Jacob v Director of Public Prosecutions & another (Constitutional Application E008 of 2023) [2023] KEHC 25781 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25781 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CONSTITUTIONAL APPLICATION E008 OF 2023

EM MURIITHI, J

NOVEMBER 28, 2023

BETWEEN

LENOX MWIRIGI JACOB ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

OFFICE OF ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

The Petition

1. Before the court is an application challenging the constitutional validity of the terms of a sentence of a trial court, filed by the applicant who previously unsuccessfully appealed a conviction and sentence for imprisonment for 10 years for the offence of robbery with violence c/s 296 (2) of the *Penal Code* in this court decision in Meru HCCRA No 15 of 2020.

2. The applicant principally pleads the Article 27 of the *Constitution* and contends that failure to direct that the sentence of imprisonment for 10 years imposed by the trial court upon conviction for robbery with violence c/s 296 (2) of the *Penal Code* violates his right to equal protection and equal benefit of the law, and in his written submissions as follows:

> " My lordship, As I conclude it is my humble submission that failure to include the time in spent in custody (remand) while undergoing trial as provided for under section 333(2) of the *Criminal procedure Code*, in my sentence of 10 years awarded during sentencing goes against the principle of equal treatment and equal protection of the law.
>
> My Lordship, Section 333(2) of the *Criminal Procedure Code* provides that:

(2) Subject to the provisions of Section 38 of the *Penal Code* every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code.

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

Reason Wherefore:

My Lordship, I kindly beg this Honorable Court in compliance with Articles50 (2) (p) 27(1) (2)(4)(5)(6) of the *Constitution* and Section 333(2) of the *Criminal Procedure Code* to order the sentence of 10 years to run from the date of arrest which is 8/2/2015"

3. At the hearing the applicant relied on his written submissions and urged the court to relook the matter and review the sentence.

4. The DPP opposed the petition by self-explanatory grounds of opposition dated as follows:

" Respondent's Grounds of Opposition

1. That the judgment of Hon. Muriithi, PJ dated 4thNovember, 2021 was made in accordance with the law.

2. That this court cannot sit on appeal of its own judgment when the Petitioner had an opportunity to ventilate his grievance before this court.

3. That this court has no jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate court on the judgment."

5. The Counsel for the DPP emphasised at the hearing that –

" The judgment was by this court. I rely on grounds of opposition dated 23/5/2023. The court confirmed conviction and sentence. The Court cannot sit on appeal from its own judgment. The Petitioner had opportunity to ventilate grievance. There is no jurisdiction. To review the judgment."

The Trial Court File

6. The Court was not able to secure the availing of the trial court file but from the certified record of proceedings in the High Court appeal file, this court was above to stablish that the applicant had been on bail during his trial and no question of period spent in custody therefore arose in terms of section 333 (2) of the Penal Code.

7. The Record of the trial court shows that on 7/4/2015, the applicant who was the accused No 3 on the charge sheet had his surety was approved and his release ordered as follows:

" 07/04/2015

Before C. Maundu SFM

Pros CP Langat

CC D. Njagi

Accused absent

Language English/Kiswahili

Proposed surety sworn states in Kiswahili:

My name is Michael Baariu M'Imunya ID No 13356369. I work at Laisamis subcounty in Marsabit County as veterinary officer I hail from Liundu village, Buathine Sub-location, Naathu location Igembe North Sub-county.

I wish to stand surety for Lenox Mwirigi Jacob (accused 3) who is a cousin to my wife. I undertake to pay Kshs. 200,000/= in case he absconds. I will ensure he attends court. He is a minor. He is due to join form one(l). I have the admission letter.

C.MAUNDU

SENIOR PRINCIPAL MAGISTRATE

07/04/2015

Court Prosecutor:

No objection.

C.MAUNDU

SENIOR PRINCIPAL MAGISTRATE

07/04/2015

Court:

Surety for accused 3 is approved. Payslip for January, 2015 deposited in court.

C.MAUNDU

SENIOR PRINCIPAL MAGISTRATE

07/04/2015"

8. Then just before judgment, when on 18/11/2019 after the defence closed it case the trial court sought to reserve judgment for 6/12/2019, the applicant is shown on record as having requested for another date as he had a family meeting on the proposed date, indicating that he was out on bond all the while during his trial:

" Accused 4:

That is the close of my defence.

