REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 1 OF 2020

IN THE MATTR OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF REVISION OF SENTENCE UNDER SECTION 362, 364(1) AND 365 OF THE CRIMINAL PROCEDURE ACT, CHAPTER 75 OF THE LAWS OF KENYA

AND

IN THE MATTER OF JURISDICTION AND POWERS UNDER ARTICLES 20(1), 23(1), 25(C), 165(3) AND 258(1) OF THE CONSTITUTION

BETWEEN

DAVID WANJALA WEPUKHULU......PETITIONER

AND

REPUBLIC..RESPONDENT

JUDGMENT

[1] The Petitioner, **David Wanjala Wepukhulu**, approached the Court seeking sentence review pursuant to **Section 362, 364 (1) (b) and 365** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. The Petitioner also relied on the case of **Francis Karioko Muruatetu & Others vs. Republic** [2017] eKLR. His prayer is that the Court be pleased to allow his Petition and set aside the sentence imposed on him and/or substitute the same with an order for release on probationary terms.

[2] The Petition was premised on the grounds set out in the petitioner's Supporting Affidavit, sworn on **9 January 2020**; wherein he deposed that he was convicted and sentenced to serve 20 years' imprisonment for the offence of manslaughter; and that, although he appealed the sentence within the stipulated 14 days' period, his appeal has not been responded to. He accordingly sought revision of sentence in favour of a probationary term; contending that he has been in prison for a substantial period of time; that he is remorseful, repentant and reformed.

[3] The Petition was urged by way of written submissions, filed on **22 September 2020.** Along with the submissions, the petitioner filed what he termed as Grounds of Petition, contending that he is a first offender who did not intend to commit the offence; the sentence imposed is too harsh; he has been in prison for a long time; he has transformed; and that he is rehabilitated and ready to be re-integrated into the society.

[4] In his written submissions, the petitioner urged the Court to follow **Republic vs. Cholmondeley** [2009] eKLR by taking into account the circumstances in which the offence was committed; including the period served so far. He also relied on **Article 27(4)** of the Constitution in urging for commensurate treatment as was given in **the Cholmondeley Case**. He reiterated his stance that he is a first offender and that his actions were committed out of ignorance; that the sentence against him is too harsh and that he has been in prison for a long period of time. He urged the court to reduce his sentence to a non-custodial term.

[5] The petitioner also relied on the case of **Muruatetu** (supra), and gave the comparison that if the offenders under **Section 204** as read with **Section 205** and **Section 296** of the **Penal Code** have been treated with leniency, then he too deserved the same consideration. He pointed out that he has already served six (6) years behind bars and he has been exposed to various rehabilitation programmes offered to inmates and has consequently reformed. The petitioner prayed for a second chance in life and stated that he will be a mentor and role model to members of the society. Consequently, he urged the Court to invoke its discretion and reduce his sentence to a non-custodial sentence.

[6] To that end, the petitioner relied on the following authorities:

[a] Eldoret High Court Petition No. 24 of 2019: Ben Pkiech Loyatum vs. Republic;

[b] Eldoret High Court Petition No. 7 of 2018: Moses Kitui Barasa vs. Republic;

[c] William Okungu Kittiny vs. Republic [2018] eKLR

[d] Meru High Court Petition No. 53 of 20.. John Gitonga alias Kadosi vs. Republic;

[e] Douglas Muthaura Ntoribi vs. Republic

[f] Eldoret High Court Petition No. 2 of 2018: Richard Kiptum Yego vs. Republic;

[g] Eldoret High Court Misc. Criminal Application No. 37 of 2018: Henry Katap Kipkeu vs. Republic.

[7] The petition was opposed by **Mr. Mugun**, learned counsel for the State. In his view, the petition for re-sentencing is untenable considering that the Supreme Court has given further directions on the **Muruatetu** case.

[8] A perusal of the record reveals that the petitioner was arraigned before the subordinate court on a charge of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. He denied the allegations against him, and, after trial and due process of the law, he was found guilty and was accordingly convicted and thereafter sentenced to serve a prison term of twenty (20) years with effect from **11 December 2015**. The Petitioner stated that, being aggrieved by his conviction and sentence, he filed an Appeal before the Eldoret High Court but later withdrew the same on the ground that there was delay on the part of the court in processing the Appeal. He thus filed the Petition herein and has sought reprieve from this court citing **Muruatetu** and **Section 362, 364 (1) (b) and 365** of the **Criminal Procedure Code,** among other provisions.

[9] For purposes of the Court's supervisory mandate under **Article 165(6) and (7)** of **the Constitution**, **Section 362** of the **Criminal Procedure Code** recognizes that:

> **"The High court may call for and examine the records 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."**

[10] In the same vein, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

> **"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."**

[11] This being a Petition for re-sentencing, it does not qualify for revision under the aforementioned provisions. Indeed, no attempt was made to show that there is an illegality or error in the proceedings of or the sentence imposed by the lower court. As the Applicant was taken through the trial process, any dissatisfaction with the sentence ought to have been challenged by way of appeal. Accordingly, I would agree with the expressions of **Hon. Wakiaga, J. in** ***George Aladwa Omwera vs. Republic*** *[2016] eKLR*, **in which he cited the decision of the Supreme Court of India in Veerappa Pillai vs. Remaan Ltd** that:

> **"The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order should be made…"**

[12] As to the applicability of the case of **Muruatetu,** the Directions of the Supreme Court dated **6 July 2021** are instructive, that **Muruatetu** applies only to the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and not any other offence. Here is what the Supreme Court had to say:

> **[11] The ratio decidendi in the decision was summarized as follows;**
>
> > **"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".**
>
> **[12] We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.**
>
> **…**

> **[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court."**

[13] Needless to say that the offence of manslaughter with which the petitioner was charged does not carry a mandatory sentence; and that the petitioner was not subjected to the discretionary maximum penalty either. As has been pointed out herein above, if he believed that he 20 years' imprisonment was harsh given the circumstances, then his remedy ought to have been on appeal and not re-sentencing.

[14] It is in the light of the foregoing that I find the petition devoid of merit. The same is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF JANUARY, 2022.

OLGA SEWE

JUDGE