Moru v Republic (Miscellaneous Criminal Appeal E078 of 2023)
[2023] KEHC 24052 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

MISCELLANEOUS CRIMINAL APPEAL E078 OF 2023

RN NYAKUNDI, J

OCTOBER 25, 2023

BETWEEN

GILBERT MORU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being a review from original conviction and sentence in Lodwar Senior Principal Magistrates Court criminal Case No. E170 of 2023, Hon. M K Muchiri RM on 6th May, 2022)

RULING

1. The Applicant was charged with the offence of Defilement contrary to section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offences were that on the 08th Day of January 2021 at {Particulas withheld] in {Particulas withheld] Sub- County within Turkana County, Gilbert Moru intentionally and unlawfully caused his penis to penetrate the vagina of M.A.E a child aged 15 years.

2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the *sexual offences Act*. The particulars of the offences were that on the 08th Day of January 2021 at {Particulas withheld] in {Particulas withheld] Sub- County within Turkana County, Gilbert Moru intentionally and unlawfully caused his penis to penetrate the vagina of M.A.E a child aged 15 years.

3. The applicant was convicted and sentenced to serve 20 years imprisonment for the offence of defilement contrary to section 8(1) (2) of the *sexual offences Act* No. 3 of 2006. Being aggrieved by the conviction, he preferred an appeal before this court which was dismissed on conviction and the sentence reviewed to 15 years imprisonment.

Analysis And Determination

4. I have considered the submissions filed by the accused person. In them, he seeks to be heard and that the evidence tendered be reviewed. He seems to challenge the age of the victim, which this court considered in the appeal. The chain of judicial steps taken by the applicant after conviction and sentence for defilement bear the answer to the single issue arising: whether the applicant's prayers should be allowed?

5. His appeal to this court against conviction was dismissed and the sentence reviewed to 15 years imprisonment.

6. The Applicant wishes to take up on the issue of evidence which was already determined in the appeal. The court concluded that the conviction was proper and the sentence was reviewed to 15 years. The applicant cannot therefore re-litigate the issue before this court. Neither can he seek a review of the findings of the Judge of the High Court in the self-same High Court.

7. In effect, the applicant seeks for a new trial and in my view for such a prayer to be granted, the applicant must satisfy the requirements of Article 50 (6) (a) & (b) of *the Constitution*.

   Article 50 (6) (a) & (b) of *the Constitution* provides that: -

   (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if-

      (a) The person's appeal, if any, has been dismissed by the Highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed; and

      (b) New and compelling evidence has become avail

8. Thus, for a new trial to be ordered under Article 50 (6) of *the Constitution*, the applicant herein must prove two things: first that his appeal to the highest court has been dismissed or that he did not appeal within the stipulated time allowed for appeal and secondly, he must prove that new and compelling evidence has become available. The principle of res-judicata as applied to civil law is very familiar to many lawyers and judges though not commonly invoked in the field of criminal law proceedings. One hears more of doctrine of jeopardy. In res-judicata a question of fact or of law distinctly put in issue, adjudicated and directly determined by a court of competent jurisdiction established under article 50 (1) of *the constitution* cannot afterwards be disputed between the same parties in which a final judgment on the merits exist. What was involved and determined in the former criminal proceedings is to be tested by the current forum by an examination of the record and proceedings therein including the probative evidence and submissions submitted by the parties for consideration and in the decision making process. The findings of the court from those issues is of significance to bar further proceedings within the rubric of the doctrine of res-judicata. It will be noted here since the emerging jurisprudence by the Supreme Court in the Francis Muruatetu case there has been an encroachment upon *the constitution* as it relates to rights, entitlement, infringement and violations by the defendants in a criminal case seeking to quash an indictment or order on sentence solely on constitutional grounds. The charged so conspiracy by the convicts from various quarters in our correctional facilities to file applications for resentencing, reduction of sentence, and or revision of sentences or orders for subordinate courts appears conclusively to pause a threat to the integrity of the criminal justice system. It is rite the prior judgment of acquittal or conviction conclusively determining all questions of fact or of law distinctly put in issue before a constitutional forum and directly settled upon a trial can only be a subject of an appeal. My presumption on revisionary jurisdiction was not made to entertain pleas from a final judgment of a competent court in which issues were determined with finality as framed by the parties. The defendants or convicts for that matter participation in the scheme whether it be called a scheme

to resentence, reduce sentence or revision has reached a point where such adjudication require very clear rules and guidelines to avoid adding new elements to the old scheme and thus broadening the jurisdiction of the court. It is manifest therefore that the extent to which a plea of res-judicata in a criminal proceedings and a decision thereof may be a defence depends upon what issues of facts or of law were actually determined in the former trial. It is possible of course for the court to discern the sameness of the evidence, issues and parties to the litigation. Here again I concede there is a sense of urgency in view of the vigour speaking through my practice such applications are being lodged from various quarters in our jurisdiction to try and test the full measure of criminal law. Although these questions have been constantly before the courts and has been the subject of frequent decisions yet it is a matter for argument up to the present time within the hierarchy of courts. It appears to me that there is nothing wrong if it appears by the record of itself or as explained by proper evidence that the same point was determined by a competent court in favour of a prisoner, appellant, applicant, defendant in a previous criminal trial which is brought in issue not on appeal or proper cause of action which is brought in issue for a second and third criminal trial of the same prisoner, appellant, defendant, convict such questions must be of necessity not escape estoppel. At the opposite extreme such prisoners and synonymous parties have crafted ways to approach the courts by way of resentencing, revision, decongestion etc to quash, vary, substitute legal orders and verdicts relying on the same evidence as before. Verdicts on both issues were found against him or her on appeal, revision or resentencing but still not yet done with the criminal system. The term legal justice refers to the rule of law and not the rule of any individual. The objective and proper administration of justice by courts of law is a necessary component of legal justice. According to Ulpian – 'justice is the constant and perpetual will to render to everyone that to which he is entitled'. In the context of our legal order the concept and application of the canons in the criminal justice system and the enquiry on the fair, and proportionate sentence/punishment is becoming elusive and not a reality. The notation of punishment is central in the administration of criminal justice. All about justice and its conceptualization but no doubt the applicant is attempting to engage in a review upon review of the decision of this court- a practice that is akin to asking the court to sit on appeal over its judgment or one that borders on abuse of process of the court. In the case of *Williams's v Spautz* 16 [1992] 174 CLR 509 the court pointed out two important reasons for the existence of the doctrine.

> " The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the courts processes may lend themselves to oppression and injustice".

9. In the circumstances of this case, the applicant is clearly engaging in abuse of the court process. Consequently, the Applicant cannot approach the High Court again for a review of his case. His only recourse is to file an appeal to the Court of Appeal.

In the upshot, the prayers sought herein are dismissed.

Orders accordingly.

DATED AND SIGNED AT LODWAR THIS 25TH DAY OF OCTOBER, 2023

In the presence of;

The Applicant

Mr. Yusuf for the DPP

.....

R. NYAKUNDI

JUDGE