



REPUBLIC OF KENYA



KENYA LAW
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**Mohammed v Republic (Criminal Revision 198 of 2020)
[2022] KEHC 148 (KLR) (21 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION 198 OF 2020**

MW MUIGAI, J

FEBRUARY 21, 2022

**IN THE MATTER OF APPLICATION FOR REVIEW AGAINST
JUDGMENT BY HON. OLUOCH (CM) TO SERVE 30 YEARS
IMPRISONMENT DELIVERED ON 31/10/2019 MAVOKO LAW**

COURTS

AND

**IN THE MATTER OF ARTICLE 50(2) (P)(Q), 27, 23, 25, 165 OF
THE CONSTITUTION & SECTION 333(2), 362 AND 364 OF THE**

CPC

AND

**IN THE MATTER OF HIGH COURT APPEAL NO. 22 OF 2015 AT
MACHAKOS**

AND

**IN THE MATTER OF CRIMINAL CASE NO. 55 OF 2014 AT
MAVOKO**

BETWEEN

HASSAN ABDALLAH MOHAMMED APPLICANT

AND

REPUBLIC RESPONDENT



RULING

BACKGROUND

1. The Applicant was charged before the Principal Magistrate's Court at Mavoko in Criminal case No. 55 of 2014 for the offence of Robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code*.
2. The Trial Magistrate convicted and sentenced the Appellant to death sentence on 10/12/2014.
3. Aggrieved by the conviction and sentence, the Applicant appealed before this Court in High Court Criminal Appeal No. 22 of 2015.
4. On 24th November, 2017 the Hon. Justice D.K Kemei dismissed the Appeal and upheld both the conviction and sentence for the charge of robbery with violence.
5. The Applicant then lodged an application for resentencing before the CM's Court at Mavoko where the Court resentenced the Applicant to serve 30 years imprisonment on 31st October, 2019.

REVISION

6. 3rd June, 2020, the Applicant filed a Chamber Summons under Certificate of Urgency seeking the following orders:-
 1. spent
 2. THAT this Court consider the Constitutionality of the mandatory nature of sentence imposed on a charge of robbery with violence under section 296(2) of the Penal code.
 3. THAT the Court to allow review in respect to resentencing delivered at Mavoko Law Courts on 31 October 2019 to serve 30 years imprisonment from death sentence.
7. The application is based on the initial and supplementary grounds as well as the averments in the Applicant's supporting affidavit sworn on unknown date which the court has considered.

REPLYING AFFIDAVIT

8. In response the Respondent filed a Replying Affidavit sworn by Martin Mwongera on 22nd June, 2020 and filed in Court on the same date stating as follows:-
 - (a) That the Applicant in Criminal Case No. 55 of 2014 was convicted and sentenced to death in the Magistrate's Court at Mavoko.
 - (b) That the Applicant dissatisfied with the sentence imposed, appealed to the High Court.
 - (c) That the High Court in Criminal Appeal No. 22 of 015, upheld the conviction and resent the Applicant for resentencing again at the Trial Court.
 - (d) That the Trial Court reduced the Applicant's sentence from life imprisonment to 30 years.
 - (e) That upon close scrutiny of the application, it is ill-advised, frivolous and an abuse of the Court process.

APPLICANT'S SUBMISSIONS



9. The Applicant stated that he is seeking reconsideration of the sentence on revision of the sentence only as the conviction is safe.
10. The Applicant stated that in considering his mitigation and subsequent rendering of less appropriate sentence the High Court in the case of *Michael Kalawao –vs- Republic [2018]* took into account the sentencing Policy Guidelines (2016) and held that the Court has to take into account the aggravating and mitigating circumstances as below:-
 - (a) Age of the offender
 - (b) Being first offender
 - (c) Whether the offender pleaded guilty
 - (d) Character and record of the offender
 - (e) Commission of the offence against gender based violence
 - (f) Remorsefulness of the offender
 - (g) The possibility of reform
11. That the Applicant is deeply remorseful and repentant as a result of the offence charged and that he apologizes to the society and most importantly to God; and that for the inconveniences he has caused to the entire criminal justice system; that he was a first offender, illiterate with a huge family responsibilities. He cited the case of *Mulamba Ali Mabanda vs Republic* Criminal Appeal No. 12 of 2013 [2018] where the Court held thus;

“the Appellant was a first offender, had a young family, and said to have reformed and had already paid his debt to the society and learnt his lesson.”
12. The Applicant further submitted that this Court takes into account the time he has spent in custody while undergoing trial as provided for under Section 333(2) of the *Criminal Procedure Code* and cited the case of *Ahamad A. Mohamed* in HCRA. 135 of 2016 where the court of appeal held that “the sentence should commence from the date of arrest.”

PROSECUTION SUBMISSIONS

13. The Prosecution Counsel, Martin Mwangera submitted that the Applicant case has already been heard and determined substantively by this Court hence the Applicant ought to proceed to the Court of Appeal. According to counsel, the application is unprocedural and an abuse to the structure of courts.
14. According to counsel, this court is *functus officio* at this point. Reliance was placed on Article 50(2)(q) of the *Constitution, 2010* and in the cases of *Telkom Kenya Limited vs. John Ochanda (Suing on behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR the court observed thus:

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler Vs Alberta Association of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860)”



15. Once a court becomes functus officio the only orders it can grant are review orders which are in exception to the functus officio doctrine and this was summarized in the case of *Jersey Evening Post Ltd Vs Ai Thani* [2002] JLR 542 At 550, which was also cited and applied by the Supreme Court;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

HIGH COURT JUDGMENT

16. Aggrieved by the conviction and sentence, the Applicant appealed before this Court in High Court Criminal Appeal No. 22 of 2015.
17. On 24th November 2017, Hon. Justice D.K Kemei dismissed the Appeal and upheld both the conviction and sentence for the charge of robbery with violence contrary to Section 295 as read with 296 (2) of the Penal Code.
18. The Applicant applied before the Trial Court for resentencing and the Trial Court sought Resentencing Report which was availed on 14th October 2019. The Trial Court set aside the death penalty and sentenced him to 30 years imprisonment.
19. The Appellant is now before this court seeking a reduction of the 30 years sentence meted out by the Trial Court.

DETERMINATION

20. This Court is to determine the issue of revision of sentence under Article 50 (2) (p) & (q) of CoK 2010; Sections 333(2) of Criminal Procedure Code.

JURISDICTION OF THE COURT

20. Article 165 CoK 2010 provides in part the High Court jurisdiction;
- (3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;....
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
21. The jurisdiction of the High Court is to hear and determine an appeal from the Trial Court/ Magistrate’s Court under Section 354 & 361 of the Criminal Procedure Code; which set out powers of the High Court and Second appeals on matters of law only in the Court of Appeal.

DISPOSITION



21. The High Court vide Judgment delivered on 24th November 2017 by Hon Justice D. Kemei, dismissed the appeal, upheld both conviction and sentence, thereby the Applicant exhausted the Appeal process before the High Court. The judgment of the High Court is of equal, similar, competent and concurrent jurisdiction as this Court. Therefore, the appeal if any ought to be lodged in the Court of Appeal.

DELIVERED SIGNED & DATED IN OPEN COURT ON 21ST FEBRUARY 2022 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

HASSAN ABDALLAH MOHAMMED APPLICANT - VIRTUAL

MWONGERA FOR THE RESPONDENT

GEOFFREY - COURT ASSISTANT

