upheld.

4. The Application was canvassed through written submissions and orally in Court on March 6, 2023. In his undated submissions filed on February 21, 2023, the Applicant submitted that he was remorseful and had reformed in the period that he had been in custody. The Applicant submitted that he was the sole breadwinner for his needy family and aged parents. Further, that the mandatory minimum sentences were declared unconstitutional because the courts lacked discretion in sentencing as per Article 28 of *the Constitution*. To this end, he cited *Philip Mueke Maingi and 5 Others v Republic*, High Court of Kenyan at Machakos, Petition No. E017 of 2021.

5. The Applicant submitted that courts should promote restorative justice and value rehabilitation when sentencing. That he had undertaken various Bible courses during his period of incarceration and was now a born-again Christian who wished to be released so that he could sensitize the youth on crime.

6. On his part, the Prosecution Counsel submitted that they were not opposed to the Application and left the matter for the Court's determination.

7. The Applicant in this case was sentenced to 20 years imprisonment. It is now well settled that sentencing is a reserve of the trial court. In *Bernard Kimani Gacheru v Republic* [2002] eKLR, the Court of Appeal stated thus: -

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

8. I have considered the present Application and noted that the Applicant's sentence was upheld by this Court on appeal. *The Constitution of Kenya* contemplates at Article 50 that every accused person will be afforded a right of appeal or revision if dissatisfied with the decision of the court. It states thus:-

(2) Every accused person has the right to a fair trial, which includes the right—

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

9. This Article is applied only in circumstances where the decision in review was made by a subordinate court. In the present case, it was this Court that re-affirmed the sentence of the trial court and therefore, it has already discharged its duty under the law. The High Court cannot call for its own record and exercise jurisdiction over a decision for which it has already become functus officio.

10. The question that arises therefore is one of jurisdiction. I am persuaded by the decision of Aburili J. in the case of *Daniel Otieno Oracha v Republic* [2019] eKLR where the Petitioner had applied for review

of a sentence imposed by a court of concurrent jurisdiction and while holding that the court did not have jurisdiction to review the said Judgment, the learned Judge observed that: -

> "
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> " 14. The law abhors that practice of a Judge sitting to review a Judgment or decision of another Judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a Judgment of the subordinate court or if the Petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise....."
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> 16. The Judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own Judgment or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.
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> 17. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matters falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High Court....."
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> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

11. Similarly, I associate myself with the determination of Ngugi J. (as he then was) in *John Kagunda Kariuki v Republic* [2019] eKLR held thus: -

> " 8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who couldhave benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences....."

12. It follows then that this Court lacks the necessary jurisdiction to entertain the present Application. (see *Owners of the Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd* [1989] KLR, 1). The appropriate court to determine this Application is the Court of Appeal under section 379 of the Criminal Procedure Code. No legal provisions exist to allow this Court to hear and determine appeals or reviews arising from its own decisions.

13. At the same time, when a party is dissatisfied with the decision of a court of law, the avenues available for redress are either to seek an appeal to a higher court or to seek review from a higher court as prescribed by Article 50 (2) (q) of *the Constitution*. In the present case, the Applicant already exhausted the avenue of appeal at the High Court and can therefore not have a second bite at the cherry by seeking a review from the same court on the same grounds. He should move to the court of appeal.

14. In the end, this Application lacks merit and is hereby dismissed.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF MARCH, 2023

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant, Mr. Njeru for the State and Siele (Court Assistant)