Chegem v Republic (Miscellaneous Criminal Application E004 of 2023)
[2023] KEHC 25963 (KLR) (27 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25963 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2023

TA ODERA, J

NOVEMBER 27, 2023

BETWEEN

JOSEPH LESIRE CHEGEM ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This matter was initially filed in the High Court of Kisumu as Kisumu High Court Misc. Petition No. E080 of 2023. By an order issued on 20.4.2023, the file was transferred to this Court.

2. By an Application filed on 26.7.2022, the Applicant sought for sentence hearing pursuant to the Muruatetu Case and the case of Douglas Muthaura Ntoribi Misc. App. No. 4 of 2015 at Meru. The facts were that the Applicant was charged and convicted of the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code in Kisii Criminal Case No. 65 of 2004. He was then sentenced to death. He appealed to the Court of Appeal vide Court of Appeal Criminal Case No. 78 of 2018, which appeal was dismissed and the Court affirmed both the conviction and sentence.

3. The Applicant also filed a Chamber Summons Application which was filed on 26.7.2022. The grounds are similar to those in the application hereinabove referred to.

4. The Application was supported by a Supporting Affidavit which was filed on 26.7.2022. The Applicant deponed that the application was predicated on the Supreme Court's decision in the Muruatetu Case. He deponed that he Appealed to the Court of Appeal vide Court of Appeal Criminal Appeal No. 78 of 2018 which appeal was dismissed. He deponed that he had been in custody for 19 years and that he had had a positive journey of rehabilitation. He sought to rely on order (b) of the Supreme Court Ruling in Petition Nos. 15 & 16 of 2015 for a sentence re-hearing only. He deponed that the Court had jurisdiction under Article 165(3)(b) of the *Constitution* to hear and determine the matter.

5. The Respondent opposed the Application vide Submissions dated 11.7.2023. The Respondent opposed the Application on the following grounds:

   i) The court lacks jurisdiction to determine the application since the prayers the appellant is seeking are akin to asking this honourable court to revise a decision of the court of appeal with this court lacks jurisdiction to do so.

   ii) The applicant made a similar to this Honourable court separately constituted in Constitutional Petition No. 91/2019 and the said application was rightfully dismissed on the 18.02.2020.

   iii) The application is a non-starter and bad in law and ought to be dismissed for lack of merit.

Determination

6. Upon perusing the Court File, I noted that the Applicant has made several applications to Court touching on the same matter.

7. There was Kisumu High Court Petition No. 25 of 2018 that was transferred to this Court vide a Court Order issued on 23.5.2018. In that Petition filed on 25.4.2018, the Applicant sought for a declaration that the Court find that his Constitutional rights had been breached for being sentenced to death in violation of the Supreme Court's decision in the Muruatetu Case.

8. There was also Migori High Court Criminal Constitutional Petition No. 2 of 2018. This was transferred to this Court by the Court's Orders issued on 8.6.2018.

9. The Applicant also filed Kisii High Court Petition No. 74 of 2019 and filed on 17.6.2019. In that Petition, he sought to have the Court review its sentence as the sentence imposed was unconstitutional.

10. The Applicant again filed Kisii High Court Constitutional Petition No. 91 of 2019. A Ruling was delivered by this Court, differently constituted, on 18.2.2020 where the Petition was dismissed.

11. The Applicant also filed Kisii High Court Constitutional Petition No 3 of 2020. By an order issued on 20.5.2020, this Court, differently constituted, held that the matter had been dealt with in Kisii Constitutional Petition No. 91 of 2020 and the file was marked as closed. Looking at this file, I note that indeed the Applicant's sentence was commuted to life sentence with effect from 20.10.2016.

12. Not content with the foregoing, the Applicant filed the present Application, though he initially filed it in the High Court in Kisumu.

13. The present Application is ideally an application for revision.

14. Section 362 of the *Criminal Procedure Code* provides as follows: -

> The High Court may call for and examine the record of any criminal proceedings before a 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. Emphasis mine

15. Section 364 of the *Criminal Procedure Code* provides thus: -

> 364. Powers of High Court on revision

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under section 203 or 296[2] of the *Penal Code*, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances [Control] Act*, the *Prevention of Organized Crimes Act*, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecutions has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate – in his own defence'.

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned. Emphasis mine

16. In the case of *Reuben Mwangi Nguri v Republic* [2021] eKLR, the Court went into great detail in defining and delineating the constructs of revision. The Court held thus:

> " 5. The prayer of revision vested in this court under Section 362 of the *Criminal Procedure Code* is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court. Accordingly, revision is by no means to be taken as an appeal by the aggrieved appeal to the High Court in criminal cases where such orders are being sought under Section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.
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> 6. According to Prof. Tan in his article on appellate, Supervisory and Revisionary jurisdiction, Longman Publishers 1989 (Walter Woon Edition at page 233) he set out the following differences:
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> (a) Supervision extends to all administration interests but revision to subordinate courts.
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> (b) Supervision depends upon party initiative in seeking relief but revision may occur on a judge's initiative on the other hand.
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> (c) Supervision of entirety is unlawful to questions not touching the merits of the case but the revision will lie on the errors of law and fact.