A.G. MUNENE

SE IOR RESIDENT MAGISTRATE

Court:

Judgment on 06/12/2019.

A.G. MUNENE

SENIOR RESIDENT MAGISTRATE

Accused 3:

The date is not convenient as we will have a family meeting to share out property.

A.G. MUNENE

SENIOR RESIDENT MAGISTRATE

Court:

Judgment on 05/12/2019.

A.G. MUNENE

SENIOR RESIDENT MAGISTRATE"

9. There is nothing on the record to show that his bail was subsequently cancelled and he was remanded. The allegation in his submissions had he had been in pre-trial detention for 5 years in incorrect.

Judgment of this court on appeal

10. Moreover, this court having already ruled in the matter by its judgment on appeal in HCCCRA No 15 of 2020, *Jeremiah Gitonga Baskwani & another v Republic* [2021] eKLR the Court is *functus officio* and it cannot properly reopen the same question which it has determined. In its judgment of the Court ruled with regard to the appeal from sentence as follows:

> " Whether there is reason to disturb the sentence of the trial Court.
>
> 51. Both Appellants were sentenced to serve a term 10 years imprisonment. The Appellants have urged in their Petition of Appeal that the said term was excessive. The Court however observes that the penalty section for the offence of robbery with violence attracts the death penalty. This Court also takes judicial notice of the Directions of the Supreme Court of 6th July 2021 in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR, explaining that the ratio of the decision applied to murder cases only and directing as follows:
>
> > "[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. *Muruatetu* as it now stands cannot directly be applicable to those cases."
>
> These Directions are binding on this Court by virtue of Article 163(7) of the *Constitution*.
>
> 52. This Court therefore finds that the Appellants in fact got lenient sentence. The Court also notes that there were aggravating circumstances in the case in that the Appellants were armed with rifles and the value of the items stolen was high. Save for the fact that there is no cross-appeal filed by the Prosecutions seeking an enhancement of the sentence, this Court would have enhanced the same.

53. This Court does not, therefore, find any reason to disturb the sentence meted out by the trial Court."

11. The applicant is obliged to move the Court of Appeal on a second appeal on a question of law.

Resentencing Procedure

12. Indeed, the now famous procedure for re-sentencing is a remedy devised by the Supreme Court in Muruatetu I, *Francis Karioko Muruatetu & another v Republic* [2017] eKLR upon its decision on the constitutionality of the mandatory death sentence in murder cases where in outlawing the mandatory sentence of death it ordered that persons sentenced upon the hitherto understanding of the law as prescribing a mandatory sentence of death for murder may seek resentencing at the High Court without necessity of appeal.

13. The Supreme Court guidelines of 6/7/2021 in Muruatetu II, *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) clearly apply only to the death penalty with the counsel as regards resentencing that:

> " iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
>
> iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn."

The resentencing procedure does not apply where it is contended that the sentence is unlawful.

14. There is no scope for re-sentencing where the challenge is on legality of the sentence imposed, which is the clear province of appeal. That would be an error of law which can only be perfected on appeal. The Court finds that the applicant in this case is compelled to take up his challenge on the legality of sentence to the Court of Appeal, this court having become *functus officio* (see *Maina v R* (1989) KLR 506 (Bosire, J as he then was)) by its order dismissing the appeal from the sentence of the trial court as aforesaid.

15. However, if it is merely sought to correct a failure to direct in terms of section 333 (2) of the *Criminal Procedure Code* "the sentence shall take account of the period spent in custody", the interest of justice may require immediate rectification. The court considers that the failure to direct that the sentence commences from the date of arrest /arraignment or otherwise to take into account period of pre-trial detention in accordance with section 333(2) of the *Criminal Procedure Code* may be rectified under the principle of slip rule on clerical or arithmetic corrections.

Orders

16. Accordingly, for the reasons set out above, the Petition herein for review of the terms of the sentence of imprisonment for ten (10) years for the offence of robbery with violence c/s 296 (2) of the *Penal Code* is allowed to the extent only that the period of two months when the appellant was in custody during his trial, between his arrest on 8/2/2015 and release on bail on 7/4/2015, will be taken into account in the computation of his imprisonment term.

17. File closed.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

The Appellant/Applicant in person.

Mr. Masila for the DPP.