(d) Supervision is effected by way of prerogative writs but revision is marked by complete flexibility of remedies.

17. The Court also cited the case of *Kiwala v Uganda* 1967 EA 758 where the Court held "Once a case has been revised by the High Court becomes functus officio and that the revision is final unless there is an appeal to the court of appeal."

18. In the case of *Uganda v Polasi* as cited in the case of *Reuben Mwangi Nguri v Republic* (*Supra*) held:

> " The case has come to this court's notice in the exercise of its functions. The accused, it would seem, was unaware of the illegality of the sentence.... Once this state of affairs has come to the notice of the High Court, what must it do when it is enjoined to exercise general powers of supervisions and control over the magistrates' courts, coupled with the specific powers of revision, under.... the *Criminal Procedure Code*? The court is clothed with authority to correct errors.... Here the accused is sentenced to undergo imprisonment for seven years, a sentence which exceeds the legal limits by five years and, accordingly, there's a gross illegality. In these circumstances, the clear duty of this court, notwithstanding the fact that the accused has abandoned his appeal, is to invoke.... the Criminal Procedure Code and cure the illegality. I would hold in the circumstances of this case, even if this court is functus officio, it has jurisdiction under its revisional powers to correct the formidable error of the trial magistrate which has already occasioned an injustice." Emphasis mine

19. The Court further cited the case of *REX v Compensation Appeal Tribunal* 1952 1KB 338-347 where the English Court of Appeal held as follows: -

> " The court of Kings Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity. This control tends not only to seeking that the inferior tribunals keep within their jurisdiction, but also to seeking that they observe the law...." Emphasis mine

20. I believe I have said enough to conclusively show that I have no jurisdiction whatsoever to revise the orders of a Superior Court or a Court with concurrent jurisdiction.

21. In any event, the *Sentencing Guidelines (2023)* provides for who can apply for resentencing hearing. They provide as follows: -

Policy Directions

A. Who can Apply for Resentencing?

4.8.14 All convicts as specified in the relevant instructing instrument.

In the case of murder convicts:

a) All offenders convicted of murder who have been subject to the mandatory death penalty and desire to be heard on sentence as at the time of the Supreme Court's decision (14 December 2017).

b) All offenders sentenced to death for murder after the decision in Muruatetu but without regard to or compliance with the court's declaration (i.e. not taken into account mitigating factors).

22. According to the foregoing, is the resentencing application tenable? The answer is in the negative. The Court of Appeal in *Joseph Lesire Chekem v Republic* [2018] eKLR, held:

> (28) As regards the sentence, the learned judge took into account the mitigating circumstances put forward by the appellant's advocate but nonetheless found that the circumstances were such that the accused was not deserving of leniency, and accordingly sentenced the accused to death as lawfully provided. We are aware of the Supreme Court's decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR in which the Supreme Court were in agreement with this Court's decision in *Godfrey Ngotho Mutiso v Republic*, Criminal Appeal No. 17 of 2008 that, although the *Constitution* recognizes the death penalty as being lawful it does not provide that when a conviction for murder is recorded only the death sentence shall be imposed. However, we appreciate as the Supreme Court did in the Muruatetu decision that sentencing is the exercise of judicial discretion. In this case, the trial judge having exercised her discretion, we find no reason to interfere.

23. That said, it follows that the Applicant herein was not subjected to the mandatory death sentence but that the Trial Court heard him on mitigation and found that he was not deserving of leniency hence sentenced him to death.

24. To further buttress this, the Supreme Court in *Muruatetu & another v Republic* (Directions) (*Supra*), the Court held:

> 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows: -
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> i .....
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> ii. .....
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> 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.

25. The Applicant was required to first establish that he was a victim of the mandatory death sentence as the punishment for murder under Section 203 as read together with Section 204 of the *Penal Code*. It is clear that he was not.

26. It is, therefore, plain to this Court that the Applicant is not among the group of persons entitled to benefit under a resentencing hearing.

27. And where the death sentence has been commuted to life imprisonment, as is the case herein, the directions provide thus:

> 4.8.15 Capital offenders in murder cases whose sentence has been commuted to life imprisonment cannot apply for resentencing where mitigation had been considered. However, Article 50(6) of the *Constitution* can be invoked by convicts who have gone through the entire appellate process to petition for a retrial.

28. In the circumstances, I find that the Application herein is then without merit.

29. The Application is dismissed for lack of merit.

30. It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 27TH DAY OF NOVEMBER 2023.

T.A ODERA

JUDGE

In the presence of:

for the State

for the Accused Person/Applicant

Court Assistant